

KF
141
A3
v.130

LIBRARY
University of California
IRVINE



THE LIBRARY
OF
THE UNIVERSITY
OF CALIFORNIA
IRVINE

GIFT OF

J. A. C. Grant



Isidore B. Dockweiler.



Digitized by the Internet Archive
in 2007 with funding from
Microsoft Corporation

THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN.

VOLUME 130.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
Law Publishers and Law Booksellers.
1910.

KF
141
A3
V.130

COPYRIGHT 1910,

BY

BANCROFT-WHITNEY COMPANY.

THE FILMER BROTHERS ELECTROTYPE COMPANY,
TYPOGRAPHERS AND STEREOTYPERS.
SAN FRANCISCO.

AMERICAN STATE REPORTS.

VOLUME 130.

SCHEDULE

showing the original volumes of reports in which the cases herein selected and re-reported may be found, and the pages of this volume devoted to each state.

	PAGE.
ALABAMA REPORTS	Vols. 155, 156. 17-108
COLORADO REPORTS	Vol. 44. 109-143
DELAWARE (Pennewill) REPORTS .	Vol. 6. 144-179
ILLINOIS REPORTS	Vols. 239, 240. 180-293
IOWA REPORTS	Vol. 139. 294-351
KANSAS REPORTS	Vol. 78. 352-418
KENTUCKY REPORTS	Vol. 129. 419-502
MARYLAND REPORTS	Vol. 109. 503-557
MICHIGAN REPORTS	Vol. 155. 558-584
MINNESOTA REPORTS	Vol. 106. 585-654
NEBRASKA REPORTS	Vol. 82. 655-703
SOUTH DAKOTA REPORTS	Vol. 21. 704-747
TENNESSEE REPORTS	Vol. 121. 748-798
TEXAS REPORTS	Vol. 101. 799-874
TEXAS CRIMINAL REPORTS.	Vol. 54. 875-905
VERMONT REPORTS	Vols. 80, 81. 906-1076
WASHINGTON REPORTS	Vol. 51. 1077-1122

SCHEDULE

SHOWING IN WHAT VOLUMES OF THIS SERIES THE CASES
REPORTED IN THE SEVERAL VOLUMES OF OFFICIAL
REPORTS MAY BE FOUND.

State reports are in parentheses, and the numbers of this series in bold-faced figures.

- ALABAMA.**—(83) 3; (84) 5; (85) 7; (86) 11; (87) 13; (88) 16; (89) 18; (90, 91) 24; (92) 25; (93) 30; (94) 33; (95) 36; (96, 97) 38; (98) 39; (99) 42; (100, 101) 46; (102) 48; (103) 49; (104, 105) 53; (106, 107, 108) 54; (109, 110) 55; (111) 56; (112) 57; (113) 59; (114) 62; (115, 116) 67; (118, 119) 72; (120) 74; (121) 77; (122, 123, 124, 125) 82; (126, 127) 85; (128) 86; (129) 87; (130) 89; (131, 132) 90; (133) 91; (134) 92; (135) 93; (136) 96; (137) 97; (138) 100; (139) 101; (140) 103; (141) 109; (142) 110; (143) 111; (144) 113; (145) 117; (146, 147) 119; (146, 148) 121; (149) 123; (150) 124; (151) 125; (152) 126; (153) 127; (154) 129; (155, 156) 130.
- ARKANSAS.**—(48) 3; (49) 4; (50) 7; (51) 14; (52) 20; (53) 22; (54) 26; (55) 29; (56) 35; (57) 38; (58) 41; (59) 43; (60) 46; (61, 62) 54; (63) 58; (64) 62; (65) 67; (66) 74; (67) 77; (68) 82; (69) 86; (70) 91; (71) 100; (72) 105; (73) 108; (74) 109; (75) 112; (76, 77) 113; (78) 115; (79) 116; (80) 117; (81, 82) 118; (83) 119; (84) 120; (85) 122; (81, 86) 126; (87) 128; (88) 129.
- CALIFORNIA.**—(72) 1; (73) 2; (74) 5; (75) 7; (76) 9; (77) 11; (78, 79) 12; (80) 13; (81) 15; (82) 16; (83) 17; (84) 18; (85) 20; (86) 21; (87, 88) 22; (89) 23; (90, 91) 25; (92, 93) 27; (94) 28; (95) 29; (96) 31; (97) 33; (98) 35; (99) 37; (100) 38; (101) 40; (102) 41; (103) 42; (104) 43; (105) 45; (106) 46; (107) 48; (108) 49; (109) 50; (110, 111) 52; (112) 53; (113) 54; (114) 55; (115) 56; (116) 58; (117) 59; (118) 62; (119) 63; (120) 65; (121) 66; (122) 68; (123) 69; (124) 71; (125) 73; (126) 77; (127) 78; (128, 129) 79; (130) 80; (131) 82; (132) 84; (133) 85; (134) 86; (135) 87; (136) 89; (137) 92; (138) 94; (139) 96; (140) 98; (141) 99; (142) 100; (143) 101; (144) 103; (145) 104; (146) 106; (147) 109; (148) 113; (149) 117; (150) 119; (151) 121; (152) 125; (153) 126; (151, 154) 129.
- COLORADO.**—(10) 3; (11) 7; (12) 13; (13) 16; (14) 20; (15) 22; (16) 25; (17) 31; (18) 36; (19) 41; (20) 46; (21) 52; (22) 55; (23) 58; (24) 65; (25) 71; (26) 77; (27) 83; (28) 89; (29) 93; (30) 97; (31) 102; (32) 105; (33) 108; (34) 114; (35) 117; (36) 118; (37) 119; (38) 120; (39) 121; (40) 122; (41) 124; (42) 126; (43) 127; (44) 130.
- CONNECTICUT.**—(54) 1; (55) 3; (56) 7; (57) 14; (58) 18; (59) 21; (60) 25; (61) 29; (62) 36; (63) 38; (64) 42; (65) 48; (66) 50; (67) 52; (68) 57; (69) 61; (70) 66; (71) 71; (72) 77; (73) 84; (74) 92; (75) 96; (76) 100; (77) 107; (78) 112; (79) 118; (80) 125; (79, 81) 129.
- DELAWARE.**—(5 Houst.) 1; (6 Houst.) 22; (7 Houst.) 40; (9 Houst.) 43; (1 Marv.) 65; (2 Marv.) 69; (1 Pennewill) 73; (2 Pennewill) 82; (3 Pennewill) 94; (4 Pennewill) 103; (5 Pennewill) 119; (6 Pennewill) 130.
- FLORIDA.**—(22) 1; (23) 11; (24) 12; (25, 26) 23; (27) 26; (28) 29; (29) 30; (30) 32; (31) 34; (32) 37; (33) 39; (34) 43; (35) 48; (36)

51; (37) 53; (38) 56; (39) 63; (40) 74; (41) 79; (42) 89; (43) 99; (44) 103; (45, 46, 47) 110; (48, 49, 50) 111; (51, 52) 120; (53) 125; (54, 55) 127.

GEORGIA.—(76) 2; (77) 4; (78) 6; (79) 11; (80, 81) 12; (82) 14; (83, 84) 20; (85) 21; (86) 22; (87) 27; (88) 30; (89) 32; (90) 35; (91, 92, 93) 44; (94) 47; (95, 96) 51; (97) 54; (98) 58; (99) 59; (100) 62; (101) 65; (102) 66; (103) 68; (104) 69; (105) 70; (106) 71; (107) 73; (108) 75; (109) 77; (110, 111) 78; (112) 81; (113) 84; (114) 88; (115) 90; (116) 94; (117) 97; (118) 98; (119) 100; (120) 102; (121) 104; (122) 106; (123) 107; (124) 110; (125) 114; (126) 115; (127, 128) 119; (129) 121; (130) 124; (131) 127.

IDAHO.—(2) 35; (3, 4, 5) 95; (6) 96; (7) 97; (8) 101; (9) 108; (10) 109; (11) 114; (12) 118; (13) 121; (14) 125; (15) 128.

ILLINOIS.—(121) 2; (122) 3; (123) 5; (124) 7; (125) 8; (126) 9; (127) 11; (128) 15; (129) 16; (130) 17; (131) 19; (132) 22; (133, 134) 23; (135) 25; (136) 29; (137) 31; (138, 139) 32; (140, 141) 33; (142) 34; (143, 144, 145) 36; (146, 147) 37; (148) 39; (149, 150) 41; (151) 42; (152) 43; (154) 45; (153, 155) 46; (156) 47; (157) 48; (158) 49; (159) 50; (160, 161) 52; (162) 53; (163) 54; (164, 165) 56; (166) 57; (167) 59; (168, 169) 61; (170) 62; (171) 63; (172, 173) 64; (174) 66; (175) 67; (176) 68; (177, 178) 69; (179) 70; (180, 181) 72; (182) 74; (183, 184) 75; (185) 76; (186) 78; (187) 79; (188) 80; (189) 82; (190) 83; (191, 192) 85; (193) 86; (194, 195) 88; (196) 89; (197) 90; (198) 92; (199, 200) 93; (201) 94; (202) 95; (203) 96; (204, 205) 98; (206, 207) 99; (208) 100; (209) 101; (210) 102; (211, 212) 103; (213) 104; (214) 105; (215) 106; (216, 217) 108; (218, 219) 109; (220) 110; (221) 112; (222) 113; (223) 114; (224) 115; (225) 116; (226) 117; (227) 118; (228) 119; (229, 230) 120; (231) 121; (232, 233) 122; (234) 123; (235) 126; (236, 237) 127; (238) 128; (239, 240) 130.

INDIANA.—(112) 2; (113) 3; (114) 5; (115) 7; (116) 9; (117, 118) 10; (119) 12; (120, 121) 16; (122) 17; (123) 18; (124) 19; (125) 21; (126, 127) 22; (128) 25; (129) 28; (130) 30; (131) 31; (132) 32; (133) 36; (134) 39; (135) 41; (136) 43; (137) 45; (138) 46; (139) 47; (140) 49; (1, 2, 3 Ind. App.; 141) 50; (4, 5, 6 Ind. App.; 142) 51; (7, 8 Ind. App.; 143) 52; (9, 10 Ind. App.) 53; (11 Ind. App.) 54; (13 Ind. App.; 144) 55; (14 Ind. App.) 56; (15 Ind. App.; 145) 57; (146) 58; (16 Ind. App.) 59; (17 Ind. App.) 60; (147, 148) 62; (18 Ind. App.; 149) 63; (150; 19 Ind. App.) 65; (20 Ind. App.) 67; (151) 68; (21 Ind. App.) 69; (152) 71; (22 Ind. App.) 72; (153) 74; (23 Ind. App.; 154) 77; (24 Ind. App.) 79; (155) 80; (25 Ind. App.) 81; (156) 83; (26 Ind. App.) 84; (157; 27 Ind. App.) 87; (28 Ind. App.) 91; (158) 92; (29 Ind. App.) 94; (159) 95; (30 Ind. App.) 96; (160) 98; (31 Ind. App.) 99; (161) 100; (32 Ind. App.; 162) 102; (33 Ind. App.) 104; (163) 106; (34 Ind. App.) 107; (164) 108; (35 Ind. App.) 111; (165) 112; (36 Ind. App.) 114; (37 Ind. App.; 166) 117; (167) 119; (168) 120; (169) 124; (170) 127.

IOWA.—(72) 2; (73) 5; (74) 7; (75) 9; (76, 77) 14; (78) 16; (79) 18; (80) 20; (81) 25; (82) 31; (83) 32; (84) 35; (85) 39; (86) 41; (87) 43; (88) 45; (89, 90), 48; (91) 51; (92) 54; (93) 57; (94, 95) 58; (96, 97) 59; (98) 60; (99) 61; (100) 62; (101, 102) 63; (103) 64; (104) 65; (105) 67; (106) 68; (107) 70; (108) 75; (109) 77; (110) 80; (111) 82; (112) 84; (113) 86; (114) 89; (115) 91; (116) 93; (117) 94; (118) 96; (119) 97; (120) 98; (121) 100; (122, 123) 101; (124) 104; (125, 126) 106; (127) 109; (128) 111; (129) 113; (130) 114; (131) 117; (132, 133) 119; (134) 120; (135) 124; (136) 125; (137) 126; (138) 128; (139) 130.

KANSAS.—(37) 1; (38) 5; (39) 7; (40) 10; (41) 13; (42) 16; (43) 19; (44) 21; (45) 23; (46) 26; (47) 27; (48) 30; (49) 33; (50) 34; (51) 37; (52) 39; (53) 42; (54) 45; (55) 49; (56) 54; (57) 57; (58) 62; (59) 68; (60) 72; (61) 78; (62) 84; (63) 88; (64) 91; (65) 93; (66) 97; (67) 100; (68) 104; (69) 105; (70) 109; (71) 114; (72) 115; (73) 117; (74) 118; (74, 75) 121; (76) 123; (77) 127; (78) 130.

KENTUCKY.—(83, 84) 4; (85) 7; (86) 9; (87) 12; (88) 21; (89) 25; (90) 29; (91) 34; (92) 36; (93) 40; (94) 42; (95) 44; (96) 49; (97) 53; (98) 56; (99) 59; (100) 66; (101) 72; (102) 80; (103) 82; (104) 84; (105) 88; (106) 90; (107) 92; (108) 94; (109) 95; (110) 96; (111) 98; (112) 99; (113) 101; (114) 102; (115) 103; (116) 105; (117, 118) 111; (119) 115; (120) 117; (122) 121; (121) 123; (123, 124) 124; (125, 126, 127) 128; (128) 129; (129) 130.

LOUISIANA.—(39 La. Ann.) 4; (40 La. Ann.) 8; (41 La. Ann.) 17; (42 La. Ann.) 21; (43 La. Ann.) 26; (44 La. Ann.) 32; (45 La. Ann.) 40; (46, 47 La. Ann.) 49; (48 La. Ann.) 55; (49 La. Ann.) 62; (50 La. Ann.) 69; (51 La. Ann.) 72; (52 La. Ann.) 78; (104) 81; (105) 83; (106) 87; (107) 90; (108) 92; (109) 94; (110) 98; (111) 100; (112, 113) 104; (114) 108; (115) 112; (116) 114; (115, 117) 116; (118) 118; (119) 121; (120) 124; (121) 126; (119, 122) 129.

MAINE.—(79) 1; (80) 6; (81) 10; (82) 17; (83) 23; (84) 30; (85) 35; (86) 41; (87) 47; (88) 51; (89) 56; (90) 60; (91) 64; (92) 69; (93) 74; (94) 80; (95) 85; (96) 90; (97) 94; (98) 99; (99) 105; (100) 109; (101) 115; (102) 120; (103) 125; (104) 129.

MARYLAND.—(67) 1; (68) 6; (69) 9; (70) 14; (71) 17; (72) 20; (73) 25; (74) 28; (75) 32; (76) 35; (77) 39; (78) 44; (80) 45; (79) 47; (81) 48; (82) 51; (83) 55; (84) 57; (85) 60; (86) 63; (87) 67; (88) 71; (89) 73; (90) 78; (91) 80; (92) 84; (93) 86; (94) 89; (95) 93; (96) 94; (97) 99; (98) 103; (99) 105; (100) 108; (101) 109; (102) 111; (103) 115; (104) 118; (105) 121; (106) 124; (107) 126; (108) 129; (109) 130.

MASSACHUSETTS.—(145) 1; (146) 4; (147) 9; (148) 12; (149) 14; (150) 15; (151) 21; (152) 23; (153) 25; (154) 26; (155) 31; (156) 32; (157) 34; (158) 35; (159) 38; (160) 39; (161) 42; (162) 44; (163) 47; (164) 49; (165) 52; (166) 55; (167) 57; (168) 60; (169) 61; (170) 64; (171) 68; (172) 70; (173) 73; (174) 75; (175) 78; (176) 79; (177) 83; (178) 86; (179) 88; (180) 91; (181) 92; (182) 94; (183) 97; (184) 100; (185) 102; (186) 104; (187) 105; (188) 108; (189) 109; (190) 112; (191) 114; (192) 116; (193) 118; (194) 120; (195) 122; (196) 124; (197) 125; (198) 126; (199) 127; (200) 128.

MICHIGAN.—(60, 61) 1; (62) 4; (63) 6; (64, 65) 8; (66, 67) 11; (68, 69, 75) 13; (70) 14; (71, 76) 15; (72, 73, 74) 16; (77, 78) 18; (79) 19; (80) 20; (81, 82, 83) 21; (84) 22; (85, 86, 87) 24; (88) 26; (89) 28; (90, 91) 30; (92) 31; (93) 32; (94) 34; (95, 96) 35; (97) 37; (98) 39; (99) 41; (100) 43; (101) 45; (102) 47; (103) 50; (104) 53; (105) 55; (106) 58; (107) 61; (108) 62; (109) 63; (110) 64; (111) 66; (112, 113) 67; (114) 68; (115) 69; (116, 117) 72; (118) 74; (119) 75; (120) 77; (121, 122) 80; (123) 81; (124) 83; (125) 84; (126) 86; (127) 89; (128) 92; (129) 95; (130) 97; (131) 100; (132) 102; (133) 103; (134) 104; (135) 106; (137) 109; (138) 110; (139) 111; (136, 140) 112; (141, 142) 113; (143) 114; (144) 115; (145) 116; (146) 117; (147, 148) 118; (149) 119; (144, 150) 121; (146, 151) 123; (152) 125; (153) 126; (154) 129; (155) 130.

MINNESOTA.—(36) 1; (37) 5; (38) 8; (39, 40) 12; (41) 16; (42) 18; (43) 19; (44) 20; (45) 22; (46) 24; (47) 28; (48) 31; (49) 32;

(50) 36; (51, 52) 38; (53) 39; (54) 40; (55) 43; (56) 45; (57) 47; (58) 49; (59) 50; (60) 51; (61) 52; (62) 54; (63) 56; (64) 58; (65) 60; (66) 61; (67, 68) 64; (69) 65; (70) 68; (71) 70; (72) 71; (73) 72; (74) 73; (75) 74; (76, 77) 77; (78, 79) 79; (80) 81; (81, 82) 83; (83) 85; (84) 87; (85) 89; (86) 91; (87) 94; (88) 97; (89) 99; (90) 101; (91) 103; (92) 104; (93) 106; (94) 110; (95) 111; (96) 113; (97) 114; (98, 99) 116; (100) 117; (101) 118; (98, 102) 120; (103) 123; (104) 124; (105) 127; (106) 130.

MISSISSIPPI.—(65) 7; (66) 14; (67) 19; (68) 24; (69) 30; (70) 35; (71) 42; (72) 48; (73) 55; (74) 60; (75) 65; (76) 71; (77) 78; (78) 84; (79) 89; (80) 92; (81) 95; (82) 100; (83) 102; (84) 105; (85) 107; (86) 109; (87) 112; (88) 117; (89) 119; (86, 89, 90) 122; (91) 124.

MISSOURI.—(92) 1; (93) 3; (94) 4; (95) 6; (96) 9; (97) 10; (98) 14; (99) 17; (100) 18; (101) 20; (102) 22; (103) 23; (104, 105) 24; (106) 27; (107) 28; (108, 109) 32; (110, 111) 33; (112) 34; (113, 114) 35; (115) 37; (116, 117) 38; (118) 40; (119, 120) 41; (121) 42; (122) 43; (123) 45; (124, 125) 46; (126) 47; (127) 48; (128) 49; (129) 50; (130) 51; (131) 52; (132) 53; (133) 54; (134) 56; (135, 136) 58; (137) 59; (138) 60; (139) 61; (140) 62; (141, 142) 64; (143) 65; (144) 66; (145) 68; (146) 69; (147, 148) 71; (149, 150) 73; (151) 74; (152) 75; (153, 154) 77; (155) 78; (156) 79; (157) 80; (158, 159) 81; (160) 83; (161) 84; (162, 163) 85; (164) 86; (165) 88; (166) 89; (167, 168) 90; (169) 92; (170, 171) 94; (172) 95; (173) 96; (174, 175) 97; (176) 98; (177) 99; (178, 179) 101; (180, 181, 182) 103; (183, 184, 185, 186) 105; (187) 106; (188, 189) 107; (190, 191) 109; (192) 111; (193, 194) 112; (195, 196) 113; (197) 114; (198) 115; (199) 116; (200) 118; (201, 202) 119; (203, 204, 205) 120; (206) 121; (207, 208, 209) 123; (210, 211) 124; (212) 126; (213, 214) 127; (215) 128; (216, 217) 129.

MONTANA.—(9) 18; (10) 24; (11) 28; (12) 33; (13) 40; (14) 43; (15) 48; (16) 50; (17) 52; (18) 56; (19) 61; (20) 63; (21) 69; (22) 74; (23) 75; (24) 81; (25) 87; (26) 91; (27) 94; (28) 98; (29) 101; (30) 104; (31) 107; (32) 108; (33) 114; (34) 115; (35) 119; (36) 122; (37) 127; (38) 129.

NEBRASKA.—(22) 3; (23, 24) 8; (25) 13; (26) 18; (27) 20; (28, 29) 26; (30) 27; (31) 28; (32, 33) 29; (34) 33; (35) 37; (36) 38; (37) 40; (38) 41; (39, 40) 42; (41) 43; (42, 43) 47; (44) 48; (45, 46) 50; (47) 53; (47, 48) 58; (49) 59; (50) 61; (51, 52) 66; (53) 68; (54) 69; (55) 70; (56) 71; (57) 73; (58) 76; (59) 80; (60) 83; (61) 87; (62) 89; (63) 93; (64) 97; (65) 101; (66) 103; (67) 108; (68) 110; (69) 111; (70) 113; (71) 115; (72) 117; (73) 119; (74, 75) 121; (76, 77) 124; (78, 79) 126; (80) 127; (81) 129; (82) 130.

NEVADA.—(19) 3; (20) 19; (21) 37; (22) 58; (23) 62; (24) 77; (25) 83; (26) 99; (27) 103; (28) 113; (29) 124.

NEW HAMPSHIRE.—(64) 10; (62) 13; (65) 23; (66) 49; (67) 68; (68) 73; (69) 76; (70) 85; (71) 93; (72) 101; (73) 111; (74) 124.

NEW JERSEY.—(43 N. J. Eq.) 3; (44 N. J. Eq.) 6; (50 N. J. L.) 7; (51 N. J. L.; 45 N. J. Eq.) 14; (46 N. J. Eq.; 52 N. J. L.) 19; (47 N. J. Eq.) 24; (53 N. J. L.) 26; (48 N. J. Eq.) 27; (49 N. J. Eq.) 31; (54 N. J. L.) 33; (50 N. J. Eq.) 35; (55 N. J. L.) 39; (51 N. J. Eq.) 40; (56 N. J. L.) 44; (52 N. J. Eq.) 46; (57 N. J. L.; 53 N. J. Eq.) 51; (54 N. J. Eq.; 58 N. J. L.) 55; (59 N. J. L.) 59; (55 N. J. Eq.) 62; (60 N. J. L.) 64; (56 N. J. Eq.) 67; (61 N. J. L.) 68; (62 N. J. L.) 72; (57 N. J. Eq.) 73; (63 N. J. L.) 76; (58 N. J. Eq.) 78; (64 N. J. L.) 81; (59, 60 N. J. Eq.)

83; (65 N. J. L.) 86; (61 N. J. Eq.; 66 N. J. L.) 83; (62 N. J. Eq.) 90; (67 N. J. L.) 91; (63 N. J. Eq.) 92; (68 N. J. L.) 96; (64 N. J. Eq.) 97; (69 N. J. L.) 101; (65 N. J. Eq.; 70 N. J. L.) 103; (66 N. J. Eq.) 105; (71 N. J. L.) 108; (67 N. J. Eq.) 110; (68 N. J. Eq.; 72 N. J. L.) 111; (69 N. J. Eq.) 115; (73 N. J. L.; 70 N. J. Eq.) 118; (74 N. J. L.) 122; (71 N. J. Eq.) 124; (75 N. J. L.) 127; (72 N. J. Eq.) 129.

NEW YORK.—(107) 1; (108) 2; (109) 4; (110) 6; (111) 7; (112) 8; (113) 10; (114) 11; (115) 12; (116, 117) 15; (118, 119) 16; (120) 17; (121) 18; (122) 19; (123) 20; (124, 125) 21; (126) 22; (127) 24; (128, 129) 26; (130, 131) 27; (132, 133) 28; (134) 30; (135) 31; (136) 32; (137) 33; (138) 34; (139) 36; (140) 37; (141) 38; (142) 40; (143) 42; (144) 43; (145) 45; (146) 48; (147) 49; (148) 51; (149) 52; (150) 55; (151) 56; (152) 57; (153) 60; (154) 61; (155) 63; (156) 66; (157) 68; (158, 159) 70; (160) 73; (161, 162) 76; (163, 164) 79; (165) 80; (166, 167) 82; (168) 85; (169, 170) 88; (171) 89; (172) 92; (173) 93; (174) 95; (175) 96; (176) 98; (177) 101; (178) 102; (179) 103; (180) 105; (181) 106; (182) 108; (183) 111; (184) 112; (185) 113; (186, 187) 116; (188) 117; (184, 189) 121; (190, 191) 123; (192, 193) 127; (184, 194) 128.

NORTH CAROLINA.—(97, 98) 2; (99, 100) 6; (101) 9; (102) 11; (103) 14; (104) 17; (105) 18; (106) 19; (107) 22; (108) 23; (109) 26; (110) 28; (111) 32; (112) 34; (113) 37; (114) 41; (115) 44; (116) 47; (117) 53; (118) 54; (119) 56; (120) 58; (121) 61; (122) 65; (123) 68; (124) 70; (125) 74; (126) 78; (127) 80; (128) 83; (129) 85; (130) 89; (131) 92; (132) 95; (133) 98; (134) 101; (135) 102; (136) 103; (137, 138) 107; (139, 140) 111; (137, 141, 142) 115; (143) 118; (144) 119; (145) 122; (146, 147) 125; (148, 149) 128.

NORTH DAKOTA.—(1) 26; (2) 33; (3) 44; (4) 50; (5) 57; (6, 7) 66; (8) 73; (9) 81; (10) 88; (11) 95; (12) 102; (13) 112; (14) 116; (15, 16) 125.

OHIO.—(45 Ohio St.) 4; (46 Ohio St.) 15; (47 Ohio St.) 21; (48 Ohio St.) 29; (49 Ohio St.) 34; (50 Ohio St.) 40; (51 Ohio St.) 46; (52 Ohio St.) 49; (53 Ohio St.) 53; (54 Ohio St.) 56; (55, 56 Ohio St.) 60; (57 Ohio St.) 63; (58 Ohio St.) 65; (59 Ohio St.) 69; (60 Ohio St.) 71; (61 Ohio St.) 76; (62 Ohio St.) 78; (63 Ohio St.) 81; (64 Ohio St.) 83; (65 Ohio St.) 87; (66 Ohio St.) 90; (67 Ohio St.) 93; (68 Ohio St.) 96; (69 Ohio St.) 100; (70 Ohio St.) 101; (71 Ohio St.) 104; (72 Ohio St.) 106; (73 Ohio St.) 112; (74 Ohio St.) 113; (75 Ohio St.) 116; (76 Ohio St.) 118; (77 Ohio St.) 122; (78 Ohio St.) 125; (79 Ohio St.) 128.

OKLAHOMA.—(20, 21; 1 Okl. Cr.) 129.

OREGON.—(15) 3; (16) 8; (17) 11; (18) 17; (19) 20; (20) 23; (21) 28; (22) 29; (23) 37; (24) 41; (25) 42; (26) 46; (27) 50; (28) 52; (29) 54; (30) 60; (31) 65; (32) 67; (33) 72; (34) 75; (35) 76; (36) 78; (37) 82; (38) 84; (39) 87; (40) 91; (41) 93; (42) 95; (43) 99; (44) 102; (45) 106; (46, 47) 114; (48) 120; (49) 124; (50) 126.

PENNSYLVANIA.—(115, 116, 117 Pa. St.) 2; (118, 119 Pa. St.) 4; (120, 121 Pa. St.) 6; (122 Pa. St.) 9; (123, 124 Pa. St.) 10; (125 Pa. St.) 11; (126 Pa. St.) 12; (127 Pa. St.) 14; (128, 129 Pa. St.) 15; (130, 131 Pa. St.) 17; (132, 133, 134 Pa. St.) 19; (135, 136 Pa. St.) 20; (137, 138 Pa. St.) 21; (139, 140, 141 Pa. St.) 23; (142, 143 Pa. St.) 24; (144, 145 Pa. St.) 27; (146 Pa. St.) 28; (147, 150 Pa. St.) 30; (151 Pa. St.) 31; (148 Pa. St.) 33; (149,

152, 153 Pa. St.) 34; (154, 155 Pa. St.) 35; (156 Pa. St.) 36; (157 Pa. St.) 37; (158 Pa. St.) 38; (159 Pa. St.) 39; (160 Pa. St.) 40; (161 Pa. St.) 41; (162 Pa. St.) 42; (163 Pa. St.) 43; (164, 165 Pa. St.) 44; (166 Pa. St.) 45; (167 Pa. St.) 46; (168, 169 Pa. St.) 47; (170, 171 Pa. St.) 50; (172, 173 Pa. St.) 51; (174, 175 Pa. St.) 52; (176 Pa. St.) 53; (177 Pa. St.) 55; (178 Pa. St.) 56; (179, 180 Pa. St.) 57; (181 Pa. St.) 59; (182 Pa. St.) 61; (183, 184 Pa. St.) 63; (185 Pa. St.) 64; (186 Pa. St.) 65; (187 Pa. St.) 67; (188 Pa. St.) 68; (189 Pa. St.) 69; (190 Pa. St.) 70; (191 Pa. St.) 71; (192 Pa. St.) 73; (193 Pa. St.) 74; (194 Pa. St.) 75; (195 Pa. St.) 78; (196 Pa. St.) 79; (197 Pa. St.) 80; (198 Pa. St.) 82; (199 Pa. St.) 85; (195, 200 Pa. St.) 86; (201 Pa. St.) 88; (202 Pa. St.) 90; (203, 204 Pa. St.) 93; (205 Pa. St.) 97; (206 Pa. St.) 98; (207 Pa. St.) 99; (208 Pa. St.) 101; (209 Pa. St.) 103; (210 Pa. St.) 105; (211 Pa. St.) 107; (212 Pa. St.) 108; (213 Pa. St.) 110; (214 Pa. St.) 112; (215 Pa. St.) 114; (216 Pa. St.) 116; (217 Pa. St.) 118; (217, 218 Pa. St.) 120; (219, 220 Pa. St.) 123; (221, 222 Pa. St.) 128.

RHODE ISLAND.—(15) 2; (16) 27; (17) 33; (18) 49; (19) 61; (20) 78; (21) 79; (22) 84; (23) 91; (24) 96; (25) 105; (26) 106; (27) 114; (28) 125.

SOUTH CAROLINA.—(26) 4; (27, 28, 29) 13; (30) 14; (31, 32) 17; (33) 26; (34) 27; (35) 28; (36) 31; (37) 34; (38) 37; (39) 39; (40) 42; (41) 44; (42) 46; (43) 49; (44) 51; (45) 55; (46) 57; (47) 58; (48) 59; (49) 61; (50) 62; (51) 64; (52) 68; (53) 69; (54) 71; (55) 74; (56, 57) 76; (58) 79; (59) 82; (60, 61) 85; (62) 89; (63) 90; (64) 92; (65) 95; (66) 97; (67) 100; (68) 102; (69) 104; (70) 106; (71) 110; (73, 74) 114; (75) 117; (73, 76) 121; (77) 122; (78) 125; (79, 80, 81) 128; (82) 129.

SOUTH DAKOTA.—(1) 36; (2) 39; (3) 44; (4) 46; (5) 49; (6) 55; (7) 58; (8) 59; (9) 62; (10) 66; (11) 74; (12) 76; (13) 79; (14) 86; (15) 91; (16) 102; (17) 106; (18) 112; (19) 117; (20) 129; (21) 130.

TENNESSEE.—(85) 4; (86) 6; (87) 10; (88) 17; (89) 24; (90) 25; (91) 30; (92) 36; (93) 42; (94) 45; (95) 49; (96) 54; (97) 56; (98) 60; (99) 63; (100) 66; (101) 70; (102) 73; (103) 76; (104) 78; (105) 80; (106) 82; (107) 89; (108) 91; (109) 97; (110) 100; (111) 102; (112) 105; (113) 106; (114) 108; (115) 112; (116) 115; (117) 119; (117, 118) 121; (119) 123; (120) 127; (121) 130.

TEXAS.—(68) 2; (69; 24 Tex. App.) 5; (70; 25, 26 Tex. App.) 8; (71) 10; (27 Tex. App.) 11; (72) 13; (73, 74) 15; (75) 16; (76) 18; (77; 28 Tex. App.) 19; (78) 22; (79) 23; (29 Tex. App.) 25; (80, 81) 26; (82) 27; (30 Tex. App.) 28; (83) 29; (84) 31; (85) 34; (31 Tex. Cr. Rep.; 86) 37; (86; 32 Tex. Cr. Rep.) 40; (87; 33 Tex. Cr. Rep.) 47; (34 Tex. Cr. Rep.; 88) 53; (89, 90) 59; (35 Tex. Cr. Rep.) 60; (36 Tex. Cr. Rep.) 61; (91; 37 Tex. Cr. Rep.) 66; (38 Tex. Cr. Rep.) 70; (92) 71; (39 Tex. Cr. Rep.) 73; (40 Tex. Cr. Rep.) 76; (93) 77; (94) 86; (95) 93; (41, 42, 43 Tex. Cr. Rep.) 96; (96) 97; (44 Tex. Cr. Rep.) 100; (97) 104; (98) 107; (45, 46 Tex. Cr. Rep.) 108; (99; 47, 48, 49 Tex. Cr. Rep.) 122; (100; 50, 51 Tex. Cr. Rep.) 123; (52 Tex. Cr. Rep.) 124; (53 Tex. Cr. Rep.) 126; (101; 54 Tex. Cr. Rep.) 130.

UTAH.—(13) 57; (14) 60; (15) 62; (16) 67; (17) 70; (18) 72; (19) 75; (20) 77; (21) 81; (22) 83; (23) 90; (24) 91; (25) 95; (26) 99; (27) 101; (28) 107; (29) 110; (30) 116; (31) 120; (32) 125; (33) 126.

VERMONT.—(60) 6; (61) 15; (62) 22; (63) 25; (64) 33; (65) 36; (66) 44; (67) 48; (68) 54; (69) 60; (70) 67; (71) 76; (72) 82; (73) 87; (74) 93; (75) 98; (76) 104; (77) 109; (78) 112; (79) 118; (80, 81) 130.

VIRGINIA.—(82) 3; (83) 5; (84) 10; (85) 17; (86) 19; (87) 24; (88) 29; (89) 37; (90) 44; (91) 50; (92) 53; (93) 57; (94, 95) 64; (96) 70; (97) 75; (98) 81; (99) 86; (100) 93; (101) 99; (102) 102; (103) 106; (104) 113; (105) 115; (106) 117; (107) 122; (108) 128.

WASHINGTON.—(1) 22; (2) 26; (3) 28; (4) 31; (5) 34; (6) 36; (7) 38; (8) 40; (9) 43; (10) 45; (11) 48; (12) 50; (13) 52; (14) 53; (15) 55; (16) 58; (17) 61; (18) 63; (19) 67; (20) 72; (21) 75; (22) 79; (23) 83; (24) 85; (25) 87; (26) 90; (27) 91; (28, 29) 92; (30) 94; (31) 96; (32) 98; (33) 99; (34) 101; (35) 102; (36) 104; (37, 38) 107; (39) 109; (40, 41) 111; (42) 114; (43) 117; (44) 120; (45) 122; (46) 123; (47, 48) 125; (49, 50) 126; (51) 130.

WEST VIRGINIA.—(29) 6; (30) 8; (31) 13; (32, 33) 25; (34) 26; (35) 29; (36) 32; (37) 38; (38, 39) 45; (40) 52; (41) 56; (42) 57; (43) 64; (44) 67; (45) 72; (46) 76; (47) 81; (48) 86; (49) 87; (50) 88; (51) 90; (52) 94; (53) 97; (54) 102; (55) 104; (56) 107; (57) 110; (58) 112; (59) 115; (60) 116; (61) 123; (62) 125; (63) 129.

WISCONSIN.—(69) 2; (70, 71) 5; (72) 7; (73) 9; (74, 75) 17; (76, 77) 20; (78) 23; (79) 24; (80) 27; (81) 29; (82) 33; (83) 35; (84) 36; (85, 86) 39; (87) 41; (88) 43; (89) 46; (90) 48; (91) 51; (92) 53; (93) 57; (94) 59; (95) 60; (96, 97) 65; (98, 99) 67; (100) 69; (101) 70; (102) 72; (103) 74; (104, 105) 76; (106) 80; (107, 108) 81; (109) 83; (110) 84; (111) 87; (112) 88; (113) 90; (114) 91; (115) 95; (116) 96; (117) 98; (118) 99; (119) 100; (120) 102; (121) 105; (122) 106; (123) 107; (124) 109; (125, 126) 110; (125, 127) 115; (128, 129) 116; (130) 118; (131) 120; (132) 122; (133, 134) 126; (135, 136) 128; (137) 129.

WYOMING.—(3) 31; (4) 62; (5) 63; (6) 71; (7) 75; (8) 80; (9) 87; (10) 98; (11) 100; (12) 109; (13) 110; (14) 116; (15) 123; (16) 125; (17) 129.

AMERICAN STATE REPORTS,

VOLUME 130.

CASES REPORTED.

NAME.	SUBJECT.	REPORT.	PAGE.
Abbott v. Sanders.....	<i>Conveyance</i> ...	80 Vt. 179....	974
Alabama Great Southern Ry. Co. v. Godfrey	<i>Railroads</i> ..	156 Ala. 202....	76
Anustasakas v. International Con- tract Co.	<i>Aliens</i>	51 Wash. 119...	1089
Ault v. Nebraska Tel. Co.....	<i>Emp. Liability</i> .	82 Neb. 434...	686
Bannon v. Jackson.....	<i>Contracts</i> ..	121 Tenn. 381...	778
Barkley v. Lincoln.....	<i>Tax Sale</i>	82 Neb. 181...	659
Barrett v. Minneapolis etc. Ry. Co.	<i>Railways</i>	106 Minn. 51...	585
Batson v. Fidelity Mut. Life Ins. Co.	<i>Insurance</i>	155 Ala. 265....	21
Bedford v. Chandler.....	<i>Bills & Notes</i> ..	81 Vt. 270.....	1057
Beilke v. Carroll.....	<i>Saloon-keeper</i> .	51 Wash. 395...	1103
Benson v. Tacoma Ry. & P. Co..	<i>Carriers</i>	51 Wash. 216...	1096
Benton v. Benton.....	<i>Bills & Notes</i> ..	78 Kan. 366...	376
Best v. Tatum.....	<i>Joint Tenants</i> ..	78 Kan. 215...	365
Block v. Chicago.....	<i>Theaters</i> ..	239 Ill. 251.....	219
Board of Council v. Illinois Life Ins. Co.	<i>Taxes</i>	129 Ky. 823....	499
Bovine v. Selden.....	<i>Homestead</i> ..	155 Mich. 556...	579
Bowler v. First Nat. Bank.....	<i>Bankruptcy</i> ..	21 S. D. 449...	725
Bradley v. Burkhart.....	<i>Boundary</i> ..	139 Iowa, 323...	328
Brown v. Canterbury.....	<i>Execution</i> ..	101 Tex. 86....	824
Buffalo County Tel. Co. v. Turner.	<i>Telephones</i> ..	82 Neb. 841...	699
Burger v. Omaha & C. B. St. Ry. Co.	<i>Railways</i> ..	139 Iowa, 645...	343
Chicago & N. W. Ry. Co. v. Gar- rett	<i>Dower</i>	239 Ill. 297....	229
Childs v. Smith.....	<i>Mortgage</i> ..	51 Wash. 457...	1107
City of Osawatomie v. Miami County	<i>Limitations</i> ..	78 Kan. 270...	369
Coleman v. MacLennan.....	<i>Libel</i>	78 Kan. 711....	390
Coleman v. State.....	<i>Liquors</i>	54 Tex. Cr. 401.	896
Conrad v. Springfield Ry. Co.....	<i>Electricity</i> ..	240 Ill. 12.....	251
Correll v. National Accident Soc.	<i>Insurance</i> ..	139 Iowa, 36....	294
Creamer v. Briscoe.....	<i>Homestead</i> ..	101 Tex. 490...	869

NAME.	SUBJECT.	REPORT.	PAGE.
Davis v. Davis.....	<i>Homestead</i>	81 Vt. 259.....	1035
Delacey v. Commercial Trust Co..	<i>Public Land</i>	51 Wash. 542... ..	1112
Dodge v. Dodge.....	<i>Trusts</i>	109 Md. 164... ..	503
Donaldson v. Hall.....	<i>Wills</i>	106 Minn. 502... ..	621
Drake v. Rhodes.....	<i>Mortgages</i>	155 Ala. 498... ..	62
Dunlevy v. Fenton.....	<i>Pleading</i>	80 Vt. 505.....	1009
Dutton v. Knoxville.....	<i>Peddlers</i>	121 Tenn. 25... ..	748
Dyer v. Schneider.....	<i>Mortgage</i>	106 Minn. 271... ..	615
Eagan v. Central Vermont Ry. Co.	<i>Railways</i>	81 Vt. 141.....	1031
Ennis v. Tucker.....	<i>Quitclaim</i>	78 Kan. 55.....	352
Farley v. Byers.....	<i>Landlords</i>	106 Minn. 260... ..	613
Farmers' Sav. Bank v. Arispe Mercantile Co.	<i>Bills & Notes</i> ..	139 Iowa, 246... ..	324
Flint & Walling Mfg. Co. v. Mc- Donald	<i>Commerce</i>	21 S. D. 526.....	735
Flomerfelt v. Siglin.....	<i>Partition</i>	155 Ala. 633... ..	67
Furry v. General Accident Ins. Co.	<i>Insurance</i>	80 Vt. 526.....	1012
Garvey v. Elder.....	<i>Mining</i>	21 S. D. 77.....	704
Gilchrist v. Corliss.....	<i>Wills</i>	155 Mich. 126... ..	568
Gould Construction Co. v. Child- ers	<i>Vice-principal</i> ..	129 Ky. 536.....	473
Grant v. State.....	<i>Lottery</i>	54 Tex. Cr. 403. ..	897
Griff v. Clark.....	<i>Lien</i>	155 Mich. 611... ..	582
Gulf, W. T. & Pac. Ry. Co. v. Witt- nebert	<i>Carriers</i>	101 Tex. 368... ..	858
Haines v. West.....	<i>Judgment</i>	101 Tex. 226... ..	839
Harvey v. Denver & R. G. R. R. Co.	<i>Payment</i>	44 Colo. 258... ..	120
Hayward v. Larrabee.....	<i>Judgment</i>	106 Minn. 210... ..	606
Heart v. East Tennessee Brew. Co.	<i>Contracts</i>	121 Tenn. 69... ..	753
Heffron v. Treber.....	<i>Leases</i>	21 S. D. 194... ..	711
Henshaw v. State Bank of West Pullman	<i>Bills & Notes</i> ..	239 Ill. 515.....	241
Hollingsworth v. Colthurst.....	<i>Contracts</i>	78 Kan. 455... ..	382
Huddleston v. State.....	<i>Homicide</i>	54 Tex. Cr. 93... ..	875
Hudspeth v. State.....	<i>Larceny</i>	54 Tex. Cr. 371. ..	894
Hunter v. State.....	<i>Homicide</i>	54 Tex. Cr. 224. ..	887
Jenness v. Simpson.....	<i>Pleading</i>	81 Vt. 109.....	1029
Jennings v. Brotherhood Accident Co.	<i>Insurance</i>	44 Colo. 68... ..	109
Johnson v. Samuelson	<i>Garnishment</i> ..	82 Neb. 201... ..	666

NAME.	SUBJECT.	REPORT.	PAGE.
Keeling, <i>Ex parte</i>	<i>Habeas Corpus</i> ..	54 Tex. Cr. 118.	884
Keith v. Chicago, B. & Q. R. R. Co.	<i>Insurance</i> ..	82 Neb. 12.....	655
Kelly v. Kuhnhausen.....	<i>Idem Sonans</i> ...	51 Wash. 193..	1093
King Lumber Co. v. Crow.....	<i>Notary</i>	155 Ala. 504....	65
Knapp v. State.....	<i>Bigamy</i> ..	54 Tex. Cr. 633.	903
Krause v. El Paso.....	<i>Estoppel</i> ...	101 Tex. 211....	831
Layton v. Campbell.....	<i>Partition</i> ..	155 Ala. 221....	17
Leucht v. Leucht.....	<i>Husb. & Wife</i> ..	129 Ky. 700....	486
Lewis v. Jerome.....	<i>Administration</i> ..	44 Colo. 459....	131
Loiseau v. Arp.....	<i>Negligence</i> ..	21 S. D. 566...	741
Loneragan v. San Antonio L. & T. Co.	<i>Contracts</i> ...	101 Tex. 63.....	803
Louisville & N. R. R. Co. v. Church	<i>Carriers</i> ...	155 Ala. 329....	29
Louisville Ry. Co. v. McCarthy..	<i>Negligence</i> ..	129 Ky. 814....	494
McConnell v. Bell.....	<i>Partition</i> ...	121 Tenn. 198...	770
McDaniel v. State.....	<i>Homicide</i> ..	156 Ala. 40.....	74
McDuffee v. Boston & Maine R. R.	<i>Railroads</i> ..	81 Vt. 52.....	1019
Malcolm v. Louisville & N. R. R. Co.	<i>Carriers</i> ...	155 Ala. 337....	52
Manternach v. Studt.....	<i>Probate Sale</i> ..	240 Ill. 464....	282
Mason v. Ward.....	<i>Judgments</i> ..	80 Vt. 290....	987
Massie v. Cessna.....	<i>Wages</i> ...	239 Ill. 352....	234
Mayfield Water & L. Co. v. Webb.	<i>Negligence</i> ..	129 Ky. 395....	469
Merchants' & Miners' Trans. Co. v. Eichberg	<i>Carriers</i> ...	109 Md. 211....	524
Metropolitan Life Ins. Co. v. Brubaker	<i>Insurance</i> ..	78 Kan. 146....	356
Miller v. Kelly Coal Co.	<i>Negligence</i> ..	239 Ill. 626....	245
Morgan v. Landstreet.....	<i>Corporations</i> ..	109 Md. 558....	531
Moyer v. Leavitt.....	<i>Pledge</i> ..	82 Neb. 310....	682
National Dredging Co. v. Farm- ers' Nat. Bank.....	<i>Banking</i> ..	6 Penn. 580..	158
O'Bear-Nester Glass Co. v. An- tiexplo Co.	<i>Corporations</i> ..	101 Tex. 431....	865
Owensboro v. Sweeney.....	<i>Taxes</i>	129 Ky. 607....	477
Pearson v. Alaska Pac. Steamship Co.	<i>Mast. & Serv</i> ... 51 Wash. 569..	1117	
People v. Strauch.....	<i>Conspiracy</i> ..	240 Ill. 60....	255
Peterson v. O'Connor.....	<i>Brokers</i> ..	106 Minn. 470...	618
Plano Mfg. Co. v. Thompson....	<i>Judgment</i> ..	21 S. D. 300....	722
Ploof v. Putnam.....	<i>Trespass</i> ..	81 Vt. 471....	1072
Polk v. Carney.....	<i>Timber</i> ...	21 S. D. 295...	719
Pusey & Jones Co. v. Love.....	<i>Corporations</i> ..	6 Penn. 80...	144

NAME.	SUBJECT.	REPORT.	PAGE.
Reed v. Reed.....	<i>Gifts</i>	109 Md. 690.....	552
Reynolds v. Galveston, H. & S. A. Ry. Co.	<i>Negligence</i> ..	101 Tex. 2....	799
Rice v. Crozier.....	<i>Limitations</i> ..	139 Iowa, 629...	340
Richardson v. Anderson.....	<i>Setoff</i>	109 Md. 641.....	543
Roman v. Montgomery Iron Works.	<i>Res Judicata</i> ...	156 Ala. 604....	106
Roy v. Harney Peak Min. & Mfg. Co.	<i>Deeds</i>	21 S. D. 140....	706
Sandberg v. Rowland.....	<i>Party-wall</i> ..	51 Wash. 7....	1077
Scott v. O'Brien.....	<i>Husb. & Wife</i> ..	129 Ky. 1.....	419
Selden v. Illinois Trust & Sav. Bank	<i>Will Contest</i> ...	239 Ill. 67.....	180
Smith v. Simmons.....	<i>Taxes</i>	129 Ky. 93.....	426
Somers v. State.....	<i>Evidence</i>	54 Tex. Cr. 475.	901
Southern Express Co. v. Gibbs....	<i>Carriers</i>	155 Ala. 303	24
Southern Ry. Co. v. Darwin.....	<i>Railroads</i> ..	156 Ala. 311....	94
Southern Ry. Co. v. Nowlin.....	<i>Carriers</i>	156 Ala. 222....	91
Sparks v. Barber Asphalt Pav. Co.	<i>Taxes</i>	129 Ky. 769....	492
Spokane v. Macho.....	<i>Ordinances</i> ..	51 Wash. 322...	1100
Sprague v. Hosie.....	<i>Sales</i>	155 Mich. 30....	558
Start v. Tupper.....	<i>Banking</i>	81 Vt. 19.....	1015
State v. Audette.....	<i>Marriage</i> ..	81 Vt. 400.....	1061
State v. Bailey.....	<i>Habeas Corpus</i> .	106 Minn. 138...	592
State v. Central of Vermont Ry. Co.	<i>Carriers</i>	81 Vt. 463.....	1065
State v. Coffeyville.....	<i>Quo Warranto</i> .	78 Kan. 599....	386
State v. Drayton.....	<i>Police Power</i> ..	82 Neb. 254....	671
State v. Germania Bank.....	<i>Receivers</i> ..	106 Minn. 164...	599
State v. Guertin.....	<i>Corporations</i>	106 Minn. 248...	610
State v. Peet.....	<i>Commerce</i>	80 Vt. 449....	998
State v. Pigg.....	<i>Liquors</i>	78 Kan. 618....	387
State v. Sargood.....	<i>Judgment</i> ..	80 Vt. 412....	992
State v. Sargood.....	<i>Perjury</i>	80 Vt. 415....	995
State v. Sartwell.....	<i>Marriage</i>	81 Vt. 22.....	1017
State v. Wilcox.....	<i>Officers</i>	78 Kan. 597....	385
Sternberger v. Moffat.....	<i>Tax Sales</i>	44 Colo. 520....	140
Stiles v. Louisville & N. R. R. Co.	<i>Carriers</i>	129 Ky. 175....	429
Stubbs v. McGillis.....	<i>Judgments</i> ...	44 Colo. 138....	116
Sullivan v. Seattle Electric Co....	<i>Carriers</i>	51 Wash. 71...	1082
Swartswood v. Louisville & N. R. R. Co.....	<i>Railroads</i> ..	129 Ky. 247....	465
Taft v. Taft.....	<i>Evidence</i>	80 Vt. 256....	984
Tennessee Coal, I. & Ry. Co. v. Roussell	<i>Arbitration</i>	155 Ala. 435....	56
Thomas v. State.....	<i>Evidence</i>	121 Tenn. 83....	756
Thorp v. Fleming.....	<i>Mortgage</i> ..	78 Kan. 237....	366
Tudor v. Tudor.....	<i>Executors</i> ..	80 Vt. 220....	977

NAME.	SUBJECT.	REPORT.	PAGE.
United States v. Hrasky.....	<i>Naturalization</i> .240	Ill. 560.....	288
Van Cleef v. Chicago.....	<i>Street Fair</i>240	Ill. 318....	275
Village of Jonesville v. Southern Mich. Tel. Co.....	<i>Telephones</i>155	Mich. 86....	562
Voss v. Chamberlain.....	<i>Bills & Notes</i> ..139	Iowa, 569... .	331
Walton & Co. v. Burchell.....	<i>Negligence</i>121	Tenn. 715... .	788
Warren v. Ray.....	<i>Slander</i>155	Mich. 91... .	566
Whitnack v. Chicago B. & Q. Ry. Co.	<i>Carriers</i>82	Neb. 464....	692
Wilkins v. Somerville.....	<i>Escrow</i>80	Vt. 48.....	906
Wilkinson v. Aetna Life Ins. Co...	<i>Insurance</i>240	Ill. 205....	269
Windham & Co. v. Stephenson....	<i>Mortgages</i>156	Ala. 341....	102
Windhorst v. Bergendahl.....	<i>Bills & Notes</i> .. 21	S. D. 218....	715
Wise v. Outtrim.....	<i>Claims</i>139	Iowa, 192... .	301
Wright v. Templeton.....	<i>Process</i>80	Vt. 358.....	990
Zimmer v. Saier.....	<i>Will Contest</i> ...155	Mich. 388... .	575

AMERICAN STATE REPORTS.

VOLUME 130.

CASES

IN THE

SUPREME COURT

OF

ALABAMA.

LAYTON v. CAMPBELL.

[155 Ala. 221, 48 South. 775.]

PARTITION IN PROBATE, When not Prevented by an Adverse Claim.—Under the code of Alabama, a partition in probate is not prevented by the assertion of an unsupported adverse claim of adverse possession or a hostile title. There must be a bona fide assertion of the hostile claim as a true, existing status. The court must investigate, and if it is clear that there has not been such adverse possession as to constitute a disseizin or ouster of the petitioner and that complainant's title is good, or that the court cannot entertain on the facts presented any serious doubt as to the title, it must proceed to hear the application. (pp. 18, 19.)

TENANTS IN COMMON—Adverse Possession.—The possession of land by one tenant in common and the exercise of acts of ownership by him will be referred to the common title, and will not, without more, be considered adverse to the other cotenant, but if it appears that he has repudiated the title of his cotenant, of which the latter has notice or is chargeable with notice, then the possession will be adverse. (p. 19.)

PARTITION—Evidence—Cross-examination to Support Claim of Adverse Possession in Good Faith.—Where the defendant in partition denies the title of the complainant and claims title and adverse possession in himself, and it appears that he had purchased the interest of the complainant's grantor and been let into possession before the making of the conveyance under which the complainant claimed, defendants should be permitted, on cross-examination of the complainant and the latter's grantor, to show that no consideration had been paid, and that there was an agreement between them that the litigation was to be conducted in the name of the grantee, but the fruits of any recovery should be shared between them. Such cross-examination, if permitted, might prove that the defendants claimed to be in the exclusive and adverse possession of the land. (p. 20.)

EVIDENCE of Knowledge of a Given Fact by a Third Person, What not Proper.—It is not proper to ask a witness whether another person knew of a specified fact at a given time. The proper practice is for the witness to state the circumstances relied upon to show such knowledge. (p. 20.)

EVIDENCE to Support Surplusage Allegation.—If the averment of facts in an answer constitutes surplusage, testimony to support such averment is properly excluded. (p. 20.)

PARTITION, Surplusage, Averments in, What are and Exclusion of Evidence Supporting.—Where the circumstances of the execution of the deed under which one of the parties in partition claims are alleged in the pleading, and the deed itself is in evidence, the averment should be regarded as surplusage, and testimony tending to support it is properly excluded. (p. 20.)

William C. Oates and P. A. McDaniel, for the appellant.

W. L. Lee, for the appellee.

222 HARALSON, J. This proceeding was begun by petition of appellee (Campbell) to the probate court of Henry county, to have the lands described in the petition partitioned between himself and appellant (Layton), pursuant to sections 3161, and following, of the Civil Code of 1896. The petition alleged that appellee and appellant were tenants in common of the lands, and that each was the owner of an undivided one-half interest therein. Appellant answered the petition, denying tenancy in common, asserting entire title in himself, and averring that when the petition was filed, and when the conveyance under which appellee claims an undivided half interest in the land was executed, he was in the actual possession of the land, claiming it adversely to appellee and appellee's grantor. The case was tried by the lower court upon the issues thus presented. It was decreed that the parties were tenants in common, and a partition ordered accordingly. From this decree the appeal is taken.

The action of the court in excluding the testimony hereafter noticed, the rendition of the decree granting the relief prayed for in the petition, and the refusal of the court to dismiss the petition for want of jurisdiction, are severally assigned as error.

The statute which confers upon the probate court jurisdiction to partition lands among tenants in common provides that "no division or partition can be made under this article, when an adverse claim or title is asserted by anyone or brought to the knowledge . . . of the judge of probate": Civ. Code 1896, sec. 3176; Civ. **223** Code 1907, sec. 5220. It has been decided by this court, construing this section of the code, that the bare assertion of an unsupported claim of adverse possession or hostile title would not oust the jurisdiction of the probate court; but to have that effect there must be a bona fide assertion of an adverse claim as a true, existing status. In *Ballard v. Johns*, 80 Ala. 32, Mr. Justice Somerville, speaking for the court, says: "A false or unsupported assertion of adverse claim or possession, by a

defendant, is not sufficient. There is required a bona fide assertion of such fact, as a true existing status, as distinguished from a bare denial of complainant's title. This the court must investigate, with the view of inquiring whether it is well or ill founded. If it is clear that there has been in reality no such adverse possession as to have constituted a disseizin or ouster of the petitioner—destroying the holding together of the joint owners—and that the complainant's title is good, or that the court can entertain, on the facts presented, no serious doubts as to such title, it may proceed to hear the application. If this were not so, as has been well said, this jurisdiction would be placed 'at the mercy of every profligate or unconscientious defendant, and render the court the mere ministerial agent to carry into effect the wishes of parties in cases where there were no matters of controversy between them': *Overton's Heirs v. Woolfolk*, 6 Dana (Ky.), 371; *Freeman on Cotenancy and Partition*, secs. 502, 147; *Trial of Title to Land* (Sedgwick & Waite), sec. 167; *Fennell v. Tucker*, 49 Ala. 453, 458; *McMath v. De Bardelaben*, 75 Ala. 68; *Deloney v. Walker*, 9 Port. 497; *Straughan v. Wright*, 4 Rand. (Va.) 493; *Code* 1876, secs. 3512, 3893; *Guilford v. Madden*, 45 Ala. 290."

So much of this decision as holds that the portions of the statute applicable to partition in kind are equally ²²⁴ applicable to proceedings for the sale of property for division has been overruled (*Hillens v. Brinsfield*, 108 Ala. 605, 18 South. 604); but its soundness in respect of the question under consideration has never been doubted. If appellant's "adverse claim or title" was asserted in good faith, the probate court was without jurisdiction to proceed to partition the property, unless it was clear that appellant had neither actual possession of the property, claiming it adversely to appellee, nor title superior to that of appellee; but if it was clear that he had neither such adverse possession nor superior title, the probate court had jurisdiction, notwithstanding the good faith of the asserted adverse claim.

The possession of land by one tenant in common and the exercise of acts of ownership by him will be referred to the common title, and will not, without more, be considered adverse to the other cotenant; but if it appears that he has repudiated the title of his cotenant, of which the latter has notice, or is chargeable with notice, then the possession (all of the other necessary elements being present) will be adverse: *Johns v. Johns*, 93 Ala. 239, 9 South. 419, and cases there cited.

Appellant offered evidence tending to show that he had bought the interest of appellee's grantor, had paid the purchase price, and had been let into the exclusive possession before the conveyance from the latter to appellee. Appellee testified in his own behalf, and introduced one J. J. Layton, his grantor, as a witness. Upon cross-examination of both of these witnesses by appellant they were asked questions seeking to show that nothing of value was paid by appellee for his conveyance from J. J. Layton, but that there was an understanding between them whereby the litigation should be conducted in the name of appellee, and the fruits of the recovery shared between them. The court sustained objection to ²²⁵ the questions. In this we think there was error. The evidence, if true, tended to support appellant's contention that he had bought the interest of his cotenant, and claimed to be in the exclusive and adverse possession of the land.

J. J. Layton was also asked, on cross-examination, if appellee did not know that appellant claimed to own the entire land at the time the witness conveyed to appellee. The court properly sustained an objection to this question. A witness cannot testify that a certain person knew a given fact. The proper practice is for the witness to state the circumstances relied upon to shown his knowledge: *Bailey v. State*, 107 Ala. 151, 18 South. 234.

There was no error in excluding the testimony of appellant showing the circumstances attending the execution of the deed to J. F. and J. J. Layton, and their possession under it. While these facts are set up in the answer, the averment of them is surplusage, since they can mean no more than that the estate was conveyed to said J. F. and J. J. Layton, a fact also averred and conclusively proved by the introduction of the deed to them, under which they both claimed.

Although we are authorized to render such decree as the probate court should have rendered (Civ. Code 1896, sec. 467), we prefer to express no opinion upon the weight of the evidence, but reverse the judgment and remand the cause for the error pointed out. What we have said above will be a sufficient guide for the lower court upon another trial.

Reversed and remanded.

Tyson, C. J., and Simpson and Denson, JJ., concur.

Partition of the Estates of Deceased Persons is discussed in the notes to *Buckley v. Superior Court*, 41 Am. St. Rep. 140; *Smith v. Smith*, 119 Am. St. Rep. 586.

Partition of Lands Adversely Held may be made by a court of equity if the complainant has an immediate right of entry, but the probate or chancery court, in the exercise of a statutory jurisdiction to sell land for distribution or equitable division, cannot proceed if such lands are adversely held: *Gore v. Dickinson*, 98 Ala. 363, 39 Am. St. Rep. 67. See, also, *Camp Phosphate Co. v. Anderson*, 48 Fla. 226, 111 Am. St. Rep. 77.

Ouster by One Tenant in Common of His Cotenants and his acquisition of title by adverse possession are discussed in the note to *Joyce v. Dyer*, 109 Am. St. Rep. 609. Mere silent possession by one cotenant, however long continued, will not work an ouster and cause the statute to bar another cotenant: *Reed v. Bachman*, 61 W. Va. 452, 123 Am. St. Rep. 996. To constitute ouster by a tenant in common there must be some open, notorious assertion of an exclusive claim, and a direct interference with it or denial of the right of another cotenant: *Moragne v. Doe*, 143 Ala. 459, 111 Am. St. Rep. 52; *Gill v. Fletcher*, 74 Ohio St. 295, 113 Am. St. Rep. 963.

BATSON v. FIDELITY MUTUAL LIFE INSURANCE COMPANY.

[155 Ala. 265, 46 South. 578.]

INSURANCE, LIFE—Premium, Payment of, What is not.—The taking by an agent of a life insurance company of a promissory note of the assured for the amount of the first premium is not, in law, a payment of such premium within the meaning of the contract, where it expressly provides that no agent has power to grant credit or to extend the time for the payment of any premium. (p. 22.)

INSURANCE, LIFE—Premium, Receipt for, Parol Contradiction or Explanation of.—A receipt delivered by an agent to the assured for the first premium may be explained and avoided by parol evidence showing that no actual payment took place, and that the agent, without the authority of his principal, took the promissory note of the assured, which was never paid, the receipt containing a condition that the failure to pay the note at maturity ended the policy. (p. 23.)

Pinkey Scott, for the appellant.

Cabaniss & Bowie, for the appellee.

²⁶⁷ **DOWDELL, J.** This is an action upon a life insurance policy. The defendant filed four pleas to the complaint. The first and second pleas were a general denial of the allegations of the complaint. The third and fourth pleas set up special matters of defense. Issue was joined on the first three pleas, and special replications ²⁶⁸ were made to the fourth plea, to which demurrers were interposed and sustained. We pretermit consideration of the ruling of the court below on the demurrers to the replications, since any

consideration of these rulings, in the view we take of the case, is unnecessary to a final determination of the cause.

The third plea, on which issue was taken by the plaintiff, sets up a failure by the assured to pay the initial premium on the policy, a nonpayment of which by the terms of the contract rendered the policy invalid. The provisions in the contract of insurance in the case before us are much the same as those in the case of *Powell v. Prudential Ins. Co. of America*, 153 Ala. 611, 45 South. 208. The principles of law stated in that case and the authorities there cited find ready application here. The contract here sued on provides in terms that it "shall not be operative and binding until the actual payment of the initial premium and delivery of the policy during the lifetime and good health of the assured." It is also stipulated in the contract and agreed to by the assured that no agent of the company has the power or authority "to grant credit, or to extend the time for payment of any premium, or to waive any forfeiture, or bind the company by making any promise, or by making or receiving any representation or information; it being agreed that such power can only be exercised in writing by the president, vice-president, actuary, or assistant actuary of the company, at its head office, and shall not be delegated."

The undisputed evidence is that the initial premium was never paid. The soliciting agent, who delivered the policy, together with the receipt introduced in evidence, instead of collecting and receiving from the assured the initial premium, as was his duty, and which only as such agent he had the authority and power to do, took ²⁶⁹ the note of the assured for the initial premium payable to himself individually at thirty days. This he had no authority to do, and the assured was informed of this want of authority in the agent by the terms of the contract. The note was never turned over to or accepted by the company, and it is not shown that the defendant company ever had any knowledge or notice of this act of the agent until after the death of the assured. The act of the agent in taking the note of the assured for the initial premium, without authority from the defendant company, and without any subsequent waiver on its part of the agent's unauthorized conduct or ratification of said act of the agent, cannot in reason be said to constitute in law an actual payment of the initial premium within the meaning of the contract.

The receipt delivered to the assured by the agent at the time of the delivery of the policy, and which was introduced in evidence by the plaintiff, was open to explanation by parol evidence. It was shown, and not denied by the plaintiff, that no actual payment of the initial premium was made; and this being true, the taking of the insured's note by the agent could avail the plaintiff nothing, as it was not paid at maturity, and as, for that matter, it has never been paid, and there being in the face of the receipt given to the assured a condition that the failure to pay the note at maturity operated to end and determine the policy: *Knickerbocker Life Ins. Co. v. Pendleton*, 112 U. S. 696, 5 Sup. Ct. Rep. 314, 28 L. ed. 866; *Iowa Life Ins. Co. v. Lewis*, 187 U. S. 335, 23 Sup. Ct. Rep. 126, 47 L. ed. 204; *Fidelity Mut. Life v. Price*, 117 Ky. 25, 77 S. W. 384; *Ressler v. Fidelity Mutual Life*, 110 Tenn. 411, 75 S. W. 735.

The third plea being sustained by the undisputed evidence in the case, the defendant was entitled to the general charge, as requested in writing, and which the court gave. We find no reversible error in the record, and the judgment will be affirmed.

Tyson, C. J., and Anderson and McClellan, JJ., concur.

A Condition for the Prepayment in Cash of the First Premium before a life insurance policy takes effect is waived when an agent, in accordance with a practice approved by the company, delivers the policy and accepts the premium, part in cash, and a note for the balance, which is not paid until several days after maturity: Life Ins. Co. of Virginia v. Hairston, 108 Va. 832, 128 Am. St. Rep. 989, and see cases cited in the cross-reference note thereto.

If in Part Payment of a Premium for Issuing a Life Insurance Policy the assured gives his promissory note, and the policy contains a condition that if the note is not paid at maturity the policy shall be void, the failure to pay the note at maturity terminates the right to recover on the policy: Iles v. Mutual Reserve Life Ins. Co., 50 Wash. 49, 126 Am. St. Rep. 886.

The Waiver of Conditions in a Policy of Insurance by an Agent of the Company is the subject of a note to Johnson v. Aetna Ins. Co., 107 Am. St. Rep. 99.

SOUTHERN EXPRESS COMPANY v. GIBBS.

[155 Ala. 303, 46 South. 465.]

CARRIERS, Stipulations Limiting the Liability of.—A carrier cannot limit its liability for the negligence of itself or its agents by an agreed valuation upon consideration of reduced charges for the carriage of goods, where such valuation is disproportionate to the real value of the goods, although neither the contents of the package or its value is disclosed to the carrier. (p. 25.)

CONTRACTS, Place of Performance, When Controls.—If a contract is expressly or tacitly to be performed in another place, its validity, nature, obligation and interpretation are governed by the law of that place. (p. 25.)

CARRIERS, Contract of, When Controlled by the Law of the Place of Delivery.—A contract made with a carrier in New York to ship a package and to deliver it in Alabama is, so far as delivery is concerned, to be wholly performed in the latter state, and cannot be enforced, if invalid, by its laws. (pp. 25, 29.)

The defendant pleaded that the shipment was made under a contract, one of the conditions of which was that, in consideration of the rate charged, the company should not be liable for more than fifty dollars if no value was stated; that the shipment was made and the contract executed in the city and state of New York; that though the agent asked for the value of the goods, no value was given, and the bill of lading was stamped, "Value asked and not given." The defendant further averred that neither the Adams Express Company, which was the original shipper, nor the defendant, which received the goods from the former company, had any knowledge that their value exceeded fifty dollars, and that if a higher valuation had been disclosed, the rates would have been higher, and that under the laws of New York, the Adams Express Company limited its liability and that of the defendant to the sum of fifty dollars, as provided in the contract of bill of lading; that the defendant had tendered such sum, and the tender being refused, it brought the money into court with costs, and pleaded the tender in discharge of its liability.

London & London, for the appellant.

John H. Miller and A. Leo Oberdorfer, for the appellee.

306 TYSON, C. J. This action is to recover damages for the breach of a contract. The breach alleged and relied on for recovery is the defendant's failure to deliver to plaintiff at Birmingham, in this state, certain goods, which it contracted to deliver as a common carrier for a reward. The

value of the goods was alleged to be eight hundred dollars. Special pleas 2 and 3, to which a demurrer was sustained, do not deny the contract to deliver or its breach as alleged, but seek simply to confine the amount of plaintiff's recovery to the sum of fifty dollars, which it is alleged in these pleas was the agreed value of the goods when accepted for shipment by the Adams Express Company in the city of New York, and that such stipulation is valid under the laws of New York. It is not averred in either of them where the contract for the acceptance and delivery of the goods was made with this defendant. For aught appearing, the contract with defendant was entered into in some state other than New York, and where the same rule prevails with respect to the invalidity of such a contract as does in this state: *Southern Express Co. v. Owens*, 146 Ala. 412, 119 Am. St. Rep. 41, 41 South. 752, 8 L. R. A., N. S., 369. That rule is that it is violative of public policy for a carrier, as a paid bailee, to limit the extent of its liability for the negligence of itself or its agents or servants by an agreed valuation upon consideration of reduced charges for carriage of goods, when such agreed valuation is disproportionate to the real value of the goods, although the contents of the package or its real value are not disclosed to the carrier: *Southern Express Co. v. Jones*, 132 Ala. 437, 31 South. 501; *Southern Express Co. v. Owens*, 146 Ala. 412, 119 Am. St. Rep. 41, 41 South. 752, 8 L. R. A., N. S., 369, and cases there cited. It may be that we could rest our decision of the insufficiency of these pleas upon this point, but we do not care to do so.

The insistence is that, as the stipulation limiting defendant's liability to fifty dollars is valid under the laws of New York, where made, it should be enforced by the courts of this state, notwithstanding it is in violation of the public policy of this state as declared by our decisions. Whether this court is committed by former decision to the proposition asserted is not necessary, under the view we take of this case, to be here determined. The rule seems to be universal that a contract, as to its nature, obligation, and validity, is to be governed by the law of the state where made, unless it is performed in another state. As said by Mr. Justice Story, and approved by this court in *Hanrick v. Andrews*, 9 Port. 9: "When the contract is expressly or tacitly to be performed in any other place, there the general rule is in conformity to the presumed intention of the parties—that

the contract, as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance": See, also, 1 Brickell's Digest, p. 252, secs. 19-22; 3 Brickell's Digest, p. 125, sec. 18; Clark on Contracts, p. 507. According to the complaint, the defendant contracted to deliver the goods in this state. The place of performance was Birmingham, in this state. The delivery could have been made nowhere else, and therefore the contract, so far as delivery was involved, was to be wholly performed in this state. Transporting the property out of the state of New York and through other states did not constitute performance. "That was merely a means of enabling the company to perform by delivery of the property at its destination": *Pittsburg etc. Ry. Co. v. Sheppard*, 56 Ohio St. 68, 60 Am. St. Rep. 732, 46 N. E. 61.

³⁰⁸ In *Curtis v. Delaware etc. R. R. Co.*, 74 N. Y. 116, 30 Am. Rep. 271, the plaintiff sought to recover damages for the loss of his baggage, which was to be delivered by the defendant carrier in New York City. The contract was made in the state of Pennsylvania, and under the statute of that state the defendant's liability for its loss was limited to three hundred dollars. The court said: "The baggage, for which recovery was had, was delivered to defendant at Scranton, in the state of Pennsylvania, to be transported to and delivered in the city of New York. The first question which arises on this appeal is whether the statute of the state of Pennsylvania passed in 1867, which limits and defines the liability of railroad corporations upon contracts entered into by them for the transmission of baggage, forms a part of the contract between the plaintiff and the defendant, and should be considered as determining the right to recovery and the amount of the recovery. I think that the statute cited has no application, and that the rights of the parties must be determined in accordance with the laws of the state of New York, which are applicable to such contracts, as is manifest by referring to the principles which govern contracts of this description. One of the rules applicable to the subject is that the *lex loci contractus* is to govern, unless it appears upon the face of the contract that it was to be performed in some other place, or made with reference to the laws of some other place, and then the rule of interpretation is governed by the law of the place: *Dyke v. Erie Ry. Co.*, 45 N. Y. 113, 6 Am. Rep. 43; *Sherrill v. Hopkins*, 1 Cow. (N. Y.) 103. The place of delivery was

a material and important part of the contract, and until such delivery the same was not completed and fulfilled. Upon a failure to deliver the baggage to the plaintiff in the city of New York, there was a breach of the contract; ³⁰⁹ and, as the final place of performance was in that city, it would seem to follow that, within the rule laid down, the contract was to be governed, at least so far as a delivery is concerned, by the laws of New York. This certainly was to be done in a different place from where the contract was made, and it is a reasonable inference that it was in the contemplation of the parties at the time, and that it was entered into with reference to the laws of the place where it was to be delivered. So, also, when it appears that the place of performance was different from the place of making the contract, it is to be construed according to the laws of the place where it is to be performed: *Sherrill v. Hopkins*, 1 Cow. 108, and authorities there cited; *Thompson v. Ketchum*, 8 Johns. (N. Y.) 189, 5 Am. Dec. 332; 4 Kent's Commentaries, 459. The place of final performance of the contract being in the city of New York, although the transportation was mostly through other states, no reason exists why a failure to deliver the baggage should not be controlled by the laws which prevail at the place of delivery. It is said that the contract is entire and indivisible, and we are referred to some cases outside of this state which, it is claimed, sustain the doctrine that the locality where the contract was made, in cases of this character, must control. None of the cases cited are entirely similar to the one at bar, and none involve the precise point now considered. But even were it otherwise, they are not, I think, controlling, as no reason exists why a contract to deliver baggage should not be governed by the laws of the place where the baggage is to be delivered." In *Brown v. Camden & A. R. Co.*, 83 Pa. 316, where the contract was made with the railroad company in Philadelphia, Pennsylvania, to transport the plaintiff and his baggage from that point to Atlantic City, New Jersey, the court held that, although its performance ³¹⁰ required the transportation of plaintiff and his baggage across the Delaware river, which divided the two states, its validity and effect was to be determined by the law of New Jersey, and not by that of Pennsylvania. The court distinctly placed its holding upon the point that, as the delivery of the baggage was to be in New Jersey, the contract was to be performed wholly in that state. These cases are di-

rectly in point, and we think sound: See, also, 1 Hutchinson on Carriers, secs. 202, 203.

Southern Ry. Co. v. Harrison, 119 Ala. 539, 72 Am. St. Rep. 936, 24 South. 552, 43 L. R. A. 385, seems to be relied upon as supporting the proposition that the stipulation relied on in the pleas must be governed as to its validity by the New York law, because made there and the performance begun there, and, therefore, conclusive against the view that the contract was to be wholly performed in this state. Suffice it to say no such point was presented in that case, as will readily appear by an examination of it. It is true the court stated the rule in general terms, but expressly said it had no application to the case. It is not perceivable how that case can be held to be an authority upon the question here presented. It follows, therefore, that the action of the court in sustaining the demurrer to the pleas under consideration was correct, as likewise was its ruling upon the demurrer to pleas numbered 5 and 6.

The judgment is affirmed.

Dowdell, Anderson and McClellan, JJ., concur.

The Limitation of a Carrier's Liability by stipulations in bills of lading is the subject of a note to Chicago etc. Ry. Co. v. Calumet etc. Farm, 88 Am. St. Rep. 74. A common carrier may make a valid agreement with a shipper as to the value of property to be transported, and thus limit his liability for loss to the amount agreed upon: Central of Georgia Ry. Co. v. Hall, 124 Ga. 322, 110 Am. St. Rep. 170. But the limitation must be reasonable and the value agreed upon must bear some proportion to the actual value: Southern Express Co. v. Marks, 87 Miss. 656, 112 Am. St. Rep. 466; Nashville etc. Ry. Co. v. Stone, 112 Tenn. 348, 105 Am. St. Rep. 953; Southern Express Co. v. Owens, 146 Ala. 412, 119 Am. St. Rep. 41.

Conflict of Laws in the Case of Contracts limiting the liability of a carrier is discussed in Hughes v. Pennsylvania R. R. Co., 202 Pa. 22, 97 Am. St. Rep. 713; Davis v. Chesapeake etc. Ry. Co., 122 Ky. 528, 121 Am. St. Rep. 481; Southern Express Co. v. Owens, 146 Ala. 412, 119 Am. St. Rep. 41.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY v. CHURCH.

[155 Ala. 329, 46 South. 457.]

NEGLIGENCE, Averment of, When Sufficient.—When the gravamen of the action is the alleged nonfeasance or misfeasance of another, it is, as a general rule, sufficient for the complainant to aver the facts out of which the duty to act springs and which the defendant negligently failed to perform. It is not necessary to define the quo modo, nor to specify the particular acts of diligence the defendant should have employed in the performance of such duty. (p. 31.)

RAILWAY COMPANIES, Liability of for Negligence of a Sleeping-car Company and Its Employés.—A railway company cannot escape liability for injuries inflicted upon a passenger upon the ground that they were sustained in a sleeping-car owned by another company, which furnished its own agents or servants, notwithstanding the passenger paid an additional fare to the sleeping-car company for the privilege of riding in one of its cars, when it appears that such car was a part of the railway company's train. (p. 31.)

RAILROAD COMPANY—Porter of Pullman Car, Liability of Railroad Company for.—It is presumed that a porter employed by the Pullman Company and assigned by it to the control of the interior of a sleeping-car exercised his control with the assent of the railroad company. (p. 31.)

RAILROAD COMPANY—Instruction as to Accident on a Pullman Car, When Properly Refused.—An instruction that if the jury believe from the evidence that a table fell because of an unforeseen accident, which could not have been anticipated by reasonable care and foresight on the part of the defendant or the Pullman Company, the jury must find for the defendant, is properly refused, because it might lead the jury to believe that there must have been corporate negligence regardless of the acts or omissions of servants. (p. 32.)

CARRIERS OF PASSENGERS, Care and Skill Due from.—A railroad company owes to its passengers the duty to exercise the highest degree of care, skill and diligence known to very careful, skillful and diligent persons in like business. (p. 32.)

NEW TRIAL—Newly Discovered Evidence.—If, in an answer made to an interrogatory before the trial, the plaintiff gave the name of the physician who treated her, and the defendant could have ascertained where he resided, a new trial will not be granted because of the supposed testimony of such physician, where there was no request to delay the trial until such time as his attendance could be procured. (p. 32.)

Action to recover damages for injuries received by the plaintiff from the falling of a table or other hard article on her hand on the train of the defendant. The complaint alleged that the defendant was a common carrier of passengers by means of a railroad train, and that while plaintiff was defendant's passenger and being carried as such, the plaintiff's hand was caught in the car on the train between a table or other hard article and the wall or partition of the car, and, as a consequence thereof, the hand was bruised,

mashed and otherwise injured, and the plaintiff rendered permanently less able to work and earn money, and was put to great trouble, inconvenience and expense, and that she suffered such injuries as the proximate consequence of the negligence of the defendant in or about carrying plaintiff as its passenger as aforesaid. There was a demurrer that the complaint did not sufficiently set out the negligence of the defendant.

The evidence at the trial tended to show the plaintiff was a passenger with a ticket for transportation and also a Pullman ticket; that her injuries were received in a Pullman car by a table which, being handled by the porter of the car, fell upon her hand and pinned it to the wall. Numerous instructions were asked and refused for the purpose of obtaining a charge from the court to the effect that the defendant railway company was not answerable if the injury suffered by the plaintiff was due to the negligence of the Pullman Car Company or its employés, unless there was some negligence upon the part of the defendant or its servants other than the porter of the Pullman Car Company. The fourth and fifth requests for charges, refused to the defendant, were to the effect that the defendant was not liable unless it or its servants were guilty of the negligence causing the plaintiff's injury, and that the jury were not authorized to find that the defendant was responsible for the injury unless they also believed from the evidence that the employé of the Pullman Company was guilty of the negligence which proximately caused the plaintiff's injury. The sixth request for charges, refused to the defendant, was to the effect that if the jury believed from the evidence that the table fell from an unforeseen accident which could not have been anticipated by reasonable care and foresight on the part of the defendant or the Pullman Company, the jury must find for the defendant.

Charge 6, given at the request of the plaintiff, is as follows: "The railroad company owes to its passengers the duty to exercise the highest degree of care, skill and diligence known to very careful, skillful and diligent persons in like business."

Tillman, Grubb, Bradley & Morrow, for the appellant.

Bowman, Harsh & Beddow, for the appellee.

334 ANDERSON, J. "When the gravamen of the action is the alleged nonfeasance or misfeasance of another, as a

general rule it is sufficient if the complaint aver the facts out of which the duty to act springs and which the defendant negligently failed to do and perform. It is not necessary to define the *quo modo*, or to specify the particular acts of diligence he should have employed in the performance of such duty": *Southern R. R. v. Burgess*, 143 Ala. 367, 42 South. 35, and cases there cited. The complaint, in the case at bar, was not subject to the demurrer interposed and which was properly overruled by the trial court.

A railroad company cannot escape liability for injuries inflicted upon a passenger upon the ground that they were sustained in a sleeping-car owned by another company and which furnished its own agents and servants, notwithstanding the passenger paid an additional fare to the sleeping-car company for the privilege of riding in one of its cars, when it appears that said sleeping-car was a part of the railroad company's train. The railroad company undertook to safely transport the plaintiff, ³³⁵ and it was its duty to furnish safe cars and polite attention and careful servants, and it was liable for any neglect of duty whereby the plaintiff was injured, whether in a car owned and controlled by the sleeping-car company or not: *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. ed. 141; *Louisville & N. R. R. Co. v. Ray*, 101 Tenn. 1, 46 S. W. 554; *Kinsley v. Lake Shore R. R.*, 125 Mass. 54, 28 Am. Rep. 200; *Pullman Co. v. Norton* (Tex. Civ. App.), 91 S. W. 841. This last case was by the Texas court of civil appeals, wherein a writ of error was denied by the supreme court. The court held that under a contract between the railroad company and the sleeping-car company, and as between said parties, the sleeping-car company was liable for injuries sustained by the plaintiff when passing from one sleeper to another, but also held that as to the plaintiff's right both companies were answerable. There is no merit in assignments of error 2, 3, 8, 9, 10, 11, and 12.

Charges 4 and 5, requested by the defendant, were properly refused. If not otherwise bad, they ignore or pretermit all evidence or inferences that the porter was the servant of the railroad company. The law will presume that the porter, if employed and assigned by the Pullman Company to the control of the interior of the sleeping-car in which the plaintiff was riding when injured, exercised such control with the assent of the railroad company. Moreover, there is nothing in the record to show that the porter was

not the servant of the railroad. He was a porter on the Pullman, it is true; but he may have been the servant of the railroad, or employed and controlled jointly by both companies.

Charge 6, requested by the defendant, was properly refused. If not otherwise bad, it was calculated to mislead the jury to believe that they could not find for the plaintiff unless the accident was foreseen or anticipated ³³⁶ by the defendant or the Pullman Company—that there must have been corporate negligence, regardless of the acts or omissions of the servants.

The trial court did not err in giving charge 6, requested by the plaintiff, and did not, therefore, err in refusing a new trial for the giving of same: *Southern R. R. v. Burgess*, 143 Ala. 367, 42 South. 35.

We are not disposed to put the trial court in error for refusing the new trial. The jury evidently believed the plaintiff's evidence, which was corroborated as to the extent of her injury, and inspected her hand, which was exhibited to them, and the damage was not excessive, if the injuries were as serious as the plaintiff's evidence tended to show. Nor was proper diligence shown by the defendant to get the testimony of Dr. Worcester, who resided in Birmingham. The affidavit of counsel shows that plaintiff, in answer to interrogatories propounded to her long before the trial, gave the name of this identical witness as one of the physicians who treated her. If she did not state that he lived in Birmingham, it was doubtless due to the fact that she was not asked. At any rate, the defendant was informed that such a man treated her, and could have located him before the trial. But, conceding that defendant knew nothing of this witness until plaintiff testified in the case, the court would have doubtless delayed the trial, upon request of the defendant, such a reasonable time as would have enabled the procurement of the witness. In the absence of such a request and refusal, the defendant is in no position to put the trial court in error for refusing its motion because of newly discovered evidence.

The judgment of the city court is affirmed.

Tyson, C. J., and Dowdell and McClellan, JJ., concur.

LIABILITY OF A RAILROAD COMPANY FOR INJURIES OR LOSSES ARISING FROM THE OPERATION OF CARS NOT OWNED BY IT.

- I. Scope of Note, 33.**
- II. Distinction Between Common and Private Carriers, 34.**
- III. Right of Private Carrier to Contract for Exemption of Liability, 34.**
- IV. Liability of Railway Company Hauling Cars Owned by Others Under Special Contracts or Otherwise.**
 - a. Basis upon Which Nonliability of Railway Company is Declared, 35.**
 - b. Contracts to Haul Circus Trains and the Like, 35.**
 - c. Contracts to Haul Drawing-room and Sleeping-cars.**
 - 1. Right of Railway Company to Contract for Exemption of Liability as Against Sleeping-car Company and Its Employés, 38.**
 - 2. Right of Railway Company to Run Trains Composed Exclusively of Sleeping-cars, 40.**
 - 3. Duty of Railway Company Toward Its Passengers Occupying Sleeping-cars, 41.**
 - d. Transportation of Refrigerator or Other Special Cars, 44.**
 - e. Transportation of Cars Furnished by the Shipper or Hired at His Request, 46.**
 - f. Transportation by Connecting Carrier of Cars of Initial Carrier, 47.**
- V. Whether an Injured Employé of the Car Owner is Bound by a Contract Between Such Owner and the Railway Company Exempting the Latter from Liability Therefor, 47.**

I. Scope of Note.

In our discussion of this subject we shall exclude questions relating to the operation of trains belonging to other railway companies which are operated under some lease, license or track arrangement; nor shall we include the liability of connecting carriers; nor the validity of contracts limiting liability; nor cases involving the liability of a railway corporation for failure to furnish refrigerator-cars or special services of that sort. The line of express messenger cases, though having a general bearing on this subject, do not, as far as the cases show, involve the question whether the liability is or is not dependent upon the ownership of the express-car. Besides, in those cases it generally appears that the express messenger has assented to the contract between the express company and the railway company exempting the latter from liability. The duties of express companies as common carriers was the subject of the note attached to *Bullard v. American Express Co.*, 61 Am. St. Rep. 360. The following notes may be profitably consulted in connection with this subject: Obligations and liabilities of sleeping-car companies, attached to *Pullman Palace Car Co. v. Lowe*, 26 Am. St. Rep. 331. Respective duties of carriers and shippers of livestock: *Heller v. Chicago etc. Ry. Co.*, 63 Am. St. Rep. 548. Limitation of a carrier's liability in bills of lading, attached to *Chicago etc. R. Co. v. Calumet Stock Farm*, 88 Am. St. Rep. 74. Liability of carriers for goods shipped in cold storage, attached to *Marks v. New Orleans Cold Storage Co.*, 90 Am. St. Rep. 300.

II. Distinction Between Common and Private Carriers.

Inasmuch as the exemption from liability on the part of the railway company for injuries or losses arising from the operation of cars not owned by it is largely dependent upon the question whether the railway company in furnishing the motive power for such cars is acting as a public or private carrier, it may be well to advert to the distinction between such carriers.

Where a common carrier undertakes to transport an article in his line of business, the legal presumption is that he does it subject to his common-law liability: *Pennsylvania R. Co. v. New Jersey R. & T. Co.*, 27 N. J. L. 100. "A common carrier may, undoubtedly, become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry": *New York Central R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627. A common carrier does not undertake to carry by any or all means, but only by those means and methods and over the route to which its business is confined: *Chicago M. etc. R. Co. v. Wallace*, 66 Fed. 506, 14 C. C. A. 257, 30 L. R. A. 161. In *Cleveland etc. Ry. Co. v. Henry*, 170 Ind. 94, 83 N. E. 710, the court, in discussing this subject, said: "A vast difference exists in the powers and duties of public, or common, carriers and private carriers. A common carrier is one who holds himself out in common—that is, to all people alike—that he is engaged in the business of transporting persons, or certain kinds of property, and is prepared and ready to carry for all who apply, on the same terms. From its very nature his business is one in which the people generally, or the public, acquire an interest to the extent, at least, that the business be conducted honestly, impartially, and efficiently. Hence the law intervenes as to the public carrier, and enforces certain regulations and limitations against him in the interest of the public welfare. Among these regulations he is held, under the general rules of the common law, to be an insurer of the property intrusted to him against loss from any source, except the act of God, or the public enemy, is also held to the highest degree of care for the safety of his passengers, and is denied the right to make any contract for relief against the negligence of himself or employes. A private carrier is one who does not engage in the business of carrying, or does not hold himself out to carry certain kinds or classes of property. He is one who is under no duty or obligations to make the carriage, is at liberty to refuse to accept it as he pleases, and will undertake it only upon terms satisfactory to himself. In respect to the undertaking he enjoys the full freedom of the right of contract, and may stipulate for relief from liability for every kind of accident resulting from negligence or otherwise."

III. Right of Private Carrier to Contract for Exemption of Liability.

Where there is a right on the part of a common carrier to refuse to transport the goods or perform the services demanded, there is a

right to contract that the transportation or services shall be performed in the capacity of a private carrier and with only the liabilities attaching to such a carrier: *Central etc. R. Co. v. Lampley*, 76 Ala. 357, 52 Am. Rep. 334; *Honeyman v. Oregon etc. Co.*, 13 Or. 352, 57 Am. Rep. 20, 10 Pac. 628; *New York Cent. R. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627; *Baltimore etc. R. Co. v. Voigt*, 176 U. S. 498, 20 Sup. Ct. Rep. 385, 44 L. ed. 560; *Sager v. Northern Pac. Ry. Co.*, 166 Fed. 526. In other words, if the service demanded of the carrier is one that is not imposed upon it as a duty, it may undertake it upon such terms as it may see fit: *Chicago etc. Ry. Co. v. Hamler*, 215 Ill. 525, 106 Am. St. Rep. 187, 74 N. E. 705, 1 L. R. A., N. S., 674. In that event the liability of the carrier is measured by the specific provisions of its transportation contract: *Kimball v. Rutland etc. R. Co.*, 26 Vt. 247, 62 Am. Dec. 567. This rule is illustrated in the case of the carriage of express matter for express companies: *Pittsburgh etc. Ry. Co. v. Mahony*, 148 Ind. 196, 62 Am. St. Rep. 503, 46 N. E. 917, 40 L. R. A. 101. But in order for a carrier to limit its common-law liability as a common carrier, the assent of the shipper must be fairly obtained: *Ficklin v. Wabash R. Co.*, 117 Mo. App. 221, 93 S. W. 847.

IV. Liability of Railway Company Hauling Cars Owned by Others Under Special Contracts or Otherwise.

a. Basis upon Which Nonliability of Railway Company is Declared.—The cases in which railway companies have been held not liable for injuries or losses arising from the hauling of cars not owned by them, as will be seen from the cases hereinafter discussed, are generally based upon the principle that the carriage of such cars is not one of its duties as a common carrier. This principle is clearly illustrated in the cases involving the hauling of circus trains, the cars of which are owned by the circus proprietors. In such cases the railway company acts as a private carrier, and as such has the right to declare the conditions and terms upon which it will perform the service. Besides, in such cases the railway company has no control over the cars composing the train.

b. Contracts to Haul Circus Trains and the Like.—A railway company is not liable for an injury caused by a train of circus cars not owned by it and hauled over its road under a special contract exonerating and saving it harmless from all claims for damages to persons or property occurring during its transportation: *Robertson v. Old Colony R. Co.*, 156 Mass. 525, 32 Am. St. Rep. 482, 31 N. E. 650; *Coup v. Wabash etc. R. Co.*, 56 Mich. 111, 56 Am. Rep. 374, 22 N. W. 215; *Forepaugh v. Delaware etc. Co.*, 128 Pa. 217, 15 Am. St. Rep. 672, 18 Atl. 503, 5 L. R. A. 508; *Chicago etc. Ry. Co. v. Wallace*, 66 Fed. 506, 14 C. C. A. 257, 30 L. R. A. 161; *Wilson v. Atlantic Coast Line Co.*, 129 Fed. 774, affirmed in 133 Fed. 1022, 66 C. C. A. 486; *Clough v. Grand Trunk etc. Ry. Co.*, 155 Fed. 81, 11 L. R. A., N. S., 446; *Sager v. Northern Pac. Ry. Co.*, 166 Fed.

526. But a contrary rule was declared in *Fordyce v. McFlynn*, 56 Ark. 424, 19 S. W. 961. A common carrier is not under a duty to transport cars belonging to a circus company, and which are loaded with wild animals, over its line of railroad on a schedule arranged by the circus company: *Wilson v. Atlantic Coast Line R. Co.*, 129 Fed. 774. And where the railway company is under no obligation to haul cars as a common carrier, and has merely contracted to haul them, it is under no duty to inspect the cars: *Robertson v. Old Colony R. Co.*, 156 Mass. 525, 32 Am. St. Rep. 482, 31 N. E. 650.

In *Coup v. Wabash etc. R. Co.*, 56 Mich. 111, 56 Am. Rep. 374, 22 N. W. 215, it was sought to recover for damages to a circus train caused by a collision; the court, in holding that the contract for its hauling exempted the railway company from such damages, said: "The business of common carriage, while it prevents any right to refuse the carriage of property such as is generally carried, implies, especially on railroads, that the business will be done on trains made up by the carrier and running on their own time. It is never the duty of a carrier, as such, to make up special trains on demand, or to drive such trains made up entirely by other persons or by their cars.

"It is not important now to consider how far, except as to owners of goods in the cars forwarded, the reception of cars, loaded or unloaded, involves the responsibility of carriers, as to the owners of the cars, as such. The duty to receive cars of other persons, when existing, is usually fixed by the railroad laws, and not by the common law. But it is not incumbent on companies, in their duty as common carriers, to move such cars except in their own routine. They are not obliged to accept and run them at all times and seasons, and not in the ordinary course of business. The contract before us involves very few things ordinarily undertaken by carriers. The trains were to be made up entirely of cars which belonged to plaintiff, and which the defendant neither loaded nor prepared, and into the arrangement of which, and the stowing and placing of their contents, defendant had no power to meddle. The cars contained horses which were entirely under control of plaintiff, and which, under any circumstances, may involve special risks. They contained an elephant, which might very easily involve difficulty, especially in case of accident. They contained wild animals, which defendant's men could not handle, and which might also become troublesome and dangerous. It has always been held that it is not incumbent on carriers to assume the burden and risks of such carriage. The trains were not to be run at the option of the defendant, but had short routes and special stoppages, and were to be run on some part of the road chiefly during the night. They were to wait over for exhibitions, and the times were fixed with reference to these exhibitions, and not to suit the defendant's convenience. There was also a divided authority, so that, while defendant's men were to attend to the moving of the trains, they had nothing to do with

loading and unloading cars, and had no right of access or regulation in the cars themselves.

"It cannot be claimed on any legal principle that plaintiff could, as a matter of right, call upon defendant to move his trains under such circumstances, and on such conditions; and if he could not, then he could only do so on such terms as defendant saw fit to accept. It was perfectly legal and proper, for the greatly reduced price, and with the risks and trouble arising out of moving peculiar cars and peculiar contents on special excursions and stoppages, to stipulate for exemption from responsibility for consequences which might follow from carelessness of their servants while in this special employment. How far, in the absence of contract, they would be liable in such a mixed employment, where plaintiff's men, as well as their own, had duties to perform connected with the movement and management of the business, we need not consider. It is a misnomer to speak of such an arrangement as an agreement for carriage at all. It is substantially similar to the business of towing vessels, which had never been treated as carriage. It is, although on a larger scale, analogous to the business of furnishing horses and drivers to private carriages. Whatever may be the liability to third persons who are injured by carriages or trains, the carriage owner cannot hold the persons he employs to draw his vehicles as carriers. We had before us a case somewhat resembling this in more or less of its features in *Mann v. White River Log & Booming Co.*, 46 Mich. 38, 41 Am. Rep. 141, 8 N. W. 550, where it was sought to make a carrier's liability attach to log-driving, which we held was not permissible. All of these special undertakings have peculiar features of their own, but they cannot be brought within the range of common carriage."

The same rule which has been applied to the haulage of circus trains has been applied where the contract was to haul show cars as part of a regular freight train. Thus a recovery has been denied for the death of an employé of a traveling show company who was fatally injured in a collision while being transported in one of the show cars, the cars being hauled under a special contract with the railway company, the show company exempting the railway company from any claims for injury to persons or property while transporting such cars: *Cleveland etc. Ry. Co. v. Henry*, 170 Ill. 94, 83 N. E. 710.

In respect to injuries to express messengers, the United States supreme court has announced the principles that where it is shown that the express messenger agreed or assented to the exemption of liability as between the express company and the railway company, no recovery can be had, but where he did not do so, a recovery will be allowed: *Baltimore etc. Ry. Co. v. Voigt*, 176 U. S. 498, 20 Sup. Ct. Rep. 385, 44 L. ed. 560.

But where a railway company agreed to transport coal loaded in the shipper's own cars, the railway company has been held liable for loss of the coal as a common carrier, even though the shipper loaded

and unloaded the cars and furnished brakemen to accompany them on the road, they, however, being under the control of the conductor of the railway company: *Mallory v. Tioga R. R. Co.*, 39 Barb. 488.

c. Contracts to Haul Drawing-room and Sleeping-cars.

1. Right of Railway Company to Contract for Exemption of Liability as Against Sleeping-car Company and Its Employés.—A railway company is under no legal obligation to accept and haul a sleeping-car, even though it is customary for sleeping-cars to be attached to railway trains and thereby afford a great convenience to travelers: *Russell v. Pittsburgh etc. Ry. Co.*, 157 Ind. 305, 87 Am. St. Rep. 214, 61 N. E. 678, 55 L. R. A. 253. In the case just cited the court in discussing this subject said: "It would be no ground for an action of quo warranto against a railroad corporation that it had transported circus-cars or express-cars over its lines, or that a street-car company has received for carriage a bag of specie. But no one would seriously contend that these acts are such as the carrier must perform. He may perform them, but if he refuse, he cannot be proceeded against as for a violation of his common-law duty. If he does agree to perform them, he may stipulate, specially, how far his liability for negligence shall extend: *Coup v. Wabash etc. Ry. Co.*, 56 Mich. 111, 56 Am. Rep. 374, 22 N. W. 215; *Robertson v. Old Colony R. R. Co.*, 156 Mass. 525, 32 Am. St. Rep. 482, 31 N. E. 650; *Blank v. Illinois etc. R. R. Co.*, 182 Ill. 332, 55 N. E. 332."

The payment of a first-class passenger fare does not entitle one to demand carriage in a car equipped with adjustable reclining chairs, lavatory and services of a special porter: *St. Louis etc. R. Co. v. Hardy*, 55 Ark. 134, 17 S. W. 711. "It is no part of the contract or obligation of a common carrier of passengers to furnish berths or the services of a porter to make up beds, or perform other services for passengers. The passenger pays the Pullman Company for the services performed by it, and not the railroad company, and if one desires such services as are rendered by the Pullman Company and its porter, he must contract with that company for them. In its business as a common carrier of passengers a railroad company is bound to carry all who apply, and to treat all alike, and its duties and obligations to them are imposed by law. The obligations of a common carrier arise from the public nature of the employment, and being imposed by law, it would be against public policy to allow the obligations so imposed to be changed by a contract exempting the carrier from the consequences of negligence in the employment. A railroad company, in its business as a common carrier, undertakes to use the care and diligence required by law in the transportation of passengers, and will not be permitted to absolve itself from its duties by a stipulation in the contract of carriage by which a passenger is to take the risk of its negligence; but if the service is one that is not imposed upon it as a duty, it may undertake it upon such terms as it may see fit. There can be no doubt that the de-

defendant is not bound to haul sleeping-cars tendered to it by the Pullman Company, with its conductors, porters or other employés. The defendant is a common carrier of passengers, and as to them it assumes the duties and liabilities of a common carrier, but the Pullman Company furnishes special facilities and services to passengers, and the defendant is not a common carrier of Pullman cars and employés performing duties therein. The defendant might undertake to receive and haul the cars of the Pullman Company, but in doing so had a right to impose such terms as it might elect": *Chicago etc. Ry. Co. v. Hamler*, 215 Ill. 525, 106 Am. St. Rep. 187, 74 N. E. 705, 1 L. R. A., N. S., 674.

In *Denver etc. R. Co. v. Whan*, 39 Colo. 230, 89 Pac. 39, 11 L. R. A., N. S., 433, which was a suit by a sleeping-car conductor against the railway company for injuries suffered through the derailment of a sleeping-car attached to defendant's train, the court exhaustively discussed the basis of the rule under which the railway company was declared not liable. The railway company defended the suit by showing a contractual exemption of liability as between itself and the sleeping-car company, and a ratification of such contract by the sleeping-car conductor. The court said: "The Pullman Company was operating the sleeping-car Toltec under a special arrangement with the defendant. Its purpose in so doing was to derive revenue from passengers on the train of the defendant to which this car was attached, who desired to ride therein. The money paid by such passengers was collected by the Pullman Company and belonged to it. These collections were made by, and the car was in the charge of, the plaintiff as an employé of the Pullman Company. It was within the scope of the powers of the defendant to enter into the arrangement with the Pullman Company it did, but it was under no obligation to do so, or to haul the car of the Pullman Company for the purposes for which it was being hauled: *Pullman Car Co. v. Missouri Pac. Ry. Co.*, 115 U. S. 587, 6 Sup. Ct. Rep. 194, 29 L. ed. 499; *Express Companies*, 117 U. S. 1, 6 Sup. Ct. Rep. 542, 29 L. ed. 791. The plaintiff was not riding on the train of the defendant by virtue of any personal contract right, but as an employé of the Pullman Company, and because of a contract between the Pullman Company and the defendant. He was not a passenger between the points the train was being operated, and his occupation of the car was but an incident of his employment by the Pullman Company. The defendant was under no obligation except as fixed by the contract between itself and the Pullman Company to permit him to be upon its train in the capacity he was. The Pullman Company was under no obligation to employ him. The contract by which he secured employment with the Pullman Company was deliberately entered into. By the terms thereof he expressly released the defendant from all claims for liability of any nature or character on account of any personal injury while traveling over its lines in the capacity of an employé of the Pullman Company. Not being under any legal obligation to haul

the cars of the Pullman Company for the purpose mentioned in its contract with that company, and not being under any obligation to transport the plaintiff over its lines in the capacity he was riding, the defendant had the legal right to dictate the terms upon which it would haul the cars of the Pullman Company for the purposes mentioned, and the conditions under which its employ  s might ride therein when being so hauled: *Baltimore & O. Ry. Co. v. Voigt*, 176 U. S. 498, 20 Sup. Ct. Rep. 385, 44 L. ed. 560; *C. R. I. & P. Ry. Co. v. Hamler* [215 Ill. 525, 106 Am. St. Rep. 187, 74 N. E. 705, 1 L. R. A., N. S., 674]; *Louisville N. A. & C. Ry. Co. v. Keefer*, 146 Ind. 21, 58 Am. St. Rep. 348, 44 N. E. 796, 38 L. R. A. 93; *Pittsburgh etc. Ry. Co. v. Mahoney*, 148 Ind. 196, 62 Am. St. Rep. 503, 46 N. E. 917, 47 N. E. 464, 40 L. R. A. 101; *Russell v. Pittsburgh etc. Ry. Co.* [157 Ind. 305, 87 Am. St. Rep. 214, 61 N. E. 678, 55 L. R. A. 253]; *Blank v. Illinois C. R. Co.*, 182 Ill. 332, 55 N. E. 332; *McDermon v. Southern Pac. Ry. (C. C.)*, 127 Fed. 669; *New York C. & H. R. Co. v. Difendaffer*, 125 Fed. 893, 62 C. C. A. 1; *Kelly v. Malott*, 135 Fed. 74, 67 C. C. A. 548; *Peterson v. Chicago & N. W. R. Co.*, 119 Wis. 197, 100 Am. St. Rep. 879, 96 N. W. 532; *Alexander v. Toronto & N. R. R. Co.*, 35 U. C. Q. B. 453; *Blank v. Illinois C. R. Co.*, 80 Ill. App. 475; *Bates v. Old Colony R. Co.*, 147 Mass. 255, 17 N. E. 633; *Robertson v. Old Colony R. Co.*, 156 Mass. 525, 32 Am. St. Rep. 482, 31 N. E. 650; *Chicago M. & St. P. Ry. Co. v. Wallace*, 66 Fed. 506, 14 C. C. A. 257, 30 L. R. A. 161; *Coup v. W. St. L. & P. Ry. Co.*, 56 Mich. 111, 56 Am. Rep. 374, 22 N. W. 215.

"Such contracts as we are considering are not against public policy, and may be enforced, because their conditions are in no sense injurious to the interests of the public. The plaintiff was not compelled to enter into the contract in order to obtain the rights of a passenger. He sought something more, whereby his relation, instead of passenger, was that of an employ   of the Pullman Company, and he was upon the train solely for the purpose of transacting the business of his employer by virtue of the contracts pleaded. Perhaps, as a matter of precaution, we should here add that for some purposes the plaintiff might be regarded an employ   of the defendant; but no question is involved in this case which renders it necessary to consider that proposition."

2. Right of Railway Company to Run Train Composed Exclusively of Sleeping-cars.—A railway company has the right to run a special limited train for those only who have secured sleeping-car accommodations, and to make it a condition that the passenger shall procure a sleeping berth before he can have the benefit of the special train, and to exclude him from the train when such berth cannot be procured thereon: *Ames v. Southern Pac. Co.*, 141 Cal. 728, 99 Am. St. Rep. 98, 75 Pac. 310. We do not apprehend, however, that the railway company could urge the fact that the cars were owned by the sleeping-car company as a defense in a suit for injuries received by the passenger during the operation of the train.

3. Duty of Railway Company Toward Its Passengers Occupying Sleeping-cars.—The servants of a Pullman palace or sleeping-car, although the car is not owned by the railway company, must be regarded as the servants of the railway company of whose train the car is a part, in all matters pertaining to the safety of passengers whom it undertakes to carry over its line, and the latter company is liable for an injury received by a passenger at the hands of a porter on such car: *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 417, 8 Am. St. Rep. 538, 4 South. 85; *Louisville etc. R. Co. v. Katzenberger*, 84 Tenn. 380, 1 S. W. 44; *Louisville etc. R. Co. v. Ray*, 101 Tenn. 1, 46 S. W. 554; *Norfolk etc. R. Co. v. Lipscomb*, 90 Va. 137, 17 S. E. 809, 20 L. R. A. 817; *McKeon v. Chicago etc. Ry. Co.*, 94 Wis. 477, 59 Am. St. Rep. 910, 69 N. W. 175, 35 L. R. A. 252.

"The business of running drawing-room cars in connection with ordinary passenger-cars has become one of the common incidents of passenger traffic on the leading railroads of the country. These cars are mingled with the other cars of the company, and are open to all who desire to enter them, and who are willing to pay a sum in addition to the ordinary fare, for the special accommodation afforded by them. They are put on presumably in the interest of the road. They form a part of the train, and the manner of conducting the business is an invitation by the company to the public to use them, upon the condition of paying the extra compensation charged. Passengers cannot know what private or special arrangement, if any, exists between the company and third persons, under which this part of the business is conducted, and they have, we think, in taking one of these cars, a right to assume that they are there under a contract with the company, and that the servants in charge of the drawing-room cars are its servants. Otherwise there could be two separate contracts in the case of each passenger in these cars—one with the company and one with Wagner. Such a condition of things would involve a confusion of rights and obligations, and divide a responsibility which ought to be single and definite. Take the case of a passenger in a drawing-room car who should be burned by the negligent upsetting or breaking of a lamp by the porter, or the case of a passenger in a sleeping-car, injured by the porter's negligence. Is the passenger, in these or similar cases which might be supposed, to be turned over, for his remedy, against Wagner, on the ground that the servant who caused the injury was his servant, and not the defendant's? The public interest, and due protection to the rights of passengers, require that the railroad company, which is exercising the franchise of operating the road for the carriage of passengers, should be charged with and responsible for the management of the train, and that all persons employed thereon should, as to passengers, be deemed to be the servants of the corporation": *Thorpe v. New York Central etc. R. Co.*, 76 N. Y. 402, 32 Am. Rep. 325. The same rule was announced in *Dwinelle v. New York Cent. etc. R. Co.*, 120 N. Y. 117, 17 Am. St. Rep. 611, 24 N. E. 319, 8 L. R. A. 224.

Private contracts between the railway company and the sleeping-car company in respect to their liability for injuries caused by the defective condition of cars furnished by the latter company do not, as a general rule, affect the right of a passenger to recover from this railway company. He has a right to look to the railway company for safe transportation: *Robinson v. Chicago etc. R. Co.*, 135 Mich. 254, 97 N. W. 689.

Those duties to the passenger which are incident to the carrier's contract for transportation, continue to rest upon the railway company notwithstanding that the passenger has a contract with the sleeping-car company for special accommodations in its parlor or sleeping-car. The railway company retains its control and management of its trains, including sleeping-cars, as to all matters except those which are peculiarly incident to the sleeping-car company's special contract with the passenger. The duties of the sleeping-car company are, of course, coextensive with the nature of its contract: *Calhoun v. Pullman Co.*, 159 Fed. 387.

In the principal case the rule was laid down that a railway company cannot escape liability for injuries inflicted upon a passenger by reason of the defective condition of a sleeping-car owned by another company but maintained and carried as part of its train: *Louisville etc. R. Co. v. Church*, 155 Ala. 329, ante, p. 29, 46 South. 457. A railway passenger traveling in a sleeping-car may assume, in the absence of notice to the contrary, that the whole train is under one management, and where he is injured by the negligent falling of a berth, he may maintain an action against the railway company: *Cleveland etc. R. R. Co. v. Walrath*, 38 Ohio St. 461, 43 Am. Rep. 433. In the leading case of *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. ed. 141, the plaintiff, who was a passenger in a sleeping-car owned by the Pullman Palace Car Company, was injured by a falling berth. The court, in holding the railway company liable for his injuries, said: "He is responsible for injuries received by passengers in the course of their transportation which might have been avoided or guarded against by the exercise upon his part of extraordinary vigilance, aided by the highest skill. And this caution and vigilance must necessarily be extended to all the agencies or means employed by the carrier in the transportation of the passenger. Among the duties resting upon him is the important one of providing cars or vehicles adequate—that is, sufficiently secure as to strength and other requisites, for the safe conveyance of passengers. That duty the law enforces with great strictness. For the slightest negligence or fault in this regard, from which injury results to the passenger, the carrier is liable in damages. These doctrines to which the courts, with few exceptions, have given a firm and steady support, and which it is neither wise nor just to disturb or question, would, however, lose much, if not all, of their practical value, if carriers are permitted to escape responsibility upon the ground that the cars

er vehicles used by them, and from whose insufficiency injury has resulted to the passenger, belong to others.

"The undertaking of the railroad company was to carry the defendant in error over its line in consideration of a certain sum, if he elected to ride in what is known as a first-class passenger-car; with the privilege, nevertheless, expressly given in its published notices, of riding in a sleeping-car, constituting a part of the carrier's train, for an additional sum paid to the company owning such car.

"As between the parties now before us, it is not material that the sleeping-car in question was owned by the Pullman Palace Car Company, or that such company provided at its own expense a conductor and porter for such car, to whom was committed the immediate control of its interior arrangements. The duty of the railroad company was to convey passengers over its line. In performing that duty it could not, consistently with the law and the objections arising out of the nature of its business, use cars or vehicles whose inadequacy or insufficiency, for safe conveyance, was discoverable upon the most careful and thorough examination. If it chose to make no such examination or to cause it to be made; if it elected to reserve or exercise no such control or right of inspection, from time to time, of the sleeping-cars which it used in conveying passengers, as it should exercise over its own cars, it was chargeable with negligence or failure of duty. The law will conclusively presume that the conductor and porter, assigned by the Pullman Palace Car Company to the control of the interior arrangements of the sleeping-car in which Roy was riding when injured, exercised such control with the assent of the railroad company. For the purposes of the contract under which the railroad company undertook to carry Roy over its line, and, in view of its obligation to use only cars that were adequate for safe conveyance, the sleeping-car company, its conductor and porter, were, in law, the servants and employés of the railroad company. Their negligence, or the negligence of either of them, as to any matters involving the safety or security of passengers while being conveyed, was the negligence of the railroad company. The law will not permit a railroad company, engaged in the business of carrying persons for hire, through any device or arrangement with a sleeping-car company whose cars are used by and constitute a part of the train of the railroad company, to throw off the duty of providing proper means for the safe conveyance of those whom it has agreed to convey: 2 Kent's Commentaries, 12th ed., 600; 2 Parsons on Contracts, 6th ed., 218, 219; Story on Bailments, secs. 601, 601a, 602; Cooley on Torts, 642; Wharton on Negligence, 2d ed., sec. 627 et seq.; Chitty on Carriers, 256 et seq., and cases cited by the authors.

"It is also an immaterial circumstance that Roy, when injured, was not sitting in the particular sleeping-car to which he had been originally assigned. His right, for a time, to occupy a seat in the car in which his friend was riding was not and, under the facts disclosed, could not be questioned."

And in a suit to recover from a railway company for the negligent loss of baggage while the passenger was riding in a sleeping-car, it is no defense that the car was not owned by the railway company, but used under a contract with the owners thereof, who also furnished conductors and servants to take charge of it, in the absence of evidence that the plaintiff knew of such contract, or that the car was not owned by it or under its exclusive control: *Kinsley v. Lake Shore etc. R. Co.*, 125 Mass. 54, 28 Am. Rep. 200.

While the carrier can never shift its duty to the sleeping-car company, still its duty is limited to the safe transportation of the passenger. It is under no obligation to provide dressing-rooms for its passengers. Such conveniences are furnished by the sleeping-car company: *Ozanne v. Illinois Cent. R. Co.*, 151 Fed. 900. The railway company may be held liable for an assault committed upon a passenger in a sleeping-car during the negligent absence of the porter: *St. Louis etc. R. Co. v. Hatch*, 116 Tenn. 580, 94 S. W. 671. And the act of the railway conductor and brakeman in ejecting a passenger from a sleeping-car is the act of the railway company: *Pullman Palace Car Co. v. Lee*, 49 Ill. App. 75; *Lawrence v. Pullman's Palace Car Co.*, 144 Mass. 1, 59 Am. Rep. 58, 10 N. E. 723. Although the conductor of a Pullman car is, in his dealings with its passengers, regarded as the servant of the railway company, he is not so regarded in respect to dealings with a trespasser on the train: *Blake v. Kansas City etc. Ry. Co.*, 38 Tex. Civ. 337, 85 S. W. 430. But where a train, such as a circus train, is hauled under a special contract which exempts the railway company of its common-law liabilities as a common carrier, the operating employes of the railway company are regarded as the special servants of the owners of the cars composing the train. For the time being the railway company has parted with its control and direction of such servants, and is not responsible for their acts: *Clough v. Grand Trunk etc. Ry. Co.*, 155 Fed. 81, 11 L. R. A., N. S., 446.

A passenger injured by a defect in the vestibule of a sleeping-car may recover from either the sleeping-car company or the railway company, since both are guilty of the tort as far as the passenger is concerned, but where a contract is shown to exist between the two companies requiring the sleeping-car company to keep the car in repair, the latter company may recover over against the sleeping-car company for the amount of the verdict: *Pullman Company v. Norton* (Tex. Civ. App.), 91 S. W. 841.

A passenger riding on a free pass, who purchases a seat in a drawing-room car, is precluded from recovering for injuries suffered by him through the negligence of the railway company or its agents by reason of the stipulation indorsed on the pass exempting it from such liability: *Ulrich v. New York Central etc. R. Co.*, 108 N. Y. 80, 2 Am. St. Rep. 369, 15 N. E. 60.

d. Transportation of Refrigerator or Other Special Cars.—The general rule is, that the duty of a common carrier to furnish sound and

suitable vehicles for the transportation of property cannot be shirked or shifted: *Jones v. St. Louis etc. R. Co.*, 115 Mo. App. 232, 91 S. W. 158. Where a railway company undertakes to transport fruit or other perishable goods in a properly iced refrigerator-car, it cannot escape liability by showing that the refrigerator-cars were owned by another company which had undertaken to furnish suitable cars for that purpose: *St. Louis, Iron Mt. etc. Ry. Co. v. Renfro*, 82 Ark. 143, 118 Am. St. Rep. 58, 100 S. W. 889, 10 L. R. A., N. S., 317; *Taft Co. v. American Express Co.*, 133 Iowa, 522, 119 Am. St. Rep. 642, 110 N. W. 897, 10 L. R. A., N. S., 614; *Mathis v. Southern R. Co.*, 65 S. C. 271, 43 S. E. 684, 61 L. R. A. 824; *New York etc. R. Co. v. Cromwell*, 98 Va. 227, 81 Am. St. Rep. 722, 35 S. E. 44, 49 L. R. A. 462. But a connecting carrier is not required to keep on hand, at the connecting point, cars of a special kind for forwarding fruit, to meet a possible contingency arising from the defective condition of the car in which the fruit was originally shipped: *Corso v. New Orleans etc. R. Co.*, 48 La. Ann. 1286, 20 South. 752.

In *Continental Fruit Express Co. v. Leas* (Tex. Civ. App.), 110 S. W. 129, a brakeman was injured by reason of a defective handhold on a fruit-car furnished by the car company to the railway company. A contract existed between the two companies in respect to the liability for accidents arising from negligence of such a character. The plaintiff recovered against the car owner. The court, in holding that the brakeman was not bound by the agreement between the two companies, said: "The appellant had practically a monopoly of cars suitable for the shipment of fruit or perishable goods, in which it was protected by a patent right—a monopoly of such character that railroad companies, in order to discharge their duties to the public as common carriers, were forced to accept appellant's own terms in procuring the cars for the transportation of the kind of freight for which they were designed and alone were suitable to carry. While the law compels railway companies to carry such freight, it, by virtue of a patent right, places the control and ownership of the only kind of cars in which it can be transported in the appellant and companies like it, and without attempting to regulate them, as it does the railroads, leaves the owners of such cars free to prey upon the public by prescribing its own terms and conditions to the railway companies for their use—a power more withering and blighting to the interest of the fruit-grower than a killing frost in June. Under the guise of a contract for hiring its cars to railway companies, it shares with them in the freight for every mile it is carried in its cars over their lines of railway, and reserves the sole right of icing the cars loaded with perishable goods while en route to their destination at an enormous profit to itself, the railway companies being used as its agent to collect from the owner of the goods appellant's pro rata share of the freight and its charges for icing the cars. Such a company exercises all the functions and enjoys all the privileges of a common carrier, while it seeks by contract with the rail-

roads who haul the cars to avoid its liabilities. In short, by circumstances brought about by its own creation, the appellant has placed itself in such a position with regard to the servants of railways operating their trains that it absolutely knows that if it does not use ordinary care and skill in regard to furnishing cars reasonably safe to be operated, it will cause danger of injury to the servants of the companies operating such trains. Hence, its duty to use ordinary care and to avoid such danger—a duty that the law charges it with, and which it cannot avoid by contract with the railroad companies. It is enough that it is given a monopoly in the only kind of cars that can be used by railroad companies in transporting perishable goods; but it cannot be granted immunity from negligently taking the lives and lopping off the limbs of railway employes engaged in its service while handling its cars and carrying freight in which it shares the profits. The operation of these cars was, in fact, as shown by the evidence, the appellant's business, and the plaintiff, though not its servant by contract, was engaged in furtherance of its business when he was injured, and the duty of appellant to him while in its service was as that of a master to his servant engaged in like employment: *Leas v. Continental Express* (Tex. Civ. App.), 99 S. W. 859; *Penn. R. Co. v. Snyder*, 55 Ohio St. 342, 60 Am. St. Rep. 700, 45 N. E. 559; *Schubert v. J. R. Clark Co.*, 49 Minn. 331, 32 Am. St. Rep. 559, 51 N. W. 1103, 15 L. R. A. 818; *Philadelphia & W. Ry. Co. v. Hahn* (Pa.), 12 Atl. 479."

e. Transportation of Cars Furnished by the Shipper or Hired at His Request.—Although a shipper selects or furnishes the car on which his goods or property is loaded and transported, the railway company is, nevertheless, liable as a common carrier: *Fordyce v. McFlynn*, 56 Ark. 424, 19 S. W. 961; *Mallory v. Tioga R. Co.*, 39 Barb. 488; *Louisville & N. R. R. Co. v. Dies*, 91 Tenn. 177, 30 Am. St. Rep. 871, 18 S. W. 266; *Hannibal & St. J. R. Co. v. Swift*, 12 Wall. 262, 20 L. ed. 423. And where a railway company takes a car with a narrower gauge than its own tracks for transportation, it assumes liability for damages caused by that fact: *Pennsylvania R. Co. v. New Jersey etc. Co.*, 27 N. J. L. 100.

But where a car is one belonging to another railway company, selected by the shipper, he refusing to use the cars of the defendant railway company for his shipment, the defendant is not responsible for a loss caused by a defect in the car selected if it did not know of such defect at the time of its selection: *Illinois Cent. R. Co. v. Hall*, 58 Ill. 409. If a railway company does not hold itself out as a carrier of perishable goods, and merely agrees to procure refrigerator-cars for the transportation of such goods, and the shipper has knowledge that the contract for the icing of the car was made with the company owning the car on behalf of the shipper, his recourse for a failure to ice the car is against the refrigerator-car owner and not the railway company: *McConnell v. Southern Ry. Co.*, 144 N. C. 87, 56 S. E. 559.

f. Transportation by Connecting Carrier of Cars of Initial Carrier.—It is the duty of a railway company to inspect its cars before the train is made up, and ascertain whether they are in proper condition so far as a reasonable inspection will demonstrate that condition: *Robinson v. Chicago etc. R. Co.*, 135 Mich. 254, 97 N. W. 689. It is likewise the duty of a connecting carrier to inspect the cars of other roads received by it for transportation. The connecting carrier is liable to the same extent as if the cars were his own. When it uses such cars it adopts and makes them its own for purposes of transportation: *Missouri etc. Ry. Co. v. Merrill*, 65 Kan. 436, 93 Am. St. Rep. 287, 70 Pac. 358, 59 L. R. A. 711; *Western Maryland R. Co. v. State*, 95 Md. 637, 53 Atl. 969; *Mackin v. Boston etc. R. R.*, 135 Mass. 201, 46 Am. Rep. 456; *Fowles v. Briggs*, 116 Mich. 425, 72 Am. St. Rep. 537, 74 N. W. 1046, 40 L. R. A. 548; *Lellis v. Michigan Cent. Ry. Co.*, 124 Mich. 37, 87 N. W. 828, 70 L. R. A. 598; *Moon v. Northern Pacific R. Co.*, 46 Minn. 106, 24 Am. St. Rep. 194, 48 N. W. 679; *Shea v. Chicago etc. Ry. Co.*, 66 Minn. 102, 68 N. W. 608; *Eaton v. New York Cent. R. Co.*, 163 N. Y. 391, 79 Am. St. Rep. 600, 57 N. E. 609; *Pennsylvania R. Co. v. Snyder*, 55 Ohio St. 342, 60 Am. St. Rep. 700, 45 N. E. 559; *Continental Fruit Express v. Leas (Tex. Civ.)*, 110 S. W. 129; *Reynolds v. Boston etc. R. Co.*, 64 Vt. 66, 33 Am. St. Rep. 908, 24 Atl. 134; *Texas & P. R. Co. v. Achibald*, 170 U. S. 665, 18 Sup. Ct. Rep. 777, 42 L. ed. 1188. And where a carrier undertakes to transport perishable goods, the fact that the car containing the goods when received from the previous carrier was sealed is no excuse for not safely transporting the goods: *Beard v. Illinois Cent. Ry. Co.*, 79 Iowa, 518, 18 Am. St. Rep. 381, 44 N. W. 800, 7 L. R. A. 280. A constitutional provision requiring one railway company to receive and transport over its lines the cars of another company does not compel it to receive cars which are in a defective and unsafe condition: *Louisville etc. R. Co. v. Williams*, 95 Ky. 199, 44 Am. St. Rep. 214, 24 S. W. 1.

V. Whether an Injured Employé of the Car Owner is Bound by a Contract Between Such Owner and the Railway Company Exempting the Latter from Liability Therefor.

The question whether a contract exempting a railway company from any liability arising from the transportation of cars not owned by it, and which it is under no duty to transport as a common carrier, will bind an employé of the car owners has arisen in several cases. In *Clough v. Grand Trunk etc. Ry. Co.*, 155 Fed. 81, 11 L. R. A., N. S., 446, decided by the United States circuit court of appeals, the question was very clearly discussed by Judge Lurton, who distinguished such cases from the express messenger cases. He said: "If the contract under which the Wallace circus was being transported over the railway of the defendant was a valid contract, the relation of the railway company to the circus company was not that of a common carrier at all. That the railway company was under no common-law obligation to move the circus company over its line

in the manner in which it was being transported at the time of the injury to the plaintiff in error must be conceded. If the railway company was under no statutory or common-law obligation to render the special service it was called upon to render, there were no reasons of public policy which forbade the rendition of such service upon such terms as the parties might stipulate. The right to make special stipulation under such conditions has been recognized and applied in a number of cases substantially like the case at bar, where circus trains were hauled under special agreements relieving the company from carrier's liability: *Coup v. Wabash etc. Ry. Co.*, 56 Mich. 111, 56 Am. Rep. 374, 22 N. W. 215; *Forepaugh v. Delaware etc. Ry. Co.*, 128 Pa. 217, 15 Am. St. Rep. 672, 18 Atl. 503, 5 L. R. A. 508; *Robertson v. Old Colony R. R. Co.*, 156 Mass. 525, 32 Am. St. Rep. 482, 31 N. E. 650; *Chicago M. etc. Ry. Co. v. Wallace*, 66 Fed. 506, 14 C. C. A. 257, 30 L. R. A. 161; *Wilson v. Atlantic C. L. R. Co. (C. C.)*, 129 Fed. 774. The same freedom of contract in respect to the transportation of express matter and express messengers has been recognized repeatedly: *Baltimore & O. Ry. v. Voigt*, 176 U. S. 498, 20 Sup. Ct. Rep. 385, 44 L. ed. 560, and cases therein cited.

"But it is urged with much force that Clough, the injured plaintiff in error, was not a party to the contract between the circus proprietors and the railway company, and therefore not affected by it. It has been said also that he neither agreed to relieve the railway company from liability for negligence while being carried upon the circus train nor bargained away by any agreement with the circus company his right to hold the railway company or the circus company liable for any negligence by which he might be injured while being transported as an employé of the latter. Upon these grounds it has been urged that the Voigt case has no application, because there the messenger had expressly assumed in his contract with the express company the risk of all injury he might sustain while in its service, and to assume and ratify any agreement the express company had made or might make releasing any transportation company from liability to any of its employés. It is unnecessary to consider whether an express messenger's right of action to recover for carrier's negligence would depend upon any personal agreement made by him. In the Voigt case the messenger's release to the express company was a fact in the case, and as that inured to the benefit of the railway company, it was unnecessary to go further. See, also, *Long v. Lehigh Valley Co.*, 130 Fed. 870, 65 C. C. A. 354, where it was held that the messenger would be presumed to know and assent to any contract between the express company and the railway company under which he was to be transported.

"In *Brewer v. New York etc. R. Co.*, 124 N. Y. 59, 21 Am. St. Rep. 647, 26 N. E. 324, 11 L. R. A. 483, it was held that the messenger was not affected by the contract between the express company and the railway company by which he was made to assume the hazard of his carriage, he having no knowledge of the contract.

"The express messenger cases are all distinguishable from the case at bar in the character of the service which the railway company undertook to render. In the express company case the car in which the express matter was carried and the messenger traveled was furnished by the railway company, and the car itself was part of a train under the exclusive control of the carrier. Under the contract here involved, the trains were made of cars furnished and loaded by the circus company. These trains were pulled by engines which were the general property of the railway company, but the special property of the circus company under a contract of hiring. The trains were to be hauled over the tracks of the defendant in error, but only upon a special contract for the use of the tracks to the extent necessary. The engine and the train were under the control of servants of the railway company, but under a contract by which they became, for the purpose of moving this train, the special servants acting under order and directions and in behalf of the circus company. . . . The plaintiff paid no fare, and his only right upon the train was by virtue of the contract and arrangement which his employers had with the railway company. By the terms of that agreement his employers assumed all risks of transportation and undertook themselves as hirers of motive power to move their train under trackage rights acquired under same agreement. As the relation of passenger and carrier did not exist between plaintiff and the railway company, an action for negligence based only upon that relationship cannot be maintained."

A similar rule was announced by the supreme court of Indiana in *Cleveland etc. Ry. Co. v. Henry*, 170 Ind. 94, 83 N. E. 710, under a similar contract with a traveling show company. Mr. Justice Hadley, speaking for the court, said: "If appellant was under no duty as a public carrier to convey the show-cars, it had the right, as a private carrier, to name the conditions upon which it would undertake it. The decedent, when he embarked upon these cars, could not shut his eyes to the fact that their transportation to Crawfordsville would be the act of a private carrier. The character of the cars; their unsuitableness for general commercial uses; their peculiar construction; their occupancy solely by the outfit of a private business; their movement, involving the use of a locomotive, engineer, and train crew in the service of the railroad company; the right to carriage without the payment of fare—in all created such a state of appearances as would convey notice to all employes of the show company that the drawing of the cars from place to place over its railroad was no part of the company's ordinary business, nor in the capacity of a common carrier, and was under a special contract of some sort, between the railroad company and the show company. Being so advised, it was the duty of the decedent to investigate for himself with respect to the nature of the contract as was said by this court in *Webb v. Insurance Co.* (1903), 162 Ind. at page 635, 69 N. E., at 1013 (66 L. R. A. 632): 'Where one has

knowledge of facts sufficient to excite the attention of a person of ordinary prudence and put him upon further inquiry, he is required to make such inquiry in good faith and with diligence, and, in the absence of so doing, he will be chargeable with the knowledge of the particular point or fact which inquiry would have revealed."

"But it is argued that appellee's decedent was not a party to any contract relieving appellant from any liability for its negligence. To this it is suggested with greater force that the decedent was not a party to any contract with appellant for his carriage. He had made no effort to procure transportation from the railroad company. He had bought no ticket. He had tendered no fare to the appellant. He had entered the show-car for passage to Crawfordsville, with the knowledge that he had obtained no right to be carried upon the railroad from appellant. As a legal proposition, he was required to know that the car which he had entered would not be hauled to Crawfordsville under the legal rules which usually govern transportation by a public carrier. He was likewise bound to know that the car would be drawn to its destination under some private arrangement between his employer and the railroad company, and that whatever right he had to be carried over the railroad arose from the contract or agreement made by his employer with appellant. His right could not rise higher than its source. Being an employé of the show company, his right to transportation had been purchased, or stipulated for, by his employer. When he entered the showman's service and accepted the method of transportation provided for his employés, the acceptance was subject to all the conditions upon which it rested. In other words, he could not accept the benefit provided by his employer and put aside the burden."

A contrary rule was, however, declared by the court in *Sager v. Northern Pac. Ry. Co.*, 166 Fed. 526, under similar circumstances. The court admitted the validity of contracts between a circus company and the railway company exempting the latter from liability but relying upon the rule announced in the case of *Brewer v. New York etc. Ry. Co.*, 124 N. Y. 59, 21 Am. St. Rep. 647, 26 N. E. 324, 11 L. R. A. 483, which was a suit by an express messenger against the railway company for injuries, held that the circus employé was not bound by the contract between the circus proprietor and the railway company. In rendering his opinion, Judge Purdy said: "In the case at bar the plaintiff undoubtedly knew that his employers, Gollmar Bros., had made an arrangement for his transportation from place to place while he was employed in the service of the circus company. He probably knew, as we may, I think, fairly assume, that the arrangement between his employers and the railroad company was such as to exempt and relieve the railroad company from that extraordinary degree of care which the law imposes upon common carriers in the performance of their duties to the general public. The plaintiff, of course, knew that the railroad company could not be required to move the circus train in the manner in which it was being moved at the time of his alleged injury, and we must

assume that he knew that his employer had made some contract with the defendant whereby he [the plaintiff], together with his other coemployés, should be carried about the country. Such fact, however, does not furnish the least justification for the assumption that he authorized his employers to make an arrangement with the railroad company absolving that company from liability for damages in the event of injury. It seems to me that the plaintiff in this case had the right to assume that his employers in making a contract with the railroad company for his transportation would, if necessary, fully protect his rights against the negligent acts of the railroad. Certainly it is not to be presumed that he intended to authorize his employers to bargain away, without his knowledge, such an important right as an action for damages in case he was injured through the negligence of the railroad company. Plaintiff's employer had the right to arrange for his transportation, as that was presumably part of his contract of employment with the circus company, but when Gollmar Bros., without any notice to this plaintiff, attempted to bargain away rights existing or subsequently arising between him and third parties, they were attempting to do that which they had no power or authority to do, and the plaintiff should not be bound by such unauthorized action.

"The fallacy underlying the contention of counsel for the defendant consists, as it seems to me, in the assumption that the plaintiff's right to maintain this action must be measured by the contract by virtue of which he was on the train at the time of the accident; in other words, that the plaintiff's rights can rise no higher than the contract under which he was being carried. But this assumption loses sight of the proposition that the liability of the defendant for the negligent and injurious acts of its servants is not necessarily founded on any contract or privity between the plaintiff and the railroad company. As was said by the supreme court of the United States in *Philadelphia & Reading Ry. Co. v. Derby*, 55 U. S. 467, 483, 14 L. ed. 502: 'It is true a traveler by stage or other public conveyance, who was injured by the negligence of the driver, has an action against the owner founded upon his contract to carry him safely. But the maxim of respondeat superior, which by legal imputation makes the master liable for the acts of his servant, is wholly irrespective of any contract, express or implied, or any other relation between the injured party and the master.'

"My conclusion is, therefore, that the contract between the defendant, the Northern Pacific Railway Company, and the Gollmar Bros., exempting the former from all liability to the latter and their employés, while legal and binding as between the parties themselves, cannot, as a matter of law, operate to defeat an action brought by one of the employés of the circus company, having no knowledge of such contract, to recover damages from the railroad company caused by the negligence of the railroad company's servants": *Sager v. Northern Pac. Ry.*, 166 Fed. 526.

MALCOLM v. LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

[155 Ala. 337, 46 South. 768.]

CARRIERS OF PASSENGERS, Remedies Against for Carelessness or Negligence.—A person injured through the negligence or carelessness of a carrier may proceed either upon contract, alleging the careless or negligent acts of the defendant as a breach of the contract, or in tort, making the carelessness or negligence ground of his right of recovery, and if he proceeds in tort, must show that he stands in the relation of a passenger to the carrier. (p. 53.)

NEGLIGENCE, What Essential to a Right of Recovery for. To sustain a recovery for alleged negligence, there must be established the legal relation of cause and effect between the negligence relied upon and the injury suffered. (pp. 53, 54.)

CARRIER'S NEGLIGENCE in Failing to Stop Train at Station—Proximate Cause of Injury from, What is not.—Where an intending passenger goes to a railway station and purchases a ticket for his transportation to another station, and, through the negligence of the carrier in not stopping its train, he is unable to be transported and thereupon walks to the intended point of destination, any injury suffered from such walking is not a natural consequence of the train's failing to stop, and he cannot recover beyond the price of his ticket. (p. 55.)

Action against a railway company for the negligent failure to stop defendant's train and take the plaintiff to the point of destination called for by his ticket. Judgment for the price of the ticket, and the plaintiff appealed.

Hamilton & Crumpton, for the appellant.

George W. Jones and Rabb & Page, for the appellee.

338 DENSON, J. The facts of this case in brief are these: The plaintiff, an old man, on January 7, 1907, went to the station of the defendant, at Castleberry, a regular station of the railroad company, for the purpose of becoming a passenger on one of defendant's trains from Castleberry to Evergreen, another regular station on defendant's road, the two being twelve miles apart. There was a regular passenger train, operated by the defendant over its road, which was due at Castleberry at 5 A. M., and which usually stopped at that station to take passengers. The defendant had a station agent at Castleberry, whose duty it was to sell tickets to **339** persons applying for passage over defendant's road. Before the hour of 5 A. M. plaintiff applied to this agent for a ticket from Castleberry to Evergreen. The agent sold him the ticket for thirty-three cents, the regular price, and informed plaintiff that the train would stop at

Castleberry. Two of defendant's passenger trains passed Castleberry that morning, going to Evergreen, after plaintiff purchased his ticket and while he was waiting at the station to take passage; but neither of them stopped. He was then informed by the station agent that no other train would pass Castleberry, going to Evergreen, until 3 o'clock in the afternoon of that day. Plaintiff having an important engagement at Evergreen, did not wait for the afternoon train, but walked to Evergreen, for the purpose of keeping his engagement. In consequence of the walk the plaintiff suffered much pain, inconvenience and humiliation. The nature of the engagement the plaintiff had is not disclosed by the record, nor is the character of the inconvenience or humiliation shown, except that which may be inferred from the fact that the plaintiff walked to Evergreen. There was a verdict for the plaintiff for thirty-four cents, and judgment on the verdict; and by this appeal he seeks to obtain a reversal of same.

In the view we take of the case, it is unnecessary to determine the controversy between the litigants in respect to the nature of the action—whether the complaint is in assumpsit or in tort. All the cases hold that a passenger, injured through the negligence or carelessness of the carrier, may proceed either upon the contract, alleging the careless or negligent acts of the defendant as a breach of the contract, or proceed in tort, making the carelessness and negligence of the company the ground of his right of recovery; and, if he proceed for the tort, it becomes necessary on the ³⁴⁰ part of the plaintiff to show that he stands in the relation of a passenger of the carrier, in order to establish his right to recover damages for the negligence of the carrier in not discharging its duty in carrying him. Assuming, then (without deciding), that the contention of the plaintiff that the complaint states a cause of action in case is the proper construction of the complaint, we have presented for consideration the question, Are pain, inconvenience, and humiliation, elements of recoverable damages in this cause? The circuit court held that they were not the basis of recoverable damages, this ruling having been invoked on a motion to strike such claim from the complaint.

Taking the complaint as in case, the ground upon which plaintiff bases his right of recovery is the negligent failure of the defendant to stop its train at Castleberry and receive the plaintiff as a passenger to be transported to Evergreen.

It is elementary that there must be established the legal relation of cause and effect between the particular negligence and wrong described—the walk and injuries incident thereto. In *Western Ry. Co. v. Mutch*, 97 Ala. 194, 38 Am. St. Rep. 179, 11 South. 894, 21 L. R. A. 316, this extract from 16 American and English Encyclopedia of Law, first edition, page 431, was quoted approvingly: “To constitute actionable negligence, there must be not only ‘causal connection between the negligence complained of and the injury suffered; but the connection must be by a natural and unbroken sequence—without intervening efficient causes—so that but for the negligence of the defendant the injury would not have occurred. It must not only be a cause, but it must be the proximate cause; that is, the direct and immediate efficient cause of the injury’”: *Alabama Great Southern R. R. Co. v. Arnold*, 80 Ala. 600, 2 South. 337. No difficulty arises in ³⁴¹ the application of this principle when the damage directly follows the wrong. It ordinarily arises when there is an intervening cause, or several causes contributing to the result. “If the injury is produced by the wrongful act during the continuance of its causation, it will be regarded as the proximate cause, but as too remote, through furnishing the occasion, when the injury occurred after the act is completed and terminated, by the intervention of another and independent cause. On the intervention of other agencies, the inquiry should be: Is the original wrongful act an antecedent, efficient and dominant cause, which puts the other causes in operation?”: *Alabama etc. R. R. Co. v. Arnold*, 80 Ala. 600, 2 South. 337.

The question, then, is, Did the act of the defendant in failing to stop its train produce the injuries complained of? Did the injuries result directly from such act? We have a class of cases where the carrier has been held liable to the passenger for injuries to health, etc., incident to walking back to a station after having been carried beyond it, or the point of destination (*Alabama etc. R. R. Co. v. Sellers*, 93 Ala. 9, 30 Am. St. Rep. 17, 9 South. 875; *Louisville & N. R. R. Co. v. Daney*, 97 Ala. 338, 11 South. 796); but the theory worked out in those cases is that the carrier, by its wrongful act, placed the plaintiffs in a position where it was necessary for them to act, to avoid the consequences of the wrongful act of the carrier, and, acting with ordinary prudence and care, to the end of extricating themselves from the difficulty in which they had been placed, they sus-

tained the injury. The injury was, therefore, traceable directly to the carrier's negligence as its cause, and as its proximate cause. Passengers wrongfully put short of, or beyond, the destination stipulated for would be most likely to walk to the point to which they desired to go, if no other convenient way was presented or was open to them; ³⁴² and it is not straining any legal principle to hold that injuries received in consequence of the walk are recoverable damages.

But we find no trouble in distinguishing the case in judgment from that class of cases. Here it is made to appear that the carrier had nothing to do with placing the plaintiff in the position in which he found himself after the failure of the trains to stop. He was in the same position he occupied before he purchased his ticket, and we cannot perceive that injuries resulting from the walk by the plaintiff to Evergreen were a natural sequence of the failure of the agents of the carrier to stop the trains at Castleberry. As was said in *Indianapolis, B. & W. Ry. Co. v. Birney*, 71 Ill. 391, a case strikingly similar to the case in hand: "That he should be delayed in reaching that point was a natural consequence, as there was no other known means by which the space could be overcome in so short a time as by a train of cars; but that the appellant should walk through the extreme cold to that point, and thus injure his health, was by no means a necessary result." As was further said in that case, had he procured a carriage and horses to make the trip, the company would no doubt have been liable for reasonable compensation for its use and for a driver, or had he waited the next train, and gone on it, he would have been entitled to nominal damages, at least, for necessary expenses incurred whilst waiting the arrival of the train, and loss, if any, by failure to meet the engagement: *Gulf etc. R. R. Co. v. Cleveland* (Tex. Civ. App.), 33 S. W. 687; *Francis v. St. Louis Transfer Co.*, 5 Mo. App. 7; *Evans v. St. Louis etc. Co.*, 11 Mo. App. 463. In the light of the foregoing principles, and applying them to the facts of this case, the court is of the opinion that plaintiff was awarded the only damages he was entitled ³⁴³ to recover in the action, and, of consequence, that there is no reversible error shown by the record.

Affirmed.

Tyson, C. J., and Anderson and McClellan, JJ., concur.

If an Engineer upon a Railroad Train Willfully Passes a Flag Station without stopping, seeing a person intending to become a passenger standing there, the latter is entitled to recover punitive damages of the railroad company: *Milhous v. Southern Ry.*, 72 S. C. 442, 110 Am. St. Rep. 620.

When a Street Railway Company Carries a Passenger Past the Point where he has requested to be set down, and the conductor then refuses to take him back to the desired point, but directs him how to reach the same on foot, and the passenger, following such directions, in the darkness falls through a trestle, the railway company is answerable for his injuries: *Kentucky etc. R. R. Co. v. Buckler*, 125 Ky. 24, 128 Am. St. Rep. 234.

TENNESSEE COAL, IRON AND RAILWAY COMPANY v. ROUSSELL.

[155 Ala. 435, 46 South. 866.]

ARBITRATION AND AWARD, Agreement for Statutory, What Amounts to.—An agreement reciting that the parties are desirous of settling a controversy by arbitration in accordance with the statutes of Alabama evinces a common intent to provide for arbitration and award as distinguished from common-law arbitration. (p. 59.)

ARBITRATION AND AWARD, Agreement for, When Adopts the Terms of the Statute.—An agreement for an arbitration and award in accordance with the statutes of a designated state must be construed as if the requirements of the statute of that state were written in the agreement in full. (p. 59.)

ARBITRATION AND AWARD—Failure to Observe Conditions of.—Under an agreement for arbitration and award in accordance with the provisions of the statute, the substantial conditions of the statute as construed by the courts of this state must be complied with to render the award immune from attack, whether it is urged as a cause of action or of defense. (p. 59.)

ARBITRATION AND AWARD, Statute Concerning Condition of Which is not Mandatory.—The provision of the statute requiring a copy of the award to be delivered to each of the parties is not a matter of substance, and the failure to so deliver such condition is not fatal to the award. (p. 59.)

STATUTE, Re-enactment of After Receiving a Judicial Construction.—The readoption of a statute after it has received construction by the highest court of a state has the effect of adopting such construction as a part of the statute. (pp. 59, 60.)

ARBITRATION AND AWARD.—The Provision of the Statute Requiring Arbitrators to be Sworn before making their award is of substance, and a compliance with the provision must be alleged in support of the award. (p. 60.)

PLEADING COMPLIANCE WITH LAW, When Deemed to Imply Compliance with the Statutory Law.—If, in alleging an arbitration and award, the pleader avers that the arbitrators were sworn according to the laws, this implies that they were sworn in the manner provided by statute. The averment is not susceptible of the

construction that they were sworn in a manner prescribed by laws other than statutory. (p. 60.)

ARBITRATION AND AWARD, Agreement for, When Sufficiently Definite and Certain.—An agreement of submission to arbitration declaring that the parties have a controversy relating to the amount of damages, if any, suffered and which will hereafter be suffered by the party of the second part in his ownership of designated lands for the present and future operation of coal-washers of the party of the first part, now or hereafter to be located on a specified creek and its tributaries, and designating the arbitrators and submitting to them the settlement of the amount of such damages and all other damages which have been or may hereafter be suffered from such coal-washing operations, is definite and certain as to the matters submitted. (p. 60.)

ARBITRATION AND AWARD, Agreement for, What may Include.—An agreement submitting claims to arbitration may include claims for damages from a private nuisance and all future damages possible of infliction by its continuance. (p. 61.)

ARBITRATION AND AWARD—Certainty in the Award.—An award assessing damages in the whole sum of one hundred dollars, of which amount fifty dollars is for damages which may be done in the future, is certain, where the submission authorizes the arbitrators to assess all damages, future as well as present and past, due to the maintenance of specific acts of nuisance. (p. 61.)

ARBITRATION AND AWARD.—The Failure to Give One of the Parties Notice of the time and place of hearing before the arbitrators does not vitiate the award, if he was present at the hearing and participated in the arbitration. (p. 61.)

Action against the Tennessee Coal, Iron and Railway Company for damages to real estate from refuse matter thrown into a stream from defendant's coal-washer and coal mine, and carried by such stream and deposited on plaintiff's land. The defendant, among other things, pleaded that on the 2d of May, 1901, it and the plaintiff entered into an agreement to arbitrate, reciting that the parties had a controversy relating to the amount of damages, "if any, suffered and which will hereafter be suffered by the party of the second part in his ownership of certain lands on Five Mile creek [giving a description of the land] from the present and future operation of coal-washers of the party of the first part, now or hereafter to be located on said creek or its tributaries," and being desirous of settling such controversy by arbitration in accordance with the statutes of Alabama, it was therefore agreed by the parties to submit to the arbitration of (naming three arbitrators) the settlement of the amount of damages, "if any, to be paid by the party of the first part in full settlement and compromise of all damage which has been suffered in the past or may be suffered in the future to said above-described land and its owners, both present and future, both

from overflow, deposit and pollution of the water of said creek, or its tributaries, and all other kinds of damage which have been or may be hereafter suffered from said coal-washing operations of the party of the first part as now or hereafter conducted on said Five Mile creek or any of its tributaries)"; that each party agreed to accept the award of the arbitrators as filed. The defendant further averred that, pursuant to the agreement, the arbitrators rendered an award substantially as follows: "We, the undersigned arbitrators in said cause, hereby assess the damages in whole in the sum of one hundred dollars. Of this amount we assess damages which have been sustained or which may be done in the future by the Tennessee Coal, Iron and Railroad Company in the sum of fifty dollars." The defendant pleaded its offer to pay the amount of the award, but alleged that the plaintiff refused to abide by the award or to accept payment of the sum awarded.

The answer also contained other pleas of such award and arbitration, in which were included the statement or recital that the arbitrators "having been duly sworn in accordance with the laws of Alabama, and both parties being present in person or by attorney, and testimony having been duly heard, and said arbitration having in all respects been conducted in accordance with the statutes and laws of Alabama," the arbitrators rendered an award, the form and substance of which were as hereinbefore stated.

The plaintiff demurred to the plea of arbitration upon the ground that it did not aver that the arbitrators, before making their award, were sworn to impartially determine the matters submitted to them according to the evidence and manifest justice and equity of the case to the best of their judgment without favor or affection; nor was it anywhere averred that the arbitrators were sworn according to law, or that they appointed a time and place for hearing the parties and making the award, or that they gave three days' notice as to the time and place for the hearing thereof, or that a copy of the award or the original award was ever at any time delivered to the plaintiff; that the submission is indefinite and uncertain, and that the award was also uncertain in that in one part damages were named at one hundred dollars and in another part at fifty dollars; that the award was indefinite and uncertain and not responsive to the submission, and that the submission referred to injury done and to be done in the future, and because the submis-

sion referred to matters and things which might or might not be done in the future, thereby rendering the matters submitted indefinite and undeterminable.

Judgment for the plaintiff for two hundred and seventy-five dollars, and the defendant appealed.

Percy & Benners, for the appellant.

Arthur L. Brown, for the appellee.

⁴⁴⁵ McCLELLAN, J. The employment of the expression, "Whereas, the said parties are desirous of settling said controversy by arbitration in accordance with the statutes of Alabama," clearly evinces the common intent, in a material respect, to have been to make the statutory provision for a statutory (as distinguished from common-law) arbitration an integral part of their alleged agreement to arbitrate in the premises. We are therefore required to treat the pleas setting up the asserted arbitration and award as if the requirements of the statutes in this regard were written, in extenso, into the agreement; and hence, if conditions of substance were not complied with, essential to be averred in the pleas to render them immune from attack, the award was abortive, whether as ground of action thereon or defense, as is here attempted. Such an appropriation of the statutes in question as elements of the agreement between the parties necessarily operated to adopt them as and impressed with the construction given them by the courts of the state. Among other stipulations in the system thus incorporated into the agreement for submission is that providing for the delivery of a copy of the award to each of the parties: Civ. Code 1896, sec. 511. This provision was said by this court, in *Crook v. Chambers*, 40 Ala. 239, to be merely directory, and hence not of substance. The subsequent and repeated readoption of this statute effected to enact the construction thus given by ⁴⁴⁶ the court as a part of the statute itself. Hence the demurrer assailing the validity of the award on this ground was not well taken. *Anderson v. Miller*, 108 Ala. 171, 19 South. 302, was an expression of this court invited by an agreement in which the parties provided for the delivery of a copy of the award—a very different matter, as is evident.

That the arbitrators must be sworn before making their award is expressly required by Civil Code of 1896, section 515, and this provision has been, in construing this statute, pronounced to be of substance: *Tuskaloosa Bridge Co. v.*

Jemison, 33 Ala. 476; Crook v. Chambers, 40 Ala. 239. The readoption of this section effected the same result as the re-enactment of section 511. It has been ruled, however, that the necessity for an oath may be waived, though in these pleas no waiver is urged. Hence the third plea, omitting to aver that the requirement as to the oath was complied with, was fatally defective, and the demurrer thereto on that ground was well sustained. The other contain the averments that the arbitrators were sworn according to the laws, and that the arbitration was conducted according to the statutes and laws of Alabama. Doubtless this latter averment is a conclusion of the pleader; but the objection is not taken by the demurrer. At first we were inclined to think that the pleader should be held to have written to a distinction between statute law and law, and that the allegation of compliance with the laws of the state could be interpreted only as not necessarily including statutory law. This view appeared to be sustained, among others, by *Smith v. United States*, 1 Gall. 261, Fed. Cas. No. 13,122, and *Commonwealth v. Morse*, 2 Mass. 128, and *Jones v. Vanzandt*, 2 McLean, 611, Fed. Cas. No. 7502. But on further consideration we think the rule stated before has application, in the absence of accompanying qualification, to penal statutes only. In ⁴⁴⁷ other words, that the term "law," if unqualified, except in cases involving penal matters, embraces legislative enactments as well as the common law. This conclusion finds a well-considered authority in Chief Justice Shaw's opinion in *Reed v. Northfield*, 13 Pick. (Mass.) 94, 23 Am. Dec. 662. We therefore hold that pleas 4 and 5 are not objectionable in omitting to aver that the arbitrators were sworn in accordance with the statute: Sec. 515. Of course, to support, in proof, these pleas in this respect, it is essential to adduce testimony tending to show that the arbitrators were sworn as required by the statute.

The agreement for submission, stating the matters submitted, is so clearly sufficient and definite as to require no treatment here. Whatever may be said in refutation of the legality of an agreement for the continuance of a private nuisance, counsel have not brought to our attention, nor have we been able to find, any authority denying the right of an owner of real estate to, by agreement, ascertain and finally conclude himself against any further claim for damages to his property resulting from an indefinitely continuing private nuisance. Unless some element intervenes,

regarded in law as illegal, there would seem to be no reason why a property owner may not, for a valuable consideration, wholly foreclose himself against assertion of any right to claim damages to his property by reason of a continuance of the agency that produces the injury. This court is committed to the doctrine of prescription as applicable to a private nuisance: *Roundtree v. Brantley*, 34 Ala. 544, 73 Am. Dec. 470; *Wright v. Moore*, 38 Ala. 593, 28 Am. Dec. 731; *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453. And since that doctrine is grounded upon the presumption of acquiescence, for the requisite period, of the owner in the assertion by the prescripitioner of a hostile and adverse right or user, no good reason ⁴⁴⁸ appears to deny the legal efficacy of a contractually, upon consideration, expressed intention to embrace the practice that has and probably will in future damnify the owner's property. We therefore hold that the agreement for submission to arbitration was not invalid because it included all future damage possible of infliction by the continuance of the practice described.

The award, which, with the agreement, will be reported, is not subject to the criticism that it is uncertain in its finding. The mention in it of the whole damage may be entirely disregarded, and there still remains a clear finding of the damages done or to be anticipated of infliction by the appellant; or, if it be not disregarded, there is no difficulty whatever in arriving at the conclusion, within the limits of the submission, reached by the arbitrators. These pleas aver the presence and participation of the plaintiff in the arbitration; hence he can take nothing by the failure, if so, of notice to him of the time or place of hearing.

For the error in sustaining the demurrers to pleas 4 and 5, the judgment is reversed and the cause is remanded.

Tyson, C. J., and Dowdell and Anderson, JJ., concur.

A Submission to Arbitration is an agreement by which the parties refer disputed or doubtful matters pending between them to the final decision and award of another party: *Millsaps v. Estes*, 137 N. C. 535, 107 Am. St. Rep. 496. An award by arbitrators is in the nature of a judgment, and ordinarily conclusive upon the parties: *Hynes v. Wright*, 62 Conn. 323, 36 Am. St. Rep. 344. Awards are favored in law, and reluctantly set aside; every presumption is in favor of their fairness, and the burden of proof is on the party seeking to set them aside to do so by clear and strong proof: *Brush v. Fisher*, 70 Mich. 469, 14 Am. St. Rep. 510; *Roberts v. Consumers' Can Co.*, 102 Md. 362, 111 Am. St. Rep. 377. As to when an award may be impeached for fraud, mistake or misconduct, see *Waisner v. Waisner*, 15 Wyo. 420, 123 Am. St. Rep. 1081, and cases cited in the cross-reference note thereto.

DRAKE v. RHODES.

[155 Ala. 498, 46 South. 769.]

MORTGAGE FORECLOSURE Under a Power—Statute of Frauds.—To a sale made under a power contained in a mortgage it is not essential that there be a memorandum to satisfy the statute of frauds. Without such a memorandum and before any deed is executed, the equity of redemption is cut off, and if the want of a writing can be alleged as an objection, it is only by the mortgagee or the purchaser. (p. 63.)

MORTGAGE FORECLOSURE Under a Power—Purchase by the Mortgagee.—A stipulation in a mortgage containing a power of sale conferring on the mortgagee the privilege of becoming a purchaser is valid, and renders a sale to him as efficacious as if made to a stranger. (pp. 63, 64.)

MORTGAGE Containing a Power of Sale—Mistake in the Notice of Sale in the Name of the Mortgagor.—A notice of sale under a power giving the name of the mortgagor as A. J. P. D., when it was A. P. J. D., does not vitiate the sale where the notice in other respects correctly describes the mortgage, its date and place of record, and the lands included therein. (pp. 63, 64.)

MORTGAGE—Sale Under a Power.—It is not necessary that the notice of a sale to be made under a power contained in a mortgage state that there had been a default in the payment of the debt secured thereby, when the mortgage itself does not require such statement. (p. 64.)

James F. Jones, for the appellant.

L. M. Lane and A. O. Lane, for the appellee.

500 DENSON, J. Complainants seek the cancellation of a mortgage and to redeem certain lands which were mortgaged to secure an indebtedness due from them to the respondent (mortgagee). The bill does not seek relief under the statutory right of redemption, but proceeds entirely upon the theory that there has been no valid foreclosure of the mortgage. The mortgage was executed on the twenty-first day of January, 1893, and was due October 1, 1893. It confers on the mortgagee, upon default in the payment of the debt secured at the time stipulated, the power to sell the land before the warehouse door in Georgiana, "after giving ten days' notice posted at said warehouse door." It also gives the mortgagee the privilege of becoming the purchaser at the sale made under the power in the mortgage. The bill as amended avers "that orators are informed that the defendant, said F. M. Rhodes, made some sort of an effort or attempt to foreclose said mortgage, of which 'Exhibit A,' hereto attached, is a copy, on the twenty-sixth day of May, 1896, at which attempted sale the said F. M.

Rhodes became the purchaser of the land described in the mortgage, but orators charge and allege that said mortgage was never foreclosed according to the terms and stipulations contained in said mortgage; that said foreclosure sale was not advertised and notice given of said intended sale as required by the terms and stipulations of said mortgage, and that no conveyance has ⁵⁰¹ ever been made of said lands to the purchaser at said attempted foreclosure sale; that said foreclosure sale, or intended foreclosure sale, under the power contained in said mortgage, was never reduced to writing." It will be observed that attack upon the sale is rested upon two grounds: 1. Alleged defective advertisement or notice of the sale; 2. That no memorandum of the sale was made, and therefore that it is within the statute of frauds.

The theory of the bill, from this latter point of view, is that there can be no valid foreclosure of a mortgage under a power of sale contained therein, where such sale rests in parol. It is asserted in brief of appellants' counsel that this proposition is expressly decided and upheld in the case of *Jackson v. Scott*, 67 Ala. 99. This may be conceded; but unfortunately for appellants' contention, the case relied on is overturned by later cases decided by this court: *Tipton v. Wortham*, 93 Ala. 321, 9 South. 596, and cases there cited. It is said in *Durden v. Whetstone*, 92 Ala. 480, 9 South. 176, that "the mortgagor cannot avail himself of the defense that the sale, resting in parol, is void under the statute of frauds. Such sale being voidable only, and this defense personal, it is obligatory on the mortgagee and the purchaser, so long as they treat it as binding. A deed or note or memorandum in writing is not essential." And in *Mewburn's Heirs v. Bass*, 82 Ala. 622, 2 South. 520, it is said that the following propositions are settled by the case of *Cooper v. Hornsby*, 71 Ala. 62: "1. If a sale under a power in a mortgage is regular, even though no conveyance is made, it cuts off the equity of redemption, and reduces it to a mere statutory right. 2. If there be no writing signed to take the contract without the statute of frauds, only the mortgagee and the purchaser can take advantage of the omission. ⁵⁰² The mortgagor has no other interest than that he obtain credit and benefit of the amount bid." The stipulation in the mortgage conferring on the mortgagee the privilege of becoming the purchaser is a valid one under our decisions (*Knox v. Armistead*, 87

Ala. 511, 13 Am. St. Rep. 65, 6 South. 311, 5 L. R. A. 297), and rendered the purchase by him as efficacious in all respects as if a stranger had been the purchaser (*Gamble v. Caldwell*, 98 Ala. 577, 12 South. 424); and that he was the purchaser does not put the mortgagor in a more favorable position in respect to the sale's resting in parol—does not confer on him the right to avoid the sale by reason of that fact alone. It must follow, therefore, that there is no error in the decree of the chancellor sustaining the demurrer to that part of the bill which seeks to avoid the sale on the theory that it rested in parol.

The bill was amended to meet the point made by the grounds of the demurrer that were sustained, and we have only to inquire whether the notice given of the sale conformed to the terms of the mortgage. The mortgage was executed by A. P. J. Drake and his wife, C. A. Drake. The notice recites that it was executed by A. J. P. Drake and C. A. Drake, and it is urged that, because of this transposition of the initials of the said Drake, the notice is an absolute nullity, and that the sale had in pursuance of it did not operate to effect a foreclosure of the mortgage. The notice recites that the mortgage was given to F. M. Rhodes, and gives the date of the mortgage, and the record and page of record where it is recorded in the probate office, together with the description of the lands as the same appears in the mortgage. Thus the mortgage under which the sale was advertised is definitely described, and the notice itself furnishes the means of correcting the mistake made in ⁵⁰³ transposing the initials of the mortgagor's name. Without further discussion of the question, the court is of the opinion that there is no merit in the point: 27 Cyc. 1467 (d), 1468, and cases cited in note 25 to the text; *Weber v. Fowler*, 11 How. Pr. (N. Y.) 458; *Johnson v. Wood*, 125 Ala. 330, 28 South. 454; *Colgan v. McNamara*, 16 R. I. 554, 18 Atl. 157; *White v. McClellan*, 62 Md. 347.

It is next insisted that the notice of sale is void, in that it does not state there was default in payment of the debt secured by the mortgage. It is sufficient to say of this contention that the stipulations in the mortgage, in respect to giving the notice of sale, make no requirement that such statement should be made; and we do not deem it important that such statement should have been embraced in the notice: *Model Lodging-house Assn. v. Boston*, 114 Mass. 133.

This discussion disposes of all the points which have

been urged upon our attention in the brief of appellant's counsel. We note that the bill was filed in the case for more than nine years after the sale occurred: *Cooper v. Hornsby*, 71 Ala. 62; *Elrod v. Smith*, 130 Ala. 212, 30 South. 420. The chancellor properly dismissed the bill, and the decree is in all respects affirmed.

Tyson, C. J., and Anderson and McClellan, JJ., concur.

Sales Under Powers in Mortgages and Trust Deeds are discussed in the notes to *Houston v. National etc. Loan Assn.*, 92 Am. St. Rep. 573; *Tyler v. Herring*, 19 Am. St. Rep. 266. In Georgia the statutes do not require a mortgagee to give notice to the mortgagor of an intention to exercise a power of sale contained in the mortgage; and when the instrument contains no provision for notice other than by advertisement in a certain way no other notice is necessary: *Garrett v. Crawford*, 128 Ga. 519, 119 Am. St. Rep. 398. That a substantial compliance with the statute declaring what a notice of foreclosure by advertisement must contain is sufficient, see *McCardia v. Billings*, 10 N. D. 373, 88 Am. St. Rep. 729.

A Mortgagee cannot Purchase at His Own Foreclosure Sale under a power, either directly or indirectly, unless the mortgage confers such power or the mortgagor consents to such purchase. It is not necessary for a mortgagor, when seeking to avoid the sale, to show either fraud or unfairness therein: *Houston v. National etc. Loan Assn.*, 80 Miss. 31, 92 Am. St. Rep. 565, and see the note thereto.

KING LUMBER COMPANY v. CROW.

[155 Ala. 504, 46 South. 646.]

CONSTITUTIONAL LAW—Statute Signed by the Governor and Officers of the Legislature Differing from that Passed by It.—If a statute as signed by the speaker of the House, president of the Senate, and governor of the state and approved by the latter, omits three sections which were concurred in by the Senate and Assembly, it is unconstitutional and wholly invalid. (p. 66.)

OFFICER DE FACTO, When cannot Exist.—If a person is appointed and acting solely by virtue of an unconstitutional statute, he is not an officer de facto. (p. 66.)

DEEDS, Acknowledgment of by an Unconstitutional Officer. The acknowledgment of a deed purporting to be taken before J. W. H., judge of a designated inferior court, is void, if the statute undertaking to create such court is unconstitutional. (pp. 66, 67.)

AN ACKNOWLEDGMENT by a Husband and Wife of a Mortgagor of Their Homestead Taken by a Supposed Officer Appointed and Acting Under an Unconstitutional Statute is void as to the wife and the homestead interest. (pp. 66, 67.)

ERROR AND APPEAL—Error not Prejudicial to Appellant. That part of a decree which does not prejudice the appellant will not be considered on appeal. (p. 67.)

A. A. Wiley and J. M. Chilton, for the appellant.

George W. Jones and S. Lamar Fields, for the appellee.

⁵⁰⁴ McCLELLAN, J. Bill to quiet title. The property in question was the homestead of one Coe and wife. The respondent (appellant) rested his claim to the property upon a mortgage from Coe and wife to the King Lumber Company. The acknowledgments of the mortgagor and his wife were taken by J. W. Hood, who purported to be "judge of the inferior court of Woodlawn, Jefferson ⁵⁰⁵ county, Ala.," The complainant (appellee) assails the separate acknowledgment of the wife as wholly void, because the act creating such court and a judge therefor is unconstitutional. This contention must be sustained, for the reason to be stated.

It appears from the journals of the Senate and House that after the bill had passed the House, where it originated, the Senate amended it by way of substitution of another bill therefor. This substituted bill contained sections 18, 19, and 20, which conferred additional, to that otherwise given by the bill, jurisdiction and powers on that court or judge created by the bill. This amending by the Senate was concurred in by the House, and as amended the House passed the bill, thus approving with the view to enactment the whole bill, which, as said, embraced sections 18, 19, and 20. The bill signed by the speaker of the House, the president of the Senate, and the governor did not contain said sections 18, 19, and 20; the result being that the bill passed by the legislature was not the bill signed by the officers whose signatures, after the method required by the constitution, are essential to a valid enactment. The question raised by this status is within the principle asserted and applied in *Moog v. Randolph*, 77 Ala. 597. We, of course, cannot assume that the legislature would have favorably acted upon the substituted bill had it not contained the material provisions set forth in sections 18, 19, and 20; nor that the governor would have approved the bill had it, as presented to him, embraced those sections. We therefore pronounce the act unconstitutional; and, being so, there was legally created no such office as "judge of the inferior court of Woodlawn, Jefferson county, Ala.," and hence no basis on which to rest an application of the rules saving the acts of *de facto* officers.

⁵⁰⁶ The result is that the first mortgage of Coe and wife to appellant, undertaking to convey the homestead, was

without the essential separate acknowledgment of the wife, and void, certainly to the extent of the homestead interest in the premises. The other phase of the decree, whereby the excess above two thousand dollars was condemned to the pro tanto satisfaction of the appellant's mortgage debt, is, of course, without prejudice to the appellant, and so will not be considered.

The decree appealed from is therefore affirmed.

Tyson, C. J., and Dowdell and Anderson, JJ., concur.

An Officer Appointed Under Authority of a Statute to fill an office created thereby is at least a de facto officer, whose acts, performed antecedent to a judicial declaration that the statute is unconstitutional, are valid so far as they involve the interests of the public and of third persons: *Lang v. Bayonne*, 74 N. J. L. 455. 122 Am. St. Rep. 391. See, also, *Ex parte State*, 142 Ala. 87, 110 Am. St. Rep. 20.

FLOMERFELT v. SIGLIN.

[155 Ala. 633, 47 South. 106.]

VENDOR AND VENDEE, Effect of the Death of Either Before a Conveyance.—If the vendee dies before a conveyance to him, his interest should be considered as real estate descending to his heir or subject to his devise; but if the vendor dies before conveying, his heir receives the title in trust for the vendee, and must convey on payment of the purchase money, and this money goes to the personal representative and not to the heir, because the vendor's interest by his contract of sale was converted from realty into personalty. (p. 71.)

REAL PROPERTY, Conversion of into Personalty by a Contract of Sale.—In order that a contract to sell real property may convert it into personalty, the contract must be enforceable at the death of one of the parties, but enforceability at such death refers to validity and not to evidence in the nature of conditions which may not have been performed, because such performance was not due at such death. It is sufficient that this condition can be performed by his representative. (p. 71.)

REAL PROPERTY, When Converted into Personalty by an Agreement for Its Sale.—An agreement between two persons declaring that they are owners of specified real property, that one of them is to receive from the proceeds of the property when sold a sum designated, and the remainder of the proceeds shall be divided between them, share and share alike, and also containing a further provision, to be effective if the property should not sell for a specified sum, operates to convert such real property into personalty as between the heirs and representatives of the parties. (p. 72.)

PARTIES, Misjoinder of Complainants.—Persons representing antagonistic interests cannot join as co-complainants. (p. 72.)

PARTITION—Misjoinder of Complainants, When does not Occur.—The widow and administratrix of a decedent suing for a

decree converting realty into personalty do not represent antagonistic interests, and their joinder is not improper. (p. 72.)

PARTITION—Misjoinder of Complainants.—If a widow and administratrix join in a suit for conversion of real property into personalty and also for the awarding of dower to her out of the proceeds, their interests are antagonistic, and there is a misjoinder. (p. 73.)

PARTITION—Conversion of Realty into Personalty, Proceedings for, When Administratrix and Widow cannot Represent Creditors.—If, in a bill by the complainant as administratrix and widow of the decedent for a decree declaring the conversion of the realty into personalty and also for an award to her of dower, it does not appear that the personal estate is sufficient to satisfy the debts due from the decedent, his creditors should be represented in the allotment of dower and in the ascertainment of the sum in lieu thereof. Their interests and those of the widow are antagonistic, and she cannot, as complainant, represent both. (p. 73.)

PARTITION, Sale for Division—Attorney's Fee.—On a bill to declare real property converted into personalty and for its sale and a division of its profits, an attorney's fee should be allowed. It should not be for the total price of the land, but should be based upon the common fund to be realized on the sale, after first deducting a charge imposed on the land and directed to be paid out of its proceeds. (p. 73.)

Bill by William Siglin and Mary E. Flomerfelt, as an individual and as administratrix of the estate of James A. Flomerfelt, deceased, against his heirs. The bill averred that Siglin and Flomerfelt were tenants in common of the lands described in the bill; that on or prior to the 6th of December, 1901, part of such lands belonged to Flomerfelt in severalty and a part to Siglin in severalty, and that they on that day entered into an agreement in writing whereby each conveyed to the other an undivided interest in said land; that they then had an accounting, resulting in ascertaining that Flomerfelt was entitled to be paid \$20,000 out of the proceeds of the sale of the lands; that such agreement provided that Flomerfelt was entitled to receive from the proceeds, when the land should be sold, the sum of \$20,000, after which the remainder of the proceeds or of the property should belong to and be equally divided between Siglin and Flomerfelt, but if the property should be sold for \$40,000 or less, Flomerfelt should receive the sum of \$15,000, and the balance be equally divided; if the property sold for more than \$40,000 and less than \$45,000, Flomerfelt should receive all the proceeds in excess of \$25,000, and the balance should be divided between the parties; that each of the parties would endeavor to make a sale of the property as soon as possible at the most advantageous price, but neither should authorize or consent

to the sale for less than \$45,000 without the written consent of the other.

The bill further averred the death of Flomerfelt, leaving the complainant, Mary E. Flomerfelt, as his widow, and her appointment and qualification as administratrix; that he left no children; that his heirs at law were his brothers and sisters and the descendants of a deceased sister, all of whom were made defendants; that the administratrix was entitled to \$20,000 as personal assets of the estate and also to dower as widow in that part of the real estate which was owned and held by her husband as realty; that Siglin was entitled to one-half of the proceeds of the sale of the land less the amount in cash which belonged to the estate of Flomerfelt by the terms of the agreement; that the land was incapable of division, and it was not possible to allot and set apart dower to the complainant, Mrs. Flomerfelt, by reason of the fact that the interest of her husband was an undivided one. The bill prayed for the sale of the lands, for division, and that the dower right of the complainant, Mary E. Flomerfelt, be ascertained and decreed by the court, and also for a reasonable attorney's fee.

The bill was demurred to (1) because it did not show an equitable conversion of any part of the interest of James A. Flomerfelt of the lands in question into personal property: (2) that there was a misjoinder of parties complainant, in that Mary E. Flomerfelt was joined as individual and as administratrix; and (3) that the complainants were not entitled to any allowance for their solicitors. The demurrers were overruled, and the defendants appealed.

Dortch, Martin & Allen, for the appellant.

Knox, Acker & Blackmon, for the appellee.

638 ANDERSON, J. In discussing equitable estate arising from conversion of real estate into personal and personal estate into real, Mr. Pomeroy, in his valuable work on equity jurisprudence, says: "The whole scope and meaning of the fundamental principle underlying the doctrine are involved in the existence of a duty resting upon the trustees or other parties to do the specified act; for, unless the equitable 'ought' exist there is no room for the operation of the maxim 'equity regards that as done which ought to be done.' The rule is therefore firmly settled that, in order to work a conversion while the property is yet actually unchanged in form, there must be a clear and im-

perative direction in the will, deed or settlement, or a clear, imperative agreement in the contract, to convert the property; that is, to sell the land for money, or to lay out the money in the purchase of land. If the act of converting—that is, the act itself of selling the land or of laying out the money in land—is left to the option, discretion or choice of the trustees or other parties, then no equitable conversion will take place, because no duty to make the change rests upon them. It is not essential, however, that the direction should be express, in order to be imperative. It may be necessarily implied. Where a power to convert is given without words of command, so that there is an appearance of discretion, if the trusts or limitations are of a description exclusively applicable to one species of property, this circumstance is sufficient to outweigh the appearance ⁶³⁹ of an option, and to render the whole imperative. Thus, if a power is given to lay out money in land, this will show an intention that the money should be so laid out, and will amount to an imperative direction to convert; for otherwise the terms of the instrument could not be carried into effect. In fact, the whole result depends upon the intention. If by express language, or by reasonable construction of all its terms, the instrument shows an intention that the original form of the property shall be changed, then a conversion necessarily takes place. A contract of sale, if all the terms are agreed upon, also operates as a conversion of the property, the vendor becoming a trustee of the estate of the purchaser, and the purchaser a trustee of the purchase money for the vendor. In order to work a conversion, the contract must be valid and binding, free from inequitable imperfections, and such as a court of equity will specifically enforce against an unwilling purchaser. The fact that the contract of purchase is entirely at the option of the purchaser does not prevent its working a conversion, if he avails himself of the option. This, like all other questions of intention, must ultimately depend upon the provisions of the particular instrument. The instrument might in express terms contain an absolute direction to sell or to purchase at some specified future time; and if it created a trust to sell upon the happening of a specified event, which might or might not happen, then the conversion would not only take place from the time of the happening of that event, but would take place when the event happened exactly as though there had been an absolute di-

rection to sell at that time. Subject to this general modification, the rule is settled that a conversion takes place in wills as from the death of the ⁶⁴⁰ testator, and in deeds and other instruments inter vivos as from the date of their execution": 3 Pomeroy's Equity Jurisprudence, 3d ed., secs. 1160-1162.

In case of the death of the vendee before a conveyance has been made, his interest in the land should be considered as real estate, and descends to his heir, or he may devise the same by will; and in case of the vendor's death, where he is under contract to sell lands, his heir receives the title in trust for the vendee, and must convey upon payment of the purchase money, but the purchase money goes, not to the heir, but to the personal representative, of the vendor, for the vendor's interest had been converted by the contract from realty to personalty: 6 Pomeroy, 840, 841; *Wimbish v. Montgomery M. & L. Assn.*, 69 Ala. 575. It is true the contract must be an enforceable one at the death of either party thereto; but enforceability at the time of death of one of the parties refers to the validity of the contract, and not to events in the nature of conditions which may not have been performed because such performance was not due at the time of the death of the testator. It is sufficient if these conditions can be performed by his representative: 6 Pomeroy, 845; *Williams v. Haddock*, 145 N. Y. 144, 39 N. E. 825. We think it was the manifest intent and purpose of the parties to the contract involved to establish and fix their respective interests in the land by becoming equal owners of same, subject to a charge thereon in favor of Flomerfelt of not less than \$15,000 in any event, but more in case the property should sell for \$40,000 or over. It expressly provides that the parties are "equally interested therein," subject to a prior payment out of the proceeds to Flomerfelt.

It is insisted that there was no conversion, as the interest of the parties was dependent upon a sale to be made by mutual consent and for not less than \$40,000, ⁶⁴¹ and that said sale did not take place, and cannot now be made under said contract, since the death of Flomerfelt. We cannot agree that a sale under the mutual consent clauses of the contract was a condition precedent. The contract should be considered in its entirety, and while it contemplates a private sale by parties, and binds them to same only in case the property will bring \$45,000, it does not make

them equal owners only in the event of such a sale, nor preclude a sale for division in case they fail to sell under the mutual clauses. Clearly it was contemplated by the parties that their affairs should be settled by owning the land equally, subject to Flomerfelt's claim, whether they made a consent sale or not, as the contract expressly provides for the amount to be received by Flomerfelt in case the property "should be sold for \$40,000 or less." Moreover, the contract provides for the execution of conveyances from one to the other, conveying a "one-half undivided interest in and to said property." There would be no need for mutual conveyances, if the contract was intended as a mere agreement to divide the proceeds of the sale, in case one was made by consent, for \$45,000: *Coster v. Clarke*, 3 Edw. Ch. (N. Y.) 428.

What was said in the case of *Allen v. Watts*, 98 Ala. 384, 11 South. 646, to the effect that equity does not regard the conversion as taking effect from the death of the testator, when the will authorizes a sale only upon certain conditions, is doubtless sound, but was not decisive of said case. Nor is it in the way of the conclusion reached in the case at bar; for as we have attempted to demonstrate, the conversion was not dependent upon a sale, as the parties became equal equitable owners of the land, subject to a charge upon same in favor of Flomerfelt, the exact amount of which was to be fixed according to the price for which the land ⁶⁴² should sell, under the consent clause or otherwise. The demurrer proceeding upon the theory that there was no conversion was properly overruled.

As a general rule, persons representing antagonistic interests cannot be joined as co-complainants: *Smith v. Smith*, 102 Ala. 516, 14 South. 765. There can be no antagonistic interest between the widow and the administratrix, as it is to the interest of the said widow, as well as the estate, that the conversion be decreed, thus increasing the personal assets of the estate, and to this extent and for this purpose they go hand in hand; and as the administratrix she represents the creditors and not the heirs, and if this bill was for a sale for distribution, and a construction of the contract as an incident thereto, the heirs being in court, it would fall under the influence of *Ex parte Baker*, 118 Ala. 185, 23 South. 996. But the bill goes further, and asks for dower out of the proceeds, thus presenting a feature antagonistic between the widow and the estate she represents; and sec-

tion 352 of the Civil Code of 1896 contemplates an administrator ad litem. The amount awarded her in lieu of dower would not only affect the heirs, who are in court, but the estate as well, and which has no representative, except the administratrix, and who is also seeking to charge the estate with her dower interest. The interest of the widow and the estate being antagonistic, they were improperly joined as co-complainants, and the demurrer proceeding upon this theory should have been sustained, and a decree is here rendered sustaining same.

What the result would be if the bill averred no debts against the estate, or that the personal property was sufficient to discharge all debts, we need not decide, as there is no such averment. And in the absence of such an averment there could arise a conflict between ⁶⁴³ the widow and the creditors in ascertaining her interest in lieu of dower. Of course, the proceeds of the land, less the charge thereon, would go to the heirs, subject to dower, in case the debts did not exceed the personal property; but if the debts exceeded the personal property, the land would be liable, and the amount of dower would necessarily decrease the property liable to the satisfaction of said debts. True, the law fixes the dower interest in land; but the creditors should be represented in the allotment of dower or in the ascertainment of the sum in lieu thereof, unless, of course, the bill averred no debts or a sufficiency of personal property to pay the debts.

The act (Gen. Acts 1903, p. 33) authorizes attorney's fee in cases of this character; but should the chancery court award a fee in this case, it should not be based on the total price for which the land should sell, but only upon the common fund, which would be the proceeds after deducting the charge on the land therefrom. The bill does not pray for a fee on the whole fund, but merely for such fee as the court, under the law, will award; and it was not, therefore, demurrable in this respect.

The decree of the chancery court is affirmed in part, and reversed, rendered and remanded.

Tyson, C. J., and Dowdell and McClellan, JJ., concur.

Under an Executory Contract for the Purchase of Land the vendor continues, in the strict legal sense, the owner until the purchase price is paid, retaining the legal title as security; but the vendee has the equitable title: *Lamm v. Armstrong*, 93 Minn. 434, 111 Am. St. Rep. 479. Or, as stated in *Newman v. Mountain Park Land Co.*, 85 Ark. 208, 122 Am. St. Rep. 27, one who has purchased real

property and given his notes for the purchase price, although he has received no conveyance, is deemed in equity the owner thereof, and the vendor merely as a mortgagee or trustee for the purchaser, who must take care of the property and not commit any waste thereon.

McDANIEL v. STATE.

[156 Ala. 40, 46 South. 988.]

MANSLAUGHTER Through Pointing a Gun at Another Without Intent to Shoot.—Under the statutes of Alabama making it a misdemeanor to present at another person any gun, pistol or other firearm, whether loaded or not, one who intentionally points a gun at another, though without the intention of shooting at him, is guilty of manslaughter in the second degree if the gun is accidentally discharged, producing the death of such other. (p. 75.)

CRIMINAL LAW—Presenting a Gun at Another.—There can be no unlawful presentation of a gun at another unless the presentation is intentional. (p. 75.)

MANSLAUGHTER Through Presenting a Gun at Another—Instruction Ignoring Negligence, When Properly Refused.—Under a prosecution for manslaughter brought about from presenting a gun at another and its unintentional discharge, the defendant is not entitled to an instruction that the jury must find from the evidence, beyond a reasonable doubt, that the defendant intentionally pointed a gun at the decedent, and if they are not so satisfied, they must find the defendant not guilty, if from the evidence it is open to the jury to find that the homicide occurred by reason of gross negligence in handling the gun. (p. 76.)

At the trial the defendant asked for the following instructions to the jury, both of which were refused:

“1. There can be no unlawful presentation of a gun at a person unless the presentation is intentional.

“2. The jury must find from the evidence beyond all reasonable doubt that the defendant intentionally pointed the gun at the deceased, and if they are not so satisfied from the evidence, they must find the defendant not guilty.”

George P. Jones, for the appellant.

Alexander M. Garber, attorney general, for the state.

41 HARALSON, J. The defendant was indicted for manslaughter in the second degree, charging him with unlawfully and unintentionally, but without malice, killing Mamie Walker by shooting her with a gun.

The evidence for the state tended to show that the defendant was at the house of one Blue, where the deceased, a child five years old, and two other children, twelve and ten years

old, respectively, and other persons were assembled; that the children and defendant were playing with each other; that defendant came into the room with his gun, which was loaded, and was sitting on a bench in the room, got up, raised his weapon and shot the deceased.

The evidence for the defendant tended to show that he had the gun on his lap, with the muzzle toward the door; that he did not cock the gun or point it at deceased, and he did not know how it came to fire.

The court in its general charge correctly stated to the jury: "The state contends that the defendant got off of the bench and placed the gun to his shoulder and pointed it at Mamie Walker, and that while in this position, the gun was discharged," etc.

⁴² "The defendant contends that he was sitting on the bench, with the gun across his lap, and that the gun was accidentally discharged and killed Mamie Walker."

The court charged the jury that if they believed the contention of the state, beyond reasonable doubt, they must find the defendant guilty of manslaughter in the second degree; but that if they did not believe the contention of the state, beyond reasonable doubt, and if they were reasonably satisfied that the contention of the defendant was true, they must find for him.

The defendant was found guilty, and sentenced to perform hard labor for the county for twelve months, and to pay a fine of fifty dollars, for the offense.

Section 4342 of the Criminal Code of 1896 provides that "any person who presents at another person any gun, pistol or other firearm, whether loaded or unloaded, must, on conviction, be fined not less than ten nor more than one hundred dollars."

If the gun was pointed intentionally by defendant at deceased, without any intention whatever to take life, but by accident it was discharged, producing death, he would be guilty of the crime for which he was convicted. "The jury might have found that the shooting was accidental and yet have also believed that the fatal shot was fired by defendant in the course of the unlawful act of presenting a gun at the person of deceased": *Sanders v. State*, 105 Ala. 4, 16 South. 935; *Roland v. State*, 105 Ala. 41, 16 South. 99; *Johnson v. State*, 94 Ala. 35, 10 South. 667.

Charge 1, requested by defendant, should have been given. It is in effect a simple statement of an element necessary to constitute an unlawful presentation.

Charge 3, requested by defendant, was properly refused, for the reason that it required an acquittal upon only one phase of the testimony, to wit, an intentional ⁴³ presentation; whereas, it was open to the jury to find that the homicide occurred by reason of gross negligence in the handling of the gun.

For the error pointed out, the judgment of the court below is reversed and the cause remanded.

Tyson, C. J., and Simpson and Denson, JJ., concur.

Where One Points a Gun or Pistol at another in a reckless or negligent manner, or in sport or play, without any intention to take life or do bodily harm, and it is accidentally or unintentionally discharged, killing him, the offense is manslaughter: See the note to *Johnson v. State*, 90 Am. St. Rep. 581; *Ford v. State*, 71 Neb. 246, 115 Am. St. Rep. 591.

ALABAMA GREAT SOUTHERN RAILWAY COMPANY v. GODFREY.

[156 Ala. 202, 47 South. 185.]

TRESPASSERS, Land Owner's Duty to.—The owner of premises is not under any duty to make them safe for a trespasser. (p. 79.)

RAILROAD, Use of Right of Way of, When not Permissive. Ordinarily the mere acquiescence by a railroad company in the use of a right of way does not amount to permission, but this rule has no application when the use is by its invitation. (p. 79.)

RAILROAD, Passenger, When not a Trespasser or Mere Licensee in the Use of the Premises of.—A passenger leaving a railroad depot by a pathway on its premises, which he and passengers generally were invited to use, is not a trespasser, nor a mere licensee. (p. 79.)

APPEAL AND ERROR.—The Erroneous Overruling of a Motion to Strike Out parts of a complaint, if directed at mere surplusage, is error without injury. (p. 80.)

RAILROAD—Station Agent, Invitation by to Use Premises, When not Binding on His Principal.—If the station agent of a railroad tells a passenger seeking a hotel that if he will hurry he can catch up with the representative of the hotel, who is then going from the depot to the hotel along the premises and right of way of the railroad, this does not bind the company, nor amount to a license to use its track as a highway to go to the hotel from the depot. (p. 82.)

RAILROADS—Approach to Platform of Station of, What is not.—A culvert on the main line of a railway track and distant two hundred and twenty-five feet from the depot is not an approach to the platform nor a portion of the station grounds reasonably near the platform where passengers would naturally or ordinarily

be likely to go, within the meaning of the rule requiring a railway company to keep in safe condition all portions of its platforms and approaches thereto to which the public would naturally resort, and all portions of its station grounds reasonably near the platform where the passengers would naturally and ordinarily be likely to go. (pp. 84, 86.)

RAILWAY COMPANY, Duty of to Passenger Leaving Its Cars and Station.—The duty of a railway company to make it safe for passengers to leave its cars and station continues until the passenger has left the depot grounds or had a reasonable time to do so. (p. 85.)

RAILROADS—Licensees, Use of Premises of—Right to Presume Their Safety.—One acting on an invitation, express or implied, has a right to presume the premises he is invited to use are kept at least reasonably safe, and is not called upon to look out for pitfalls. (p. 86.)

RAILROADS—Persons Using Premises Without Knowledge of an Invitation so to do.—One who acts without knowledge of an invitation to use premises must ordinarily be regarded as negligent in presuming safety in premises the nature and condition of which he is ignorant, especially at night. (p. 87.)

RAILROADS, Invitation to Use Premises of, Who Entitled to Rely upon.—The term "invitation," within the rule that the owner of the property who has held out an invitation or inducement for others to come upon his property must keep his premises in safe condition, imports that the person injured did not act merely for his own convenience or pleasure, and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession or control of the premises, but was in accordance with the intention or design with which the place or way was adapted and prepared or allowed to be so used. (pp. 87, 88.)

RAILROAD RIGHT OF WAY, Use of by Passengers and Licensees.—Ordinarily, the right of way of a railroad company is its exclusive property. Mere acquiescence in the use of such right of way does not confer on the public the right to use it nor create any obligation to look out for persons using it, other than the general duty to look out for obstructions. (p. 89.)

RAILROAD RIGHT OF WAY, Use of by Passenger for the Purpose of Reaching a Hotel.—A passenger leaving the train and station of a railway company and desiring to reach a hotel two hundred and twenty-five yards or more from the depot, and using the right of way as a place on which to walk, cannot be regarded as doing so by the invitation of the railroad company, because there were steps leading from a path from the hotel down to the railway track and passengers going to and from the hotel and depot had for a number of years used a well-beaten path upon the main line of the railroad track from the depot across the culvert and up the steps to the hotel, and the steps, though once removed by the railroad foreman, had been put back by one of its supervisors, and the company is not liable to such passenger if injured by falling from such pathway into a ditch. (p. 90.)

RAILROAD COMPANY, Duty of to Passenger as to Reaching His Hotel.—It is not part of a carrier's duty to see the passenger safely landed at his hotel. When he has been furnished safe and sufficient egress from the depot grounds, the relation of carrier and passenger ceases. (p. 90.)

Action brought by E. H. Godfrey, as a passenger, against the defendant railroad company to recover for personal injuries claimed to have been caused by the unsafe condition of a pathway along defendant's right of way. Judgment for the plaintiff, and the defendant appealed.

A. G. and E. D. Smith, for the appellant.

Bowman, Harsh & Beddow, for the appellee.

205 HARALSON, J. The trial in the court below was had upon the first and fourth counts of the complaint as amended, and the case as stated by these counts was substantially as follows:

206 Plaintiff had been carried as a passenger on one of defendant's trains to Epes, Alabama, where he alighted in the night-time, and while passing from the depot along a much traveled pathway leading therefrom, and while near to the depot, he fell from said pathway into a ditch and was thereby seriously injured; that said pathway where plaintiff fell was on defendant's premises and was habitually used, with defendant's knowledge and acquiescence, by defendant's passengers, in leaving its depot or trains at said Epes, at and before the time of plaintiff's alleged injury, by the invitation of the defendant. The fourth count contains the additional averment that the pathway led to a hotel, near by the depot, to which plaintiff was going. The negligence averred in the first count is as follows: "And defendant negligently caused or allowed said pathway or road to be or remain unsafe for passengers using the same as aforesaid in this, that the same was not properly or sufficiently lighted or otherwise properly and sufficiently safeguarded." The negligence as alleged in the fourth count was, that the defendant, with knowledge of the use of the pathway as aforesaid, and with knowledge of its danger, "negligently allowed plaintiff to pass along said pathway or road over said ditch, gully or viaduct, when the same was not properly lighted or otherwise safeguarded, without proper warning or notice of the danger thereof." Defendant filed a motion to strike those portions of the complaint which averred in substance the habitual use of the pathway by defendant's passengers, in leaving the depot, with defendant's acquiescence. The motion was overruled, and this ruling assigned as error.

The same grounds of demurrer were interposed to each of these counts, and were, in substance, that each of said

counts showed that the plaintiff was a trespasser, ²⁰⁷ or a mere licensee, upon the defendant's right of way; that no duty was shown to rest upon the defendant to light or safeguard the place where the plaintiff fell, and that said place was not shown to have been on the depot premises of the defendant, and that there was no averment of willful or wanton injury. The overruling of these demurrers by the court is also assigned as error.

It is insisted in argument by the appellant that the plaintiff was a trespasser or a mere licensee under the facts stated in the first and fourth counts, on which the case was tried. In support of this contention, as well as in support of the motion to strike portions of these counts, appellant cites the case of Memphis etc. R. R. Co. v. Womack, 84 Ala. 149, 4 South. 618, and other cases of a similar nature. The opinion in that case states: "He was clearly a trespasser upon the right of way of the defendant. Any person who enters and walks at places where the public have no right, *unless by the invitation or license of the company*, is a trespasser, and assumes the peril of the position in which he has voluntarily placed himself." (Italics ours.) The doctrine laid down in the above case, that the owner owes no duty to a *trespasser* to make his premises safe, and that ordinarily the mere acquiescence in the use of the right of way by a railroad company does not amount to permission, is well settled by numerous decisions of this court; but they have no application to the case stated in the complaint here in question, which specifically avers that this usage was by "invitation of the defendant." Different rules apply in cases where the parties injured are present on the premises by *invitation* or license of the owner, express or implied: Montgomery & Eufaula R. R. Co. v. Thompson, 77 Ala. 448, 54 Am. Rep. 72, and other cases hereinafter cited.

²⁰⁸ A fair construction of the amended complaint makes a case of a passenger leaving a train and depot by a route which he, as well as passengers in general, was *invited* to use by the railroad company, which route was negligently left unsafe and unguarded, by reason of which he was injured. It follows that, so far as the pleading discloses, he was not a trespasser or licensee, and that there was no error in overruling the demurrers. As to the motion to strike, it was at most directed at mere surplusage, the matter thus attacked being substantially repeated elsewhere

in the amended counts in connection with the averment, that such habitual usage of the dangerous pathway by defendant's passengers was not only with its acquiescence, but by its invitation; and without proof of such invitation, under the averments of the complaint the plaintiff would clearly not be entitled to recover. Hence if there was any error in overruling the motion to strike, it was error without injury.

As the second count was charged out of the case and the third count went out on demurrer sustained, their consideration is not necessary here. As stated the case was tried on the first and fourth counts.

The defendant pleaded the general issue and filed special pleas setting up contributory negligence.

The facts as shown without conflict in this case were substantially as follows: The plaintiff was a passenger on defendant's train from Birmingham to Epes, where he arrived on a very dark and rainy night. The train stopped at the depot, plaintiff left the train, and went into the depot to leave a satchel, expecting to spend the night in McGee's Hotel at Epes, where most travelers usually stopped. There was another hotel close to the depot, but few traveling men went there. McGee's hotel was situated something more than two hundred and thirty-five ²⁰⁹ yards *northward* from the depot, near the railroad on the east side. Plaintiff had stopped at McGee's hotel once before, when he came in a buggy and went to the hotel by the dirt road. Plaintiff had never gone up the railroad to the hotel, and up to the time of the injury did not know of the conditions existing on that way. The dirt road, of which plaintiff had knowledge, crossed the railroad near the depot on the *south side* and ran around northward in front of the stores at Epes and over a bridge with banisters spanning a waterway up to McGee's hotel. This same waterway also passed under the railroad through an uncovered culvert, about eighteen feet deep and cut through the rock, at a point on the railroad, two hundred and thirty-five yards north from the depot. When plaintiff went into the depot to put up his satchel one Sims, acting as defendant's depot agent, said to him that the hotelman was there with a light and that if he would hurry he could catch up with him. Plaintiff immediately started out in the darkness to follow the man with the light which he saw going up the track toward the hotel; that as plaintiff left the depot a man, shown to have

been defendant's night operator, halloed to him, "Look out for the hole up there." Plaintiff kept on up the track, and about the time the man with the light turned up the embankment toward the hotel, plaintiff fell through into the culvert and was very seriously injured; one leg had to be amputated and the other was stiffened.

It was further shown that near the hotel there were some steps leading from a path from the hotel down to the railroad track, which was, at that point, in a shallow cut; that defendant's passengers in going to and from the hotel and the depot usually, and had for a number of years, used a well-beaten path up the main line of defendant's railroad track from the depot and ²¹⁰ across the culvert and up these steps to the hotel, especially when the roads were muddy—being the same route pursued by the man with the light. It was not shown whether this custom was confined to daytime only, or extended to night and day both. The railroad company had never objected to this use of its track, though it had been so used for a number of years. The evidence did not show who put up the steps from the cut to the path leading to the hotel, but it appeared that they had been removed several years before by the section foreman and the railroad company's supervisor had them put back; that the supervisor's duty was to keep up the railroad tracks and see that they were in good condition. It was fifty yards farther from depot to hotel by the dirt road than by way of the railroad track. There was no evidence as to the depot agent's scope of duty. The railroad track over the culvert was not floored or covered, and no light or other warning placed there. There was some evidence tending to show that after the injury plaintiff said he had no one to blame but himself, but this he denied.

The plaintiff stated on cross-examination that defendant had never expressly invited, or given him permission to walk on its track or to use its track as a public highway.

The foregoing being the facts in evidence, the first inquiry arising is, Was there any evidence from which it might reasonably be inferred that the plaintiff was expressly or impliedly invited by the defendant to use its railroad track as he was using it at the time he fell to his hurt? The plaintiff having testified that he was not expressly invited or permitted by the defendant to use the way he pursued, and the evidence, for that matter, failing to disclose any express invitation, the question is narrowed down

to whether, under the facts ²¹¹ in evidence, he was impliedly invited. In this connection we note that the court below charged the jury, in written charge No. 20, "that even if an agent at the depot of defendant told plaintiff that Mr. McGee had gone on with a lantern to the hotel, and that if he went in a hurry he could catch up with him, or words to that effect, such remarks on the part of such agent would not bind the defendant, or amount to an invitation by the defendant to the plaintiff in this case to use the track of defendant as a highway to go to the hotel from the depot." With the lights before us, this charge was not improperly given. It was not shown by the evidence to have been within the scope of the agent's duties or authority to make such suggestion, and nothing appearing to the contrary, it would, as a general rule, seem to be entirely without the scope of a station agent's authority, as a representative of a railroad company, to suggest to, or invite, passengers leaving its trains or depot to go to any particular hotel not owned by the company, or to follow any particular route in reaching such hotel, unless such route had otherwise received the sanction of the company's invitation; though it might well be within such agent's authority and duty to inform passengers alighting from trains of a safe way of egress from the depot or depot platforms or approaches or grounds "reasonably near thereto," which he is apparently placed in charge of. The remark of the station agent in this case can hardly be regarded as more than his individual suggestion for which the defendant was in nowise responsible, unless it could be said to appear from the evidence that the route taken up the track to the hotel was within the station or depot grounds or approaches reasonably near thereto, or was a passageway which the railroad company had otherwise than by this remark of the agent ²¹² expressly or impliedly invited the public having business with the railroad company to use as a means of ingress or egress to or from its depot and platforms, within which limitations it might be that the station agent in charge of such depot and grounds would have implied authority from the railroad company to give information and directions to such persons. While this remark has some bearing on the question of contributory negligence, it could hardly be said that a depot agent could by a mere word extend the boundaries of the depot grounds and approaches, for the reasonable safety of which the law

imposes a duty upon the railroad company; and so the question reverts, independently of the remarks of the agent, to the inquiry (1) whether the pathway taken and used by the plaintiff at the time of the injury constituted a part of the depot grounds or approaches, (2) or was a passageway which the defendant railroad company impliedly invited its passengers, leaving its trains and depot (including the plaintiff), to make use of in making their egress therefrom.

Let us first consider the general invitation which is implied by law, and the consequent duty imposed, pertaining to the use of railroad depots, platforms, exits and approaches, and the grounds reasonably near thereto, all of which may generally be comprehended by the term "depot grounds"; what they are and how far they extend.

In the case of *Montgomery etc. Ry. Co. v. Thompson*, 77 Ala. 448, 54 Am. Rep. 72, in discussing this question, that opinion first asserts the proposition that there is a common duty resting upon all owners of real estate, upon which the public is expressly or impliedly invited to enter, that it shall be kept free from traps and pitfalls, and that for a neglect of this duty parties injured ²¹³ thereby may recover damages; but that this rule does not apply to places strictly private, or where persons are neither expected or expressly or impliedly invited to go. It then applies the foregoing principles to railroad station property in the following language: "All the property of a railroad company, including its depots and adjacent yards and grounds, is its private property, on which no one is invited, or can claim the right to enter, save those who have business with the railroad. Under this classification, however, we must include attending friends and protectors, who accompany friends to the train to aid them in getting on, in procuring tickets, in checking baggage, and kindred services. The same license is accorded to protecting friends when the traveler is to leave the train. To persons filling these classes, the railroad corporation owes special obligations of duty, different from those due to the general public. While the former come by invitation, express or implied, the latter are mere pleasure seekers, or are prompted by curiosity. For the use and comfort of the former class, railway companies are bound to keep in safe condition all portions of their platforms and approaches thereto to which the public do or would naturally resort, and all portions of their

station grounds reasonably near to the platform, where passengers, or those who have purchased tickets with a view to take passage on their cars, would naturally or ordinarily be likely to go. Within these boundaries a defect of structure which is likely to or does cause injury, or any other trap or pitfall producing a like result, will fasten a liability on the railroad owing the duty. Of similar obligations to this primary class is the duty to provide safe waiting-rooms, and to keep the depot and platform well lighted in the night-time." Can it be said that a culvert on the main line of the railroad ²¹⁴ track two hundred and thirty-five yards away from the depot is an "approach" to the platform, or "a portion of the station grounds reasonably near to the platform, where passengers would naturally or ordinarily be likely to go," within the meaning of the above-stated rule? Manifestly not. In the case from which we quote, this rule was held not to extend to a point on the bluff of a river about fifty yards from the depot, at which plaintiff, who had just got off defendant's train, fell over in the dark in an effort to reach a closet on the bank of the river, which was not lighted, and the bluff not guarded. The same general principles quoted above are followed in *Alabama etc. R. R. v. Arnold*, 80 Ala. 600, 2 South. 33, where the duty to light the platform is laid down, and in *Watson v. East Tennessee etc. Ry. Co.*, 92 Ala. 320, 8 South. 770; and same case, 94 Ala. 634, 10 South. 228. But the cases last cited hold that a railroad company is liable in damages to a passenger, who, on alighting by night at a station, where there was an eating-house for passengers, crossing a platform between the tracks and the veranda of the house, returning across another platform similarly situated, receives personal injuries from its defective condition; when the evidence shows that both of the platforms, though built by the persons who erected the hotel, were on the railroad's right of way, that there was no light at the spot, which was only thirty-seven feet from center of track, and that the defective platform, which was opposite to the railroad offices in the building, had been formerly used by the railroad, though not for several years. This platform was held to be a part of defendant's station "grounds" (92 Ala. 324); that "defendant allowed it to remain there, a standing suggestion and invitation to its use by passengers"; that "the invitation was accepted and passengers frequently used it in going to and from trains"; that it was therefore

defendant's ²¹⁵ duty to keep it in a safe condition. This brings out what might be called a visual invitation—an invitation by the reasonable appearance of things. This is further emphasized in the case (94 Ala. 636) where it is said: "We cannot suppose that travelers are informed as to the ownership or control of passways thus circumstanced. They act on the appearance of things, and are authorized to so act. Seeing the two bridges or platforms extending from the railroad's platform proper to the ticket office and eating-house, they may well suppose that they are invited to take either." There can be no doubt of the correctness of the holding in these cases, that those platforms were within the depot grounds and that an invitation would be implied by the very appearance of things, and the liability in such case would not have been affected even though the land over which the approachways extended was not the property of the railroad: See, also, *Skottowe v. Oregon etc. R. R. Co.*, 16 L. R. A. 593, and notes; *Louisville etc. Ry. Co. v. Lucas*, 6 L. R. A. 193, and notes; *John v. Charlotte etc. R. Co.*, 20 L. R. A. 520. In the *Lucas* case just cited it is said that it is the duty of the railroad company "to provide means for passengers to safely enter its cars at stations, and that duty also requires the carrier to make it safe for them to leave its cars and stations. After the passenger has left the cars and stations of a railroad carrier, its duty as a carrier ceases, but not until then." This duty continues until the passenger has left the depot grounds, as a general rule, or has had a reasonable time to do so.

In the case of *Ensley Ry. Co. v. Chewning*, 93 Ala. 24, 9 South. 458, the plaintiff was a passenger from Birmingham to Coalburg, and had gotten off the defendant's train on its main line to take a train on its branch line in the night. He walked up the track a short distance and ²¹⁶ was struck by the train. It was remarked in the opinion that "under our decisions a trespasser cannot maintain an action against a railroad company for injuries sustained while trespassing upon its roadbed, unless such injuries were caused by reckless, wanton or intentional negligence." And further on the court said: "While a person intending to take a train, awaiting its arrival, should not be regarded as a trespasser, if he merely cross or inadvertently step on the track in the dark, at or about the usual stopping place, yet plaintiff, having walked up the track beyond the limits of the usual stopping place, to meet the train, and having knowingly and

voluntarily stepped and stood on the cross-ties where he was not invited and had no right to be, must be regarded as a quasi trespasser, or, as we have said, guilty of negligence contributory to his own injury."

Applying the principles involved in the foregoing cases, we are of the opinion that the place where the plaintiff in this case was injured, under the facts so far considered, being at a culvert two hundred and thirty-five yards up the main line of track from the depot, was not within the limits of defendant's depot grounds, or approaches, "reasonably near" to the depot, to which the general invitation implied by law, and the duty imposed thereby, as stated in *Montgomery & Eufaula Ry. Co. v. Thompson*, 77 Ala. 448, 54 Am. Rep. 72, attaches; and that there was nothing in the appearance of things in and around the depot, as the plaintiff stepped out of the door into the darkness of the night, just before this misfortune came upon him, which could reasonably have led him to believe that the railroad company held out or designed its main line of track as an approach to, or pathway of egress from, its depot, or, for that matter, as a passageway to be used by its passengers who might wish to go to a hotel in which the railroad had no interest and which was some two hundred and fifty ²¹⁷ yards from its depot. It was very dark and the plaintiff could not see two hundred and thirty-five yards up the track; he could not even see the culvert when he arrived at it; he could not have seen the steps referred to, and so he could not imply an invitation from the appearance of the pathway which he chose to follow. He had never been that way before, and the evidence does not show that he ever had any knowledge of or acted upon any previous custom on the part of the passengers to go to the hotel that way—in fact, his testimony induces the belief that he did not have any such knowledge. So that, even if the evidence of common use by passengers of the way taken by plaintiff raised any implication of invitation by the company, it cannot be said, under the facts in evidence, that this invitation ever reached the plaintiff, or that he acted upon such unknown invitation; and therefore there was no causal connection between the unknown alleged implied invitation and the injury sustained. One acting upon an invitation, express or implied, has the right to presume from knowledge of that fact that the premises he is invited to use are kept at least reasonably safe, and he is not required to be careful to keep on the

lookout for pitfalls: *Watson v. East Tennessee etc. Ry. Co.*, 92 Ala. 320, 8 South. 770. But one who acts without knowledge of the invitation would ordinarily be negligent in presuming safety in premises of the nature and condition of which he was ignorant, especially at night. A reasonably prudent man would exercise more care in using premises where he was ignorant of any invitation to use them than he would if he knew or had good reason to believe he was invited to use them, especially if it were dark and he was not therefore familiar with them.

We now come to inquire whether, under the facts in evidence, without regard to the general duty to keep its depot grounds in safe condition, the defendant had ²¹⁸ impliedly invited its passengers leaving its trains at Epes, at and before the time of plaintiff's injury, to use this pathway taken by plaintiff, leading as it did beyond the limits of the depot grounds as hereinabove defined, along the track for some two hundred and fifty yards to some five or six steps up the side of the cut and then on a little farther to the hotel. In support of their contention in this connection, counsel for appellee rely mainly upon the proof of years of usage of this way by passengers leaving the depot for the hotel, and thus going from hotel to depot, without any objection by defendant, and it might be inferred from the evidence, with defendant's knowledge; and further, the fact that the steps up from the cut, when removed several years before by the section foreman, were replaced by the railroad's supervisor. It is also urged that this path was on defendant's property, and was generally used as the most convenient route by passengers in leaving its depot premises to go to the hotel. The fact that the culvert crossing beneath the track was uncovered and unlighted, and was dangerous to pedestrians using the track, especially at night, is patent and uncontradicted.

"The term 'invitation,' within the rule that the owner of the property who has held out any invitation, allurement or inducement for others to come upon the property must keep his premises in a safe condition, imports that the person injured did not act merely for his own convenience and pleasure, and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in

possession or control of the premises, but that it was in accordance ²¹⁹ with the intention and design with which the way or place was adapted and prepared or allowed to be so used. The true distinction is this: A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability. But if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for use, and for a breach of this obligation he is liable in damages to a person injured thereby": *Sweeny v. Old Colony & N. R. Co.*, 92 Mass. (Allen) 368, 87 Am. Dec. 644, cited in *Louisville etc. R. R. Co. v. Sides*, 129 Ala. 399, 29 South. 798; 4 Words and Phrases, p. 3670. "It is sometimes difficult to determine whether the circumstances make a case of invitation, in the technical sense of that word, as used in a large number of adjudged cases, or only a case of mere license. 'The principle,' says Mr. Campbell, in his treatise on Negligence, 'appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it'": *Harlan, J., in Bennett v. Louisville R. R. Co.*, 102 U. S. 577, 26 L. ed. 235.

In the case of *Sturgis v. Detroit etc. R. Co.*, 72 Mich. 619, 40 N. W. 914, which is nearly in point, and in which it was held that no invitation was implied, the plaintiff fell into a cattle-guard, which crossed under the railroad track. Plaintiff had left the train after dark, was not acquainted with the premises, and instead of going into the depot, which fronted on a highway, on the other side, and without making inquiry, walked along a platform two hundred and seventy feet long to where it ended with a step down upon the track in the station yard, and then walked up the track in the direction taken by the train which he had left. There were no lights along the track after passing the ²²⁰ depot. After walking up the track about one hundred and fifty yards beyond the platform plaintiff fell into the cattle-guard, which had no facilities for crossing. There was a safe way from the front of the depot by the regular highway to the village, which by reason of an angle was farther than the straight line along the track to the cattle-guard on the highway at the end of the station grounds. The track was leveled and graded. The railroad had all necessary platform accommodations with access to the only high-

way leading to the town. The track did not differ from those usually found on railroad premises, and no other means of travel on it appeared than on any such track. The company never took measures to light it or facilitate ingress or egress. The plaintiff urged that the way by the track was very generally used as a shorter cut between depot and village than furnished by the regular road. The court observed: "The travel over it was just such as will be found anywhere along such tracks which cannot be closed more effectually than by a cattle-guard. It is impracticable to keep off trespassers from an open track, and all who go upon it do so at their own risk of such dangers as are incident directly to such use. Under all the decisions made in this state on the subject, a company that has provided all reasonable facilities for ingress and egress from its station-houses has done its full duty in that regard. No company can be bound to suppose that passengers who do not know the way will neglect the means open to their sight, and go off in the darkness somewhere else. We think no case was made out": See, also, *Hutchinson on Carriers*, 3d ed., sec. 937.

In the absence of invitation or license, "It is the settled doctrine in this state, supported by the great weight of authority in England and America, that ordinarily the right of way of a railroad company is its ²²¹ exclusive property. Its free and unobstructed use is essential to the transaction of the business of the company in transporting freight and passengers, and to the safety of its trains. Mere acquiescence in the use of such right of way does not confer on the public a right to use it, nor create any obligation to look out for the persons using it, other than the general duty to look out for obstructions. In the absence of law making such acts punishable, railway companies are powerless to prevent such use of their tracks. Under the conditions in which they are situated physical prevention is impracticable, and acquiescence is morally compulsory. Mere acquiescence, under such circumstances, is not permission: *Memphis etc. R. Co. v. Womack*, 84 Ala. 149, 4 South. 618; *Memphis etc. R. Co. v. Lyon*, 62 Ala. 71; *Mizell v. Southern Ry. Co.*, 132 Ala. 504, 31 South. 86; *Savannah etc. Ry. Co. v. Meadors*, 95 Ala. 137, 10 South. 141; *Verner v. Alabama etc. R. Co.*, 103 Ala. 574, 15 South. 872; *Montgomery's Exrs. v. Alabama etc. R. Co.*, 97 Ala. 305, 12 South. 170.

Applying the principles laid down in the authorities to the facts of this case, we do not think the plaintiff discharged the burden of proving invitation on the part of the defendant company. Mere acquiescence in the use of the track, for that distance beyond its depot, even by passengers going to the hotel, is not enough to remove the case from the realm of mere license—the company having furnished open, free and safe exit to the highway, and there being no general duty resting upon the carrier to construct or maintain a safe passageway for its passengers to and from any particular hotel, unless under exceptional circumstances, such as eating-houses where the trains are stopped for passengers to get meals, or hotels in which the carrier is interested, or where situated within, or adjoining, depots or depot grounds. But, generally speaking, it is no part of a carrier's duty to see a passenger safely landed ²²² at his hotel. When he has been furnished safe and sufficient egress from the depot grounds, the relation of carrier and passenger ceases.

It was not shown that the railroad company constructed the steps in question; its servants merely took them down and replaced them, and the company impliedly acquiesced in the same use afterward that had existed before. Steps up the side of a shallow cut two hundred and fifty yards from depot could furnish no visual invitation to use a pathway commencing at the depot.

It is not necessary to extend this opinion by considering the numerous assignments of error separately. The court below erred in refusing the general charge requested in favor of the defendant, as well as the motion for a new trial.

Reversed and remanded.

Tyson, C. J., and Anderson and Denson, JJ., concur.

The Duty of a Railway Company to maintain its depots and the approaches thereto in a safe condition for people going for legitimate purposes is considered in the recent cases of *Magnum v. North Carolina R. R. Co.*, 145 N. C. 152, 122 Am. St. Rep. 437; *Abbot v. Oregon R. R. Co.*, 46 Or. 549, 114 Am. St. Rep. 462; *Pineus v. Atlantic Coast Line R. R. Co.*, 140 N. C. 450, 111 Am. St. Rep. 856; *Klugherz v. Chicago etc. Ry. Co.*, 90 Minn. 17, 101 Am. St. Rep. 384; *Bachant v. Boston etc. R. R.*, 187 Mass. 392, 105 Am. St. Rep. 408; *Chicago etc. R. R. Co. v. Crose*, 214 Ill. 602, 105 Am. St. Rep. 135.

SOUTHERN RAILWAY COMPANY v. NOWLIN.

[156 Ala. 222, 47 South. 180.]

RAILROAD, AGENT OF, When Acting Within the Scope of His Authority in Giving Information Respecting the Best and Quickest Route.—A complaint alleging that the defendant railway had two routes over which a passenger might travel between designated points, and that the defendant maintained an office for giving information to travelers in reference to routes of travel, and that the plaintiff, not knowing the best and quickest routes to travel, applied to defendant's agent for information and was by him misinformed as to such routes, shows that the agent was acting within the scope of his authority and that the plaintiff had a right to rely upon the information given. (p. 93.)

RAILROAD COMPANY'S LIABILITY to Passenger Misdirected as to Best and Quickest Route.—If an intending passenger applies at a railway station to its agent for the best and quickest route between designated points, and, being by such agent misdirected, on the following day purchases a ticket according to his direction over a route which is not the best nor quickest, the company is liable for the resulting injury. This remains true though such passenger had an opportunity to consult the official railway guide as to routes and schedules. (p. 93.)

VERDICT, When not Excessive.—A verdict for fifteen hundred dollars in favor of a passenger who, on applying to a railroad agent as to the best and quickest route of travel between designated points, was misdirected and thereby caused to take a route involving four or five extra stops and changes of cars, traveling part of the distance by a freight train and being compelled to stand and be greatly shaken, and occupying two or three days in making the trip, she being in ill-health at the time, and the agent being informed of that fact before giving the information, is not excessive. (p. 93.)

APPEAL AND ERROR.—An assignment that the court separately and severally erred in refusing to give defendant's written charges 1, 2, 6, 7, 8, 8½, 9, and 11 does not comply with rule 1 of the supreme court practice, and is too general to be considered on appeal. (p. 93.)

Action by Josephine Nowlin against the Southern Railway Company for negligent failure to inform her as to the best and quickest route of travel. The complaint alleged that the defendant was a common carrier of passengers for hire by means of trains on a railway; that there were two routes over which a passenger could travel by rail from Birmingham, Alabama, to Lumberton, North Carolina, over a part of both of which routes defendant operated trains for the carriage of passengers; that it maintained in Birmingham an office for the purpose, among others, of giving information to intending passengers in reference to routes of travel; that the plaintiff, not knowing the best and quickest route, and being in delicate health, applied through her agent, proposing to travel from Birmingham to Lumberton,

and inquired of defendant's agent which was the best and quickest route between those points; that it was the duty of such agent to correctly inform plaintiff as to such route, but he, nevertheless, told her that the route by way of Asheville, North Carolina, was the best and quickest; that, acting on this information, the plaintiff, on the day after she received it, purchased a ticket from defendant's agent for passage by way of Asheville; that plaintiff on the succeeding day and the day after traveled over such route; that it was not the best and quickest, but was slower and less desirable than the other, to wit, that by Atlanta, Georgia; that plaintiff was greatly delayed in her journey, was obliged to change cars four times, and to proceed by freight or mixed train a distance of one hundred miles, and to stand on her feet for a long time and be shaken by rough or irregular movements, and, being in delicate health, her condition was greatly aggravated, and she was made to suffer great mental and physical pain and lost much time, and her health and physical stamina were greatly impaired, and she was put to great trouble, inconvenience and expense.

The defendant demurred to the complaint on the grounds (1) that it did not state facts sufficient to constitute a cause of action; (2) it failed to show that there was any consideration from the plaintiff to the defendant making it liable in damages, even though the information was false; (3) that it did not appear that plaintiff paid any railroad fare to defendant, or that by reason of or in consequence of any representation any contract was entered into between plaintiff and defendant; and (4) it did not sufficiently aver that the defendant's agent was acting in the line and scope of his employment.

Plaintiff's evidence tended to support the allegations of her complaint. Judgment for the plaintiff for fifteen hundred dollars; defendant appealed. The eighth assignment of error was that the court separately and severally erred in refusing to give each of defendant's requested written charges, numbered respectively 1, 2, 6, 7, 8, 8½, 9 and 11.

James Weatherly, for the appellant.

Bowman, Harsh & Beddow, for the appellee.

227 DOWDELL, J. The complaint contained two counts. The second count was eliminated on charge requested by the defendant, appellant here. The first count, after the last

amendment, and to which the demurrer of the defendant filed to it before amendment was refiled, was good against any of the grounds stated in the demurrer. The count, as amended, stated a sufficient cause of action. On the facts stated in said count as amended, and which need not be here repeated, the agent giving the alleged information was acting within the scope of his authority, and the plaintiff had the right to rely and act upon the information given by him in purchasing her ticket, and the defendant company would be liable in damages to the plaintiff for injury proximately resulting from the negligence of such agent.

It is unimportant that the plaintiff did not purchase her ticket until the next day after receiving the information, if she purchased it relying upon the information so received. Nor is it of any consequence that the plaintiff had the opportunity of consulting the official railroad guide as to routes and schedules, from which it is urged in argument of appellant's counsel that the agent got his information. In its facts the case before us is very much like the case of *St. Louis Southwestern Ry. Co. v. White*, 99 Tex. 359, 122 Am. St. Rep. 631, 89 S. W. 746, 2 L. R. A., N. S., 110, in which the law was held by the supreme court of Texas to be as we have here ruled.

²²⁸ There was evidence which tended to support each and every allegation in the complaint. The evidence has been carefully considered, and we are not prepared to say that the trial court erred in overruling the motion for a new trial on the ground that the verdict of the jury was excessive.

The eighth assignment of error does not comply with rule 1 of supreme court practice (20 South. iv), in that it is too general. Questions, therefore, sought to be raised by this assignment are not to be considered: *Williams v. Coosa Mfg. Co.*, 138 Ala. 673, 33 South. 1015; *Ferrell v. City of Opelika*, 144 Ala. 135, 39 South. 249.

Affirmed.

Tyson, C. J., and Haralson and Denson, JJ., concur.

Simpson and Anderson, JJ., dissent, being of the opinion that the verdict is excessive and that the motion for a new trial should be granted.

The Liability of Railroad Companies for the negligence, mistakes or misrepresentations of ticket agents is the subject of a note to St. Louis etc. Ry. Co. v. White, 122 Am. St. Rep. 633.

SOUTHERN RAILWAY COMPANY v. DARWIN.

[156 Ala. 311, 47 South. 314.]

RAILROAD COMPANIES—Contributory Negligence on the Part of the Owner of Property, What is not.—The owner of premises near or contiguous to a railway right of way is not bound to anticipate negligence on the part of the railroad, and by way of precaution, to make provision against the communication of fire thereby. Such proprietors in general owe no duty to railroad companies in this respect. Hence, negligence can rarely be imputed to the proprietors so as to exonerate the railroad company from liability for its negligence. (pp. 96, 97.)

RAILROAD COMPANY—Land Owner's Right to Use His Premises Without Being Guilty of Negligence.—The owner of land contiguous to a railroad is entitled to use his land in any natural and lawful manner without incurring the imputation of contributory negligence in the occurrence of fire. He may use his property, or permit it to be used and be in the same manner and condition as if no railroad passed within the range of communication by fire. (pp. 96, 97.)

RAILROAD COMPANIES—Risk of Fire Assumed by the Owner of Adjacent Property.—The owner of property situated adjacent to a railroad assumes the risk of loss from all fire started or communicated without the negligence of the railroad company or its agents. (p. 97.)

RAILROAD COMPANIES, Liability of to Abutting Property Owners if Injured by Fire.—Railroad companies are only required to employ machinery of approved construction and to operate their engines with such precautions as are not inconsistent with the lawful, reasonable and effective conduct of their business. Beyond this abutting property owners take the risk. (p. 97.)

RAILROAD COMPANIES—Injury to Property Owner by Fire Due to Constructing His Building Near the Railroad Track.—A property owner has the right to construct a building on any part of his property and to enjoy the same without rendering himself liable to the negligence of a railway company, whereby his property is destroyed by fire. He is not guilty of contributory negligence in building a house near the railroad, so as to prevent a recovery if it is burned through the negligence of the railroad company, though he knew the danger of fire was thereby increased. He is under no obligation to stand guard over his property, and continually watch it to protect it from the negligence of the railway company. (p. 98.)

RAILROAD COMPANY—Injury from Fire Due to Combustible Matter.—The proprietor of contiguous property is not required to move combustible matter from his own land in order to guard against the consequence of possible, or even probable, negligence on the part of a railroad company in communicating fire thereto. (p. 98.)

RAILROAD COMPANY, Liability of for Fire—Plea Seeking to Charge the Plaintiff with Contributory Negligence, When not Sufficient.—In an action to recover for the loss of property by fire negligently communicated by a locomotive operated by the defendant railway company, pleas alleging the proximity of the property to the railroad and the negligence of the plaintiff in not having watchmen, since he knew of this proximity and the danger from passing trains, or that with such knowledge, plaintiff negligently

and carelessly piled cotton near the railroad, knowing of its exposed condition, do not make out a case of contributory negligence, and demurrers thereto are properly sustained. (pp. 98, 99.)

RAILROAD COMPANIES—Evidence in Actions for Communicating Fire to Property.—Evidence of a witness that he saw the train throwing large volumes of sparks is properly admitted where the other evidence is such that the jury could well infer that such sparks were from the engine in question, if from this the further inference is justifiable that it did not have a good spark-arrester. (p. 99.)

RAILROAD COMPANIES—Jury Trial, Doubt as to Which of Several Acts may have Produced the Injury—Instructions.—An instruction to the jury that uncertainty in their minds as to by which of several means fire was communicated by an engine was no reason for denying plaintiff's right of recovery, if, from the evidence, they believe the fire was due to either of these means. (p. 100.)

RAILROAD COMPANIES—Burden of Proof in Action to Recover for Injury Due to Fire.—It is proper to instruct the jury, in an action against a railroad company to recover for damages claimed to be due to the communication of fire from the locomotive of the defendant, that if the plaintiff reasonably satisfied the jury from the evidence that the fire was communicated by the defendant's locomotive, then the plaintiff has nothing to do until the defendant has reasonably satisfied you (1) that so far as regards the throwing of sparks, the engine was properly constructed; (2) that in that respect the engine was not in bad or defective condition; (3) that the throwing of sparks was not caused by the unskillful or careless management of the locomotive, and that even if the defendant in its turn reasonably satisfied the jury of all three of these things, yet the plaintiff might by other evidence overcome the evidence of the defendant and show that the fire was set out from the engine either because it was badly built, or in bad condition, or badly handled. (p. 100.)

Action against the defendant railroad company for damages in the destruction of plaintiff's property by fire. The defendant pleaded the proximity of the plaintiff's gin-house to the railroad and the contributory negligence of the plaintiff in not having a watchman at the gin, since he knew of this proximity and of the proximity of the gin and cotton and the consequent liability of fire from passing trains. Also that the plaintiff, with knowledge of the conditions, piled cotton carelessly and negligently near the railroad and gin-house, knowing of the danger of the communication of fire from the railroad company. Demurrers to the pleas setting out these facts were interposed and sustained.

At the request of the plaintiff, charges numbers 2 and 3 were given. They are as follows:

"2. Uncertainty in your minds as to whether the fire was caused by reason of the engine being improperly made, or being in bad condition, or being badly handled in respect to the throwing of sparks, is no reason for failing to find a verdict for the plaintiffs; and it will be your duty to find

your verdict for the plaintiffs if you believe from the evidence that the fire was caused by either one of those three causes.

"3. I charge you that if the plaintiffs have reasonably satisfied you from the evidence that the fire was caused by defendant's locomotive, then the plaintiffs have nothing to do until the defendant has reasonably satisfied you of each and all of the three following things: (1) That so far as regards the throwing of sparks the engine was properly built; (2) that in that respect said engine was not in a bad or defective condition; (3) that the throwing of sparks is not caused by unskillful or careless management of the locomotives. And even should the defendant in its turn reasonably satisfy you of all the three things above named, yet the plaintiffs may by their evidence overcome the evidence of defendant, and show you that the fire was set out from the engine, either because it was badly built, or in bad condition, or badly handled; and if, from all the evidence in the case, you believe that the fire was caused by the negligence of the railway, your verdict must be for the plaintiffs."

The various charges asked by the defendant were to the effect that the plaintiff was not entitled to recover under the circumstances. These charges were refused. Verdict and judgment for the plaintiff. The defendant moved for a new trial, and from the judgment and refusal to grant a new trial appealed.

Humes & Speake, for the appellant.

Bilbro & Moody, for the appellee.

316 ANDERSON, J. "The preferable doctrine appears to be that the owner of premises near or contiguous to a railroad right of way is not bound to anticipate negligence on the part of the railroad, and by way of prevention, to make provision against the communication of fire. Such proprietors in general owe no duty to railroad companies in this respect, and hence negligence, in its legal sense, can rarely be imputed to them. The rule in this connection, as most frequently expressed, is that the owner of property near or through which a railroad passes is entitled to use it in any natural and lawful manner, without incurring the imputation of contributory negligence in the occurrence of a fire; that he may use or permit his property to be used,

or be and remain in the same manner or condition as if no railroad passed within the range of communication of fire. Such proprietors may cultivate their lands, or build upon them, or leave them in a state of nature as they see proper, and take upon themselves thereby no other risks than such as are incident to the operation of the road with proper care by the company, and will therefore be entitled to damages for injuries by fires arising from the negligence of the company in the construction or management of its locomotives, or in the condition in which its track is suffered to remain. Considered in another aspect, the preferable doctrine simply means this: The owner of adjacent property assumes the risk of loss from all fires started or communicated without the negligence of the railroad. If he permits his premises to be or remain in a highly combustible state, or locates his buildings in an exposed portion with reference to flying sparks, his risk is thereby increased. It may be argued in opposition to this view that such conduct on the part of adjacent proprietors would impose on the part of the railroad company an ³¹⁷ increased and onerous burden of care and prudence, since, as has been seen, what is due care on the part of the railroad is made to vary with the circumstances. But this is not so. In point of fact the most extreme degree of care to which railroad companies are ever held is fixed and reasonable. They are only required to employ machinery of approved construction, and to operate their engines with such precautions as are not inconsistent with the lawful, reasonable and effective conduct of their business. Beyond this the abutting property owners take the risk": 13 Am. & Eng. Ency. of Law, 2d ed., pp. 482-484, and cases there cited; Louisville etc. R. R. Co. v. Marbury Lumber Co., 125 Ala. 237, 28 South. 438, 50 L. R. A. 620; Louisville etc. R. R. Co. v. Malone, 116 Ala. 600, 22 South. 897.

"A person has the right to construct buildings on any part of his property, and to enjoy the same, without rendering himself liable to the negligence of a railroad company, whereby they are destroyed by fire. It has been held, therefore, that one is not guilty of contributory negligence in building a house near a railroad track, so as to prevent a recovery, if burned through the negligence of the company, though he knew the danger of fire was thereby increased": 13 Am. & Eng. Ency. of Law, 2d ed., 487. Nor does the law require a party to stand guard over his

property, as was held in the case of *Tien v. Louisville etc. Ry. Co.*, 15 Ind. App. 304, 44 N. E. 45, and *Jacksonville etc. R. R. v. Peninsular Land T. & M. Co.*, 27 Fla. 1, 157, 9 South. 661, 17 L. R. A. 33, 65, and which we approve. A person having property adjacent to a railroad is not bound to keep his property in such a condition as to guard against the negligence of the railroad company, but every person has the right to enjoy his property in an ordinary manner; and while one is charged with the duty of saving his property when he can do ³¹⁸ so, he is under no obligation to stand guard over it and continually watch it to protect it from the negligence of a railroad company. "A proprietor of contiguous property is not required to remove combustible matter from his own land in order to provide against the consequences of possible or even probable negligence on the part of a railroad company in communicating fire thereto": 13 Am. & Eng. Ency. of Law, 2d ed., 485, and cases cited in note 3. "On the other hand, it has been declared that the negligence of the plaintiff which precludes a recovery in an action for damages for destruction by fire is where, in the presence of a seen danger (as where the fire has been set), he omits to do what prudence requires to be done under the circumstances for the protection of his property, or does some act inconsistent with its preservation. Where the danger is not seen, but anticipated merely, or dependent on future events (such as the continuance of the defendant's negligence), the plaintiff is not bound to guard against it by refraining from his usual course, if otherwise consistent with the conduct of a prudent man in the management of his property and business": 13 Am. & Eng. Ency. of Law, 2d ed., 481. This last principle is the one realized and enunciated in the case of *Louisville etc. R. R. v. Sullivan T. Co.*, 138 Ala. 379, 35 South. 327, the opinion in which proceeds upon the idea that the pleas set up negligence on the part of the plaintiff occurring subsequent to the negligence complained of on the part of the defendant, but does not hold that the condition of plaintiff's premises and his failure to guard same, prior and up to the negligent acts of the defendant, amount to contributory negligence. The special pleas in the case at bar do not set up subsequent contributory negligence, but attempt merely to charge the plaintiffs with contributory negligence growing out of the condition of their premises ³¹⁹ and their failure to keep a watch over same prior and

up to the negligence charged against the defendant, and the demurrers thereto were properly sustained.

It is true the special pleas in the case at bar bear a striking resemblance to pleas 2 and 3, which were held good in the case of Louisville etc. R. R. Co. v. Sullivan T. Co., 133 Ala. 379, 35 South. 327. But a comparison of the pleas in said case with the only count they answer, the sixth, will show that they set up negligence on the part of the plaintiff subsequent to the negligence of the defendant, as set out in the said sixth count of the complaint, and not conditions existing prior to the negligence charged to the defendant. The negligence charged in the sixth count was placing by the defendant close to the plaintiff's property dry grass and weeds; and the negligence in the seventh count was placing cotton that had been saturated with oil near plaintiff's property. The pleas set up the negligence of plaintiff in not removing them, knowing of the danger, and which was an omission subsequent to the negligence charged to the defendant. An examination of the original brief of counsel for appellant in the Sullivan case, *supra*, shows a concession that a plaintiff could not be held guilty of contributory negligence for failing to anticipate and guard against the future negligence of the defendant; the contention being that the pleas set up "subsequent negligence in failing to protect themselves against the result of the prior negligence of the defendant known to the plaintiff, and where he had the means of protecting himself from danger therefrom without unreasonable expense or trouble."

The trial court did not err in permitting the witness McCutchen to testify that he saw the train throwing "large volumes of sparks." The jury could well infer that it was the engine in question. It was seen at Scottsboro shortly before it reached Darwin's gin, and was ³²⁰ going in that direction; and the fact that it was throwing out large volumes of sparks tended to show that it did not have a good spark-arrester or that it was out of repair.

The trial court did not commit reversible error in giving charges 2 and 3, requested by the plaintiffs. They are copies of charges given in the case of Alabama etc. R. Co. v. Sanders, 145 Ala. 449, 40 South. 402.

While the defendant proved that the engine was properly handled and had a modern and perfect spark-arrester, there was contradictory evidence sufficient to justify contrary inferences by the jury. The jury examined the spark-arrester

and heard the testimony as to the size of sparks emitted from the engine, and which was sufficient to create an inference that it had no spark-arrester, or, if it did, that it was out of repair, or else not properly adjusted. There was also evidence tending to contradict the engineer as to the handling of the engine. He testified that at the time he was opposite the gin it was a downgrade and the steam was shut off; while the plaintiff offered evidence that there was an upgrade at that point and the engine was puffing and emitting a large and unusual quantity of large sparks. The trial court did not err in refusing the requested charges of the defendant: *Alabama etc. R. Co. v. Clark*, 136 Ala. 450, 34 South. 917; *Alabama etc. R. Co. v. Sanders*, 145 Ala. 449, 40 South. 402; *Louisville etc. R. R. Co. v. Marbury Lumber Co.*, 125 Ala. 237, 28 South. 438, 50 L. R. A. 620.

The trial court did not err in overruling the motion for a new trial.

The judgment of the circuit court is affirmed.

Tyson, C. J., and Haralson, Dowdell, Simpson and Denson, JJ., concur.

321 McCLELLAN, J., Dissenting. The court below had, in *Alabama etc. R. R. v. Sanders*, 145 Ala. 449, 40 South. 402, the highest authority for the giving, at the instance of the plaintiff, of charge 2. I am unable to agree that such charge is other than an incorrect statement of the law. In my opinion the terms "improperly made," "bad condition," and "badly handled," alone render the charge erroneous. It is rarely safe to adopt, either in pleading or special instructions, general expressions to be found in narration or argument in judicial opinions. The frequency of such use in opinions affords no warrant for the assumption that by such use they have become, for purposes of pleading or jury instruction, the synonyms of accurate definitions sanctioned by law, and on the application of which to given facts and circumstances the rights of parties must be determined: *McGee v. State*, 117 Ala. 229, 23 South. 797. In judicial writings, we speak of self-defense as embracing legally recognized elements of this great doctrine; yet it has been settled by this court that the employment of such an expression in a special charge is improper, since it commits to the jury the function of determining what self-defense legally is, whereas it is the duty of the court to

define it. The quoted terms do not appear to me to be the equivalent of negligence.

With respect to the ignition of property by fire from locomotives averred to be defectively constructed or equipped, aside from the burden of proof and its discharge in such cases, negligence cannot be declared if the locomotive is constructed and equipped with approved appliances as are like agencies in use by other well-regulated railroads, and which experience has proven to be adapted to the purpose. The test of negligence *vel non* in this regard is evident; and, being so, it is obvious that the term "improper" suggests no such ³²² standard. Indeed, an engine may be "improperly" made, as measured by a juror's ideas, and there is no other criterion furnished by the charge, yet that engine may be constructed and equipped in perfect accord with the best appliances and construction known to the railroad world. In other words, the charge imports no legal standard for a failure to attain which in the construction of equipment of an engine for the prevention of the ignition of property by fire therefrom negligence is imputable; but on the contrary, it instructs the jury that an "improper" construction, regardless of the law-made criterion, will warrant the imputation of negligence. If the terms quoted were employed in a complaint, is there any doubt but that it would be ruled to state no cause of action? When defining duty as a predicate for a pronouncement of negligence in an instruction, ought any less accuracy be sanctioned? Surely no charge can be said to be merely misleading when it incorrectly announces the duty for the breach of which liability is claimed.

The foregoing considerations are alike applicable to the term "bad condition." What was a condition of perfection in construction or equipment, meeting the legal duty in such cases, is wholly misstated, and the ascertainment of it is left, by the very language of the charge, to be determined by the jury, whereas the court should have defined it.

The expression "badly handled," in respect to the throwing of sparks, is perhaps more indefensible than any other element of the charge. This court has held it to be within common knowledge that a locomotive cannot be successfully operated without emitting fire. Yet it is announced in this charge, and approved, that mere bad handling in the respect of throwing sparks is the equivalent of negligent operation with that result. ³²³ What is a proper handling or opera-

tion of an engine in this respect is not stated; but the jury are told that, notwithstanding all operated engines will emit fire, they may impute negligence if the handling was bad in that regard. It does not seem to me that property rights should be affected or damages imposed upon invitation of such instructions.

For substantially similar reasons, charge 3 should have been refused.

The judgment below should, in my opinion, be reversed.

The Liability of a Railroad Company for Fires communicated by its locomotives to buildings or other property near its tracks is considered in *Norfolk etc. Ry. Co. v. Fritts*, 103 Va. 687, 106 Am. St. Rep. 911; *Peter v. Chicago etc. R. R. Co.*, 121 Mich. 324, 80 Am. St. Rep. 500; *Laird v. Railroad*, 62 N. H. 254, 13 Am. St. Rep. 564; *Kendrick v. Towle*, 60 Mich. 363, 1 Am. St. Rep. 526. These authorities also discuss the contributory negligence of the owner of the property as affecting his right to recover for the loss of his property. The owner of property along a railroad owes the corporation no duty to keep his land free from grass, weeds or brush to guard against fire: *Louisville etc. R. R. Co. v. Beeler*, 126 Ky. 328, 128 Am. St. Rep. 291. And a farmer who permits dry grass or cornstalks to remain in the field near a railroad track, where they are grown, as is customary with farmers, is not chargeable with contributory negligence nor deprived of his right of action against the railroad company for its negligence in setting out a fire: *Walker v. Chicago etc. Ry. Co.*, 76 Kan. 32, 123 Am. St. Rep. 119.

WINDHAM & CO. v. STEPHENSON & ALEXANDER.

[156 Ala. 341, 47 South. 280.]

MORTGAGE OF CHATTELS—Destruction of Mortgage Lien, Purchase of Property does not Amount to.—The purchase from a renter of his crop while it is subject to a mortgage is not wrongful, nor destructive of the lien. (p. 104.)

MORTGAGE OF CHATTELS, Existence of at the Time of the Mortgage, to What Extent Essential.—The property mortgaged need not have identity or separate entity, but it must, at least, be the product or growth or increase of property which has at the time a corporeal existence and in which the mortgagor has a present interest, not a mere hope or expectation that he will in future acquire such interest. (pp. 104, 105.)

MORTGAGE OF CHATTELS.—A mortgage of subsequently acquired property, especially by general terms of description, which is not the product, increase or accretion of something already owned by the mortgagor, amounts to nothing more than a mere agreement to give a future mortgage, and confers no lien on such after-acquired property. (p. 105.)

CHATTEL MORTGAGE, When Void Because Mortgagor had No Potential Interest.—A mortgage of an entire crop raised or to

be raised by the mortgagor during a year designated and also crops raised each successive year until the debt is paid cannot affect crops raised in the future on lands in which the mortgagor had no interest and which had not been leased to him when the mortgage was executed. (p. 105.)

Action for the destruction of a mortgage lien on chattels. Judgment for the defendants; plaintiff appealed.

D. C. Almon and J. M. Irwin, for the appellant.

G. O. Chenault, for the appellee.

³⁴² HARALSON, J. The plaintiffs, Windham & Co., sued the defendants, Stephenson & Alexander, in an action on the case, to recover one hundred dollars damages for an alleged wrongful removal and disposition of two bales of cotton and fifty bushels of corn, upon which plaintiffs claim to have a lien by virtue of a mortgage executed on the 18th of February, 1903, by Charles Daugherty to Tollie Hodges, and which was by the latter, for value received, transferred, on the 19th of February, 1903, to the plaintiffs. The mortgage was, to repeat its language, on "the entire crop of cotton and corn, fodder, grain or other articles of any kind, raised or to be raised by me and ³⁴³ family during the year 1903; also the crops raised each successive year until the debt hereby secured is paid in full."

The undisputed evidence shows that Charles Daugherty was farming in 1903, on land rented by him from said Hodges; and on February 18th of that year he executed to said Hodges a note for one hundred dollars, payable on the 15th of October following; and to secure said note, he, at the same time, executed a mortgage on his crop of that year, which note and mortgage, as stated, were for value transferred the day after their execution, to the plaintiffs, and it is under this mortgage they claim to be entitled to prosecute this suit.

As stated, said mortgage, besides conveying his crop of that year, contained the clause, "Also the crops raised each successive year, until the debt hereby secured is paid in full." It is under the latter clause that the plaintiffs claim a lien upon the cotton and corn in controversy.

This clause, *prima facie* and presumptively, upon its face, in connection with the other facts of said mortgage conveying the crops of that year, would refer to the crop in after years grown on the same premises that the crop of 1903 was raised upon.

At the date of the execution of said mortgage Daugherty owned no land of his own and was renting land upon which he was then cropping from said Hodges.

The cotton and corn to which the suit relates were raised by Daugherty in the year 1906, three years after the crop which he was raising, in 1903, on land rented from Hodges, and on land rented in 1906 from one W. C. Wallace. At the time of the execution of said mortgage—February 18, 1903—as appears and as stated, Daugherty not only owned no lands of his own, and had no others rented, but had no interest in the lands, by lease ³⁴⁴ or otherwise, on which he farmed in 1906, which lands he afterward rented from said Wallace, and on which the cotton and corn in controversy were raised. The defendant bought from said Daugherty, as is shown without conflict in evidence, the said two bales of cotton and fifty bushels of corn, part of the crop raised by him in 1906 on the Wallace lands, shown to be worth one hundred dollars.

It may be stated in passing that plaintiffs aver, “which said cotton and corn defendants sold and removed, or caused to be removed, beyond plaintiffs’ reach, or caused the same to be so mixed with other corn and cotton as to be indistinguishable therefrom, by reason of which said unlawful acts of the defendants plaintiff is prevented from enforcing his said lien thereon under his said mortgage.”

Waiving, for the present, consideration of the question as to whether plaintiffs had a lien on said crops, it would seem that they were bound to make the truth of this averment in their complaint reasonably to appear. There is, however, an absence of any evidence in support of this averment; and from aught appearing, defendants had said cotton and corn, separate from any other in the same condition as when they bought it, at the time this suit was brought and at the time of the trial of this case. No reason is shown for making it appear that plaintiffs’ lien, if they had one, had been destroyed and could not be enforced. No facts or circumstances are proven further than that they bought said property from Daugherty, which tend to show that defendants have done any acts with reference to the property in question; and the mere fact of their purchase, without more, was not wrongful as destructive of plaintiffs’ alleged lien.

As to said alleged lien, in order to establish it, it is held that “while the thing itself need not have identity, or separate entity, yet it must at least be the product, or

³⁴⁵ growth, or increase of property, which has at the time a corporeal existence, and in which the mortgagor has a present interest, not a mere belief, hope or expectation, that he will in the future acquire such an interest": *Paden v. Bellenger*, 87 Ala. 576, 6 South. 351; *Alabama S. Bank v. Barnes*, 82 Ala. 607, 2 South. 349; *Varnum v. State*, 78 Ala. 28; *Burns v. Campbell*, 71 Ala. 271; *Mayer v. Taylor*, 69 Ala. 403, 44 Am. Rep. 522; *Grant v. Steiner*, 65 Ala. 499.

"If a tenant should mortgage such crops as might be raised or grown by him on some indefinite place which he expected to rent, the conveyance would, we apprehend, be inoperative and void, as an attempted conveyance of a mere possibility or expectancy, not coupled with any interest in or growing out of property": *Burns v. Campbell*, 71 Ala. 271.

"A mortgage of subsequently acquired property, especially by general terms of description, which is not the product, increase or accretion of something already owned by the mortgagor, amounts to nothing more than a mere agreement to give future mortgage. It confers no specific lien on such after-acquired property": *Christian & C. G. Co. v. Michael*, 121 Ala. 84, 77 Am. St. Rep. 30, 25 South. 571.

In *Karter v. Fields*, 140 Ala. 352, 37 South. 204, in reference to the facts in that case, similar to the ones here, it was held: "Whether the mortgage of 1890 from Persall to Fields vested the latter with a lien on crops grown in 1893 depended upon whether Persall was the owner of the land on which the crops were grown in 1893, when he executed the mortgage in 1890."

Applying these principles to the case in hand, it would seem that to create a lien on crops to be grown, the mortgagor must have owned or had some interest in the lands on which the crops were grown, and if Daugherty, ³⁴⁶ in February, 1903, had no interest in the lands upon which the crops of 1906 were grown, at the time he executed the plaintiffs' mortgage—and it is not pretended he had any such interest—these plaintiffs had no lien on the crops grown in 1906, and would have no grievance against defendants, no matter what they did with the crops purchased by them from Daugherty. As to these crops, as was said in *Burns v. Campbell*, 71 Ala. 271, the mortgage was "inoperative and void, as an attempted conveyance of a mere

possibility or expectancy, not coupled with any interest in or growing out of property.”

We find no error in the charge given for the defendants, nor in refusing the one requested by plaintiffs, which are the only errors assigned.

Affirmed.

Tyson, C. J., and Dowdell and Simpson, JJ., concur.

The Validity and Effect of Mortgages on Unplanted Crops are considered in the note to *Burrill v. Whitcomb*, 109 Am. St. Rep. 520. It is said in the recent case of *Holt v. Lucas*, 77 Kan. 710, 127 Am. St. Rep. 459, where a mortgage covering the increase of animals is under consideration, that a chattel mortgage can operate only on property having an actual or potential existence at the time of its execution. If it is not in existence, the mortgage cannot be treated as valid so far as third persons are concerned.

ROMAN v. MONTGOMERY IRON WORKS.

[156 Ala. 604, 47 South. 136.]

RES JUDICATA—Judgment in Garnishment, Discharging Garnishee Without Contest or Trial.—If the garnishee answers denying his indebtedness to the defendants, and the plaintiff, failing to file a contest to the answer, permits a judgment of discharge of the garnishee to be entered, this is a judgment on the merits, and conclusive between the plaintiff and the garnishee that the latter was not indebted to the defendant. (p. 108.)

Suit in equity by Sigmund Roman against the Montgomery Iron Works and certain of its stockholders. The defendant in his answer pleaded that a writ of garnishment had issued at the instance of the complainant on a judgment obtained by him against the iron works; that the garnishee answered denying the indebtedness, and there being no contest on this answer, that judgment was entered discharging the garnishee. Judgment in favor of the garnishee and the plaintiff appealed.

Gunter & Gunter, for the appellant.

Massey Wilson, for the appellee.

606 ANDERSON, J. When this cause was here upon former appeal (147 Ala. 434, 41 South. 811), we held that the plea of *res adjudicata* interposed by Dimmick was sufficient, and as its averments were admitted he was entitled

to his discharge. We are still of the opinion that the judgment rendered, discharging him upon the denials of his answer, was conclusive on this particular creditor (Roman), and that there was nothing owing from Dimmick to the Montgomery Iron Works. Had the complainant contested the answer, there could be no question as to the conclusiveness of the judgment. On the other hand, when the garnishee filed his sworn answer denying indebtedness, the plaintiff had the right to contest it, and, failing to do so, he in effect conceded that it was true, and the garnishee was entitled to his discharge: *Hurst v. Home P. I. Ins. Co.*, 81 Ala. 174, 1 South. 209. And a judgment so rendered was an adjudication by the court as to an indebtedness *vel non*. It was a finding upon the only issue involved in the controversy, and was to all intents and purposes a judgment upon the merits. It is true that a judgment of nonsuit or dismissal in a garnishment case would conclude ⁶⁰⁷ nothing but cost: *Wise v. Falkner*, 45 Ala. 471. But the failure of the creditor to contest the answer, and who in the meantime permits the court to proceed to judgment, is unlike the mere dismissal of the garnishment, but is in effect an admission of the recitals of the answer. And a judgment rendered thereon for the plaintiff, if the answer admitted indebtedness, would be conclusive between the immediate parties, and one rendered for the garnishee, when the answer denied indebtedness, would also be conclusive as between the creditor and the garnishee.

The creditor makes the only issue the law contemplates, by making the affidavit which is the institution of the suit, and which charges the garnishee with being indebted, etc., to the debtor. If the garnishee admits the charge by his answer, the plaintiff would be entitled to a judgment against him, and there would be no room to question the conclusiveness of the judgment. If he denies the indebtedness, that merely puts upon the plaintiff the burden of proving his charge, which he can do by contesting the answer, and failing to do so is no failure to present an issue, as the issue was previously presented, but is a declination on his part to prove the one and only issue involved. And a judgment rendered for the garnishee would be as conclusive as one rendered for the plaintiff, when the indebtedness was admitted by the answer. Our court, in the case of *Steiner v. First National Bank*, 115 Ala. 379, 22 South. 30, speaking through Brickell, C. J., in discussing judgments in

garnishment suits, and the effect of same, says: "A garnishment, as it has often been defined and described in the course of judicial decision, is 'the institution of a suit by a creditor against the debtor of his debtor, and is governed by the general rules applicable to other suits adapted to the relative situation of the parties': 1 Brickell's Digest, p. 173, sec. 276. Such being ⁶⁰⁸ the nature and character of the proceeding, it follows necessarily that the judgment rendered, as between the parties, the plaintiff instituting it, and the garnishee standing in the relation of a defendant, has all the properties and qualities of finality and conclusiveness of a judgment rendered in any other civil suit. A judgment against the garnishee in favor of the plaintiff as finally and conclusively fixes and determines the liability of the garnishee and the rights of the plaintiff as if it had been rendered in a suit inter partes commenced in the ordinary mode of instituting civil suits; and such is in effect the declaration of the statute: Code 1886, sec. 283. A judgment against the plaintiff, discharging the garnishee, the only final judgment which can be rendered in his favor, as conclusively adjudges that he was not subject to the process, was not the debtor of the plaintiff, and had not possession or custody or control of effects of such debtor. Either judgment, the one in favor of the plaintiff or that in favor of the garnishee, concludes the rights of the parties in respect to the cause of action involved—the matter of right asserted by the one and denied by the other."

The decree of the city court is affirmed.

Haralson, Simpson and McClellan, JJ., concur.

Dowdell and Denson, JJ., dissent.

A Judgment Against a Garnishee is prima facie a bar to a subsequent recovery of the same debt by any person: Sessions v. Stevens, 1 Fla. 233, 46 Am. Dec. 339. And where property in the hands of a garnishee is adjudged to belong to the defendant in the attachment proceedings, and the garnishee acts in good faith, the judgment is conclusive between the plaintiff, the defendant, and the garnishee: Adams v. Filer, 7 Wis. 306, 73 Am. Dec. 410. See, also, Bowen v. Port Huron etc. Co., 109 Iowa, 255, 77 Am. St. Rep. 539. A valid judgment in a garnishment suit is entitled to full faith and credit in another state: Chicago etc. R. R. Co. v. Moore, 31 Neb. 629, 28 Am. St. Rep. 534.

CASES
IN THE
SUPREME COURT
OF
COLORADO.

JENNINGS v. BROTHERHOOD ACCIDENT COMPANY.

[44 Colo. 68, 96 Pac. 982.]

INSURANCE—Sick Benefits—Time to Sue.—By Denying Its Liability for sick benefits and refusing to pay them, an insurance company waives a provision in the policy that no action shall be commenced against it until three months after the receipt of proof of loss. (p. 110.)

INSURANCE—Sick Benefits—Time of Notice of Disability.—Under a policy requiring one claiming sick benefits to give notice "within ten days from the commencement of total disability," the time limited does not commence to run until he realizes that his illness is sufficiently serious to prevent him from following his usual vocation. Notice immediately given on the discovery of such serious condition is seasonable, although the illness, first diagnosed as a slight indisposition, commenced twenty days before, at which time the insured quit work by advice of his physician, and although the notice fixes the beginning of the disability at the time of the inception of the illness. (p. 112.)

INSURANCE—Liberal Construction.—Having Indemnity for Its Object, a policy of insurance is to be construed liberally to that end, and for this reason conditions and provisos are construed strictly against the insurer. (p. 113.)

INSURANCE — Sick Benefits — Total Incapacity Defined.—A person may be regarded as totally incapacitated, within the meaning of a policy insuring him against sickness, notwithstanding he takes outdoor exercise by the advice of his physician, provided he is entirely incapacitated for work or business on account of his illness. It is not necessary that he should be helpless, or confined to his bed or house. (pp. 113, 114.)

CONTRACTS.—In Construing a Contract the First Point to ascertain is what the parties meant, intended and understood by the words employed, and as an aid in this respect the object in making the agreement may be taken into consideration. (p. 114.)

INSURANCE—Sick Benefits—Unknown Illness.—Under a policy insuring against sickness, the insured is not required, as a condition to recovery, to definitely name the illness on account of which his claim is made, or its origin or cause, but he must furnish evidence of a physical condition as the result of illness which incapacitates him for labor. (p. 114.)

Miller, Barnd & Affalter and Ernest L. Williams, for the appellant.

Oscar A. Johnson, for the appellee.

⁷¹ GABBERT, J. Appellant held a policy of insurance issued by the appellee. This policy provided for payment to the insured of a stipulated sum per week for a specified time during disability resulting from sickness. Under this policy appellant brought suit before a justice of the peace to recover from the appellee the benefits to which he claimed to be entitled, and obtained judgment, from which the defendant company appealed to the county court, where it was tried *de novo*. At the conclusion of the testimony on the part of plaintiff, a motion for nonsuit was interposed by the defendant, and sustained. From this judgment the plaintiff appeals. The motion for nonsuit was based upon the following grounds: (1) That the suit was prematurely brought; (2) that notice of plaintiff's disability was not served within the time required; (3) that the plaintiff was not confined to the house for fourteen consecutive days, as required by the terms of the policy, to entitle him to sick benefits; (4) that plaintiff did not prove from what disease he was suffering, and was unable to prove any particular disease.

In order to determine whether or not the judgment of nonsuit based upon these grounds was correct, it becomes necessary to briefly review the evidence bearing on the questions raised by the motion. ⁷² The policy provides that "No legal proceedings for recovery under this certificate shall be brought until the expiration of three months after receipt by the company of acceptable proofs of loss." Within less than three months after proofs of plaintiff's illness had been received by the defendant company, he commenced suit to recover the benefits to which he claimed to be entitled. It appears from the testimony that when he first notified the defendant of his illness, it denied all liability on the policy; and that when he furnished the proofs of such illness, the company again refused to recognize that it was under any obligation to him whatever on the policy in question. Having denied its liability, and having expressly refused to pay plaintiff's claim, the defendant waived its right to insist that under the terms of the policy quoted no action should be commenced against it until three months after the receipt of plaintiff's proof of claim: California Ins.

Co. v. Gracey, 15 Colo. 70, 22 Am. St. Rep. 376, 24 Pac. 577; Preferred Accident Ins. Co. v. Fielding, 35 Colo. 19, 83 Pac. 1013; United States Casualty Co. v. Hanson, 20 Colo. App. 393, 79 Pac. 176; Modern Brotherhood of America v. Cummings, 68 Neb. 256, 94 N. W. 144.

The provision of the policy invoked by the defendant is for its benefit, as stated in substance in *California Ins. Co. v. Gracey*, 15 Colo. 70, 22 Am. St. Rep. 376, 24 Pac. 577, in order to afford it an opportunity to investigate the causes of loss and verify the proofs thereof, and also to give it an opportunity for making financial arrangements to discharge its obligation; but where, as in this instance, it repudiates all liability to the insured upon its policy, he may bring action at once upon being notified by the company that his claim will not be paid.

The policy provides that: "In the event of . . . sickness for which, directly or indirectly, any claim may be made under this certificate, no benefits will become due or be paid, nor will the company ⁷³ be liable therefor, unless notice in writing shall be received at the home office of the company . . . within ten days from the commencement of total disability resulting from sickness, which notice must be signed by the certificate holder or his attending physician or beneficiary, stating full particulars, giving occupation of the certificate holder at the time, together with the number of his certificate, and his address."

The insured became indisposed and quit work about December 20th. He says that at this time "I laid off for two or three days, got to feeling pretty good again, and I went back to work, and about January 1, 1903, or that evening, or December 31, 1902, I went home, hardly able to walk home. I did not go to work at all in the morning, thinking a few days' rest would fetch me out all right; talked to the doctor and he advised me to lay off a little bit."

According to his statements, from this date he did little or no work, and kept on getting worse until about the 20th of the month, when he was totally disabled from doing any work whatever. His physician testifies that when he first prescribed for him, which was about the 1st of January, he thought he was suffering from a cold, with some trouble of the vocal cords; that at this time he did not regard his patient's illness as at all serious; that a few days later he observed he was not improving, and advised him to refrain from work for three or four days, but that he did not im-

prove; that about the 20th of the month he came to the conclusion that his diagnosis was wrong, and that he was more seriously ill than he anticipated, and that although he did not realize it at first, the insured was really incapacitated for work from the 1st of January, or shortly after he first began to treat him. At the request of the insured ⁷⁴ the doctor notified the company of his patient's illness, placing the date of his disability from about the 1st of January. This notice was dated January 21st, and received by the company five days later. In the proof subsequently submitted by the insured to the company he places his disability as commencing about January 1st. The company refused to recognize any liability to the insured because, according to the notice of his disability, he had failed to notify the company within ten days from the date it began.

The purpose of the provision of the policy invoked by the defendant and above quoted was to enable it to verify the statements made by the insured, in order to protect itself from fraud, and the notice thereby required is a condition precedent to a right of recovery under the policy, but it does not compel an insured to determine at his peril when actual disability commenced. According to the policy, it is not every illness for which benefits are paid, but only that of such a nature as incapacitates the insured from following his usual avocation; so that it is only from the date disability caused by illness occurs that the time for notice begins to run. According to the testimony of the insured and his physician, it appears that neither thought the illness from which the former was suffering was at all serious, or of such a character as to incapacitate him for labor, except as a matter of precaution, until about the 20th of January, when, for the first time, the physician realized that his patient was really seriously ill, and as a fact had been incapacitated for work since about the first of the month. In such circumstances, the time for giving notice required by the condition of the policy under consideration did not commence to run until the insured realized that his illness was sufficiently serious to prevent him from ⁷⁵ following his usual avocation: *United States Casualty Co. v. Hanson*, 20 Colo. App. 393, 79 Pac. 176; *Rorick v. Railway Officials & Employés Assn.*, 119 Fed. 63, 55 C. C. A. 369; *Grant v. North American Cas. Co.*, 88 Minn. 397, 93 N. W. 312; *Odd Fellows' F. A. Assn. v. Earl*, 70 Fed. 16, 16 C. C. A. 596.

True, it was stated in the notice to the company, and also in the proof submitted, that the insured's disability began about January 1st, or more than ten days previous to the receipt of the notice by the company, but that is not material, when it appears from the evidence that this statement was made because neither the insured nor his physician realized until about January 20th that his illness was sufficiently serious from its inception to entitle him to benefits under the policy of insurance issued by the defendant company. The insured was only entitled to sick benefits from the date his disability began, and he could not honestly make any claim against the company under the policy until he honestly believed he was disabled for work on account of his illness, and merely because he and his physician made a mistake with respect to his condition in the early stages of his illness does not preclude his recovery.

The policy further provides that: "A disability, to constitute a claim for indemnity for sickness only, shall be continuous, complete and total, requiring absolute, necessary confinement to the house for not less than fourteen consecutive days." It appears from the testimony that during a considerable portion of the period for which plaintiff claimed sick benefits he was out nearly every day, by advice of his physician, when the weather was favorable; and that he was not actually confined to his bed on account of sickness during that time. It does appear, however, that during this period he was not able to perform any labor, or pursue his usual calling. Policies of insurance, like other written ⁷⁶ contracts, are to be considered and construed with a view to carry out the intention of both parties: *Goodrich v. Treat*, 3 Colo. 408; *State Ins. Co. v. Taylor*, 14 Colo. 499, 20 Am. St. Rep. 281, 24 Pac. 333.

The intention of the parties to a contract of insurance is indemnity, and this intention is to be kept in view and favored in construing its provisions. Having indemnity for its object, a policy of insurance is to be construed liberally to that end, and for this reason conditions and provisos therein will be strictly construed against the insurers, because their object is to limit the scope and defeat the purpose of the principal contract: *Providence L. S. I. Soc. v. Cannon*, 103 Ill. App. 534; 1 May on Insurance, 4th ed., sec. 174.

The evident purpose of the policy, construed as a whole was to indemnify the insured from loss occasioned through

illness, by providing for the payment to him of certain benefits while incapacitated for performing labor. When so incapacitated he was disabled within the meaning and intent of the policy. It was not necessary that he be helpless, or that he remain in bed, or in the house, during such illness, when it might advance his recovery and correspondingly relieve the company from its obligations to him, if he should take some exercise and expose himself to the healing influences of sunshine and fresh air, provided he is entirely incapacitated for work or business on account of his illness: *Mutual Benefit Assn. v. Nancarrow*, 18 Colo. App. 274, 71 Pac. 423.

The policy further provided that: "No disability shall constitute a claim for indemnity on account of any sickness the nature of which is unknown or incapable of direct and positive proof."

Plaintiff testified he thought that his illness was caused by a cold, and, to use his own language: "Then, I suppose I took another cold on top of that." He further states, in effect, that neither he nor his physician could name it definitely. His physician stated that he had contracted a cold, which had settled on the vocal cords and brought about a condition of chronic laryngitis, but on account of the fact that he had lost his strength and was unable to take even moderate exercise, he thought there was something else ailing him. That plaintiff was ill, and totally incapacitated for performing labor, was established without dispute by the testimony, although it does not appear with certainty what disease he was suffering from.

In construing a contract, the first point to ascertain is what the parties thereto meant, intended and understood as determined by the words employed, and, as an aid in this respect, the object of the parties in making it may be taken into consideration: *Colorado F. & I. Co. v. Pryor*, 25 Colo. 540, 57 Pac. 51. The object of the insured was to provide for an indemnity in case of illness which incapacitated him for labor. The purpose of the provision in the policy under consideration was to protect the company against fraud by preventing the insured simulating illness. It does not impose upon the insured the burden of definitely naming the illness on account of which a claim is made, or its origin, or cause, but that he must furnish evidence of a physical condition as the result of illness which incapacitates him for labor. When he does this he satisfies its purpose—i. e., that

he is not simulating illness, and at the same time establishes a fact necessary to entitle him to indemnity. Plaintiff had lost his strength and was unable even to take a moderate degree of exercise. Extreme weakness was his physical condition, and precisely what particular disease may have caused it is not material, when it was established beyond question that physical ⁷⁸ weakness, resulting from illness, incapacitated him for work or business.

It is apparent from the testimony bearing on the grounds upon which the motion for nonsuit was based, that plaintiff made out a prima facie case, and hence it follows that the trial court erred in sustaining the motion.

The judgment of the county court is reversed and the cause remanded for a new trial.

Chief Justice Steele and Mr. Justice Campbell concur.

The Principal Case is Cited as Controlling in the subsequent case of Brotherhood Accident Co. v. Jennings, 44 Colo. 144, 96 Pac. 985, a decision presenting, in the main, questions similar to those involved in the principal case.

A Provision in a Policy of Insurance that Written Notice of Illness must be given at a certain place within ten days from the inception of the illness is not void because unreasonable; and if the policy further provides that the illness must last for more than one week and that the insured must be continuously confined to his bed and regularly attended by a physician, a notice given within ten days from the time the physician begins his visits is within the terms of the policy: Craig v. United States etc. Ins. Co., 80 S. C. 151, 128 Am. St. Rep. 877. But it has been held that under a policy insuring against accident, provided written notice is given within ten days after the injury, the time for giving such notice begins to run on the happening of the accident, though the person is not aware until long afterward that a serious consequence will ensue: Hatch v. United States Casualty Co., 197 Mass. 101, 125 Am. St. Rep. 332, and see cases cited in the cross-reference note thereto.

The Denial of Liability for Loss or Injury Under a Policy of Insurance amounts to a waiver of notice of the injury or proof of loss: Home Ins. Co. of New York v. Koob, 113 Ky. 360, 101 Am. St. Rep. 354; Security Mut. Ins. Co. v. Woodson, 79 Ark. 266, 116 Am. St. Rep. 75; Ohio Farmers' Ins. Co. v. Vogel, 166 Ind. 239, 117 Am. St. Rep. 382; Springfield Fire etc. Ins. Co. v. Reynolds, 107 Md. 107, 126 Am. St. Rep. 379.

STUBBS v. MCGILLIS.

[44 Colo. 138, 96 Pac. 1005.]

JUDGMENT—Vacating for Want of Service.—A judgment is properly set aside on motion when it is shown that no service of process was made upon the defendant. (p. 118.)

PROCESS—Amendment to Correct Name.—The court does not abuse its discretion in refusing the amendment of a return of service of summons to correct the defendant's initial, if he testifies positively that the summons was not served on him, and the officer has no recollection of such service. (pp. 118, 119.)

JUDGMENT.—The Statement of the Return of Service of summons controls the recital of service in the judgment when the only evidence of service is that contained in the return; hence a recital in the judgment showing proper service does not aid a return showing a want of proper service. (p. 119.)

JUDGMENT—Motion to Vacate.—An Affidavit of Merits is unnecessary to vacate a judgment obtained without jurisdiction of the person of the defendant. (p. 119.)

JUDGMENT.—A Delay of Five Years in Moving to Vacate a Judgment for want of service on the defendant does preclude relief, in the absence of a showing that the plaintiff is in any different position than he otherwise would have been, or that the rights of innocent third persons will be violated. (p. 119.)

JUDGMENT—Time to Vacate.—A Judgment Rendered With-out Service upon the defendant is void, and subject to direct attack at any time. (p. 119.)

APPEARANCE—Proceedings Sufficient to Constitute.—Where the defendant against whom a judgment has been rendered without service of process appears to quash a garnishment and to contest a motion to amend the return of service, he submits himself to the jurisdiction of the court. (p. 120.)

JUDGMENT—Effect of Vacating for Want of Service.—When a judgment is vacated for want of service, but the defendant has, by appearing in the proceedings after judgment, submitted himself to the jurisdiction of the court, the action does not abate, but he will be permitted to answer or demur. (p. 120.)

Wilson & McClosky, for the plaintiffs in error.

Ritter & Buchanan, for the defendants in error.

139 BAILEY, J. In 1899 the plaintiffs in error instituted an action against defendants in error in the district court of La Plata county, to recover a judgment upon two promissory notes. The sheriff made return of the summons, which was issued, and that he had served the same by delivering a true copy of the ¹⁴⁰ summons, together with a copy of the complaint, "to the within named defendants, M. J. McGillis and Peter Monteith," in La Plata county, upon the "10th day of Feb., A. D. 189—." No answer was filed to the complaint and no appearance entered upon the part of either of the defendants, and judgment was rendered by

default on the third day of April, 1899. The judgment recites, *inter alia*, "that said defendant has been regularly served with process and has failed to answer the complaint herein."

Upon the 17th of October, 1904, garnishee summons in this action was served upon the First National Bank of Durango. The bank answered that "D. J. McGillis has a credit balance with us of \$1,331.65." Upon the 7th of November, 1904, the defendant D. J. McGillis filed a petition in the district court, alleging that no service of summons was had upon him in the original action, that he did not learn of the rendition of the judgment until after the 17th of October, 1904, and made certain allegations concerning the moneys on deposit in the bank for the purpose of showing that they rightfully belonged to parties other than the defendant, and then filed a motion to vacate the judgment entered in 1889, for the reason that the summons had never been served upon him. On the 19th of December, 1904, the plaintiffs filed a motion that the court "require and permit Joseph P. Airy, the one time acting sheriff in and for said La Plata county, and who served the summons in the above-entitled action as such sheriff, to amend his return on said summons so as to show the facts in regard to said service." Attached to the motion was the affidavit of the sheriff, wherein he stated that he served the summons upon defendants D. J. McGillis and Peter Monteith by delivering to each of them, within the county of La Plata, a copy of the summons, together with a copy of the complaint, ¹⁴¹ upon the tenth day of February, A. D. 1899; that by inadvertence and mistake in writing the return he wrote the name of "M." J. McGillis instead of "D." J. McGillis, and that he omitted to place the figure "9" after "189—," the year in which the service was made. These motions were heard by the court at the same time, and at the hearing the defendant McGillis testified that the summons was never served upon him, but that he had heard of the pendency of the case and the entering of the judgment three or four years previous, and that the statement made in his affidavit that he had not heard of the existence of the judgment until 1904 was a mistake; that in 1899, so far as he knew, there was no person residing in La Plata county by the name of M. J. McGillis.

Airy, the former sheriff, testified that he wrote the return on the summons, but that he had no present recollec-

tion of serving it; had no recollection of serving either Monteith or McGillis, and that he did not know of any M. J. McGillis in the county, and never heard of one.

The court granted the motion to vacate the judgment and denied the motion to amend the return, and the matter comes here upon error, plaintiffs contending that the court erred in both rulings, that the facts as shown by the testimony and the record proved indisputably that the summons was served upon the defendant McGillis, and that the writing of the initial "M." instead of "D." was a clerical error. They also assert that the recital in the judgment rendered in 1899, to the effect that there had been a service upon defendant, is a verity and overcomes the assertion made in the return that the service was made upon M. J. McGillis. They further contend that the defendant, having failed to allege that he had a meritorious defense to the cause of action, was in no position to complain of the rendition ¹⁴² of the judgment or to ask to have it set aside; and that, having waited for so great a length of time before moving against the judgment, he should be estopped from denying its validity.

If the evidence was sufficient to enable the court to determine that no service of the summons had been made upon the defendant, it became his duty to set the judgment aside: *Keely v. East Side Imp. Co.*, 16 Colo. App. 365, 65 Pac. 456; *Smith v. Morrill*, 12 Colo. App. 233, 55 Pac. 824; *Du Bois v. Clark*, 12 Colo. App. 220, 55 Pac. 750; *Great Western Min. Co. v. Woodmas of A. Min. Co.*, 14 Colo. 90, 23 Pac. 908.

In *Golden Paper Co. v. Clark*, 3 Colo. 321, it is said that application for leave to a ministerial officer to amend his return upon process may generally be regarded with liberality; that it is the memory of the officer against that of the defendant, and if the officer is sufficiently confident in his own recollection of the facts to make the proposed amendment, justice to the plaintiff would require that he should do so; but, in this action, while the affidavit of the officer affirms that he made the service of the summons upon the defendant, when he testified he said that he had no recollection of having done so. So that when the defendant testified positively and affirmatively that the summons was not served, and the officer has no recollection of its having been served, we cannot see that the court abused its discretion in refusing to permit an amendment of the return to

show that service was actually had. Notwithstanding the fact that the judgment recites that service of summons had been made upon the defendants, we think in this case the return upon the summons must control, the only evidence of service being that contained in the return.

“Where the return of the officer is inconsistent with the recitals in the judgment, the former must control, and a recital of proper service of a process ¹⁴³ will not aid the official return which shows a want of proper service”: 18 Ency. of Pl. & Pr. 987; Hemmer v. Wolfer, 124 Ill. 435, 16 N. E. 652; Hobby v. Bunch, 83 Ga. 1, 20 Am. St. Rep. 301, 10 S. E. 113; Lowe v. Alexander, 15 Cal. 296; Galpin v. Page, 18 Wall. 350, 21 L. ed. 959; Settlemier v. Sullivan, 97 U. S. 444, 24 L. ed. 1110.

In order to vacate a judgment which was obtained without jurisdiction of the person of the defendant, an affidavit of a meritorious defense to the action is not necessary in this state.

In Wilson v. Hawthorne, 14 Colo. 530, 20 Am. St. Rep. 290, 24 Pac. 548, it is said that an affidavit of merits might very properly be required, but that it was not essential and not traversable. The same thing is said in State Board of Agriculture v. Meyers, 13 Colo. App. 500, 58 Pac. 879. In Symes v. People, 17 Colo. App. 463, 69 Pac. 312, it is held that an allegation of a meritorious defense is not necessary, and so in Crippen v. X. Y. Irr. D. Co., 32 Colo. 447, 76 Pac. 794.

The contention that the defendant ought not to be heard to assert, after five years, that process was not served upon him, might be relied upon if it appeared that in the meantime rights of innocent third parties had accrued and would be violated by giving the relief sought. In the absence of such contention or proof touching the same, or in the absence of an allegation that the plaintiff is in any different position from what he would have been, had the defendant sooner moved against the judgment, the delay of the defendant will not be held to prevent his now doing so: Keely v. East Side Imp. Co., 16 Colo. App. 365, 65 Pac. 456; DuBois v. Clark, 12 Colo. App. 220, 55 Pac. 750; Smith v. Morrill, 12 Colo. App. 233, 15 Pac. 284.

There is another reason why the delay of the defendant could not be taken advantage of by the plaintiff, and that is, if the judgment was rendered without service upon the defendant, it was void as to him. A void judgment is worth-

less for any purpose, and can be directly attacked at any time when the ¹⁴⁴ party obtaining the same seeks to derive some advantage from it: Freeman on Judgments, sec. 117; Crippen v. X. Y. Irr. D. Co., 32 Colo. 447, 76 Pac. 794.

The defendant, having appeared for the purpose of quashing the writ of garnishment and for the purpose of contesting the motion of the plaintiffs to amend the sheriff's return, has submitted himself to the jurisdiction of the court, and, while the judgment of the court in denying the plaintiffs' motion and allowing that of the defendant must be upheld, the action will not, for that reason, abate; but the defendant may be permitted to answer the plaintiff's complaint or demur to it if it is defective, if he so desires.

The cause will be remanded, with direction to the court to fix a reasonable time in which the defendant should plead, and if he fails to do so, judgment may be rendered against him by default.

Affirmed and remanded for further proceedings in accordance herewith.

Chief Justice Steele and Mr. Justice Goddard concur.

An Affidavit of Merits is not essential to a motion to vacate a judgment which the court did not have jurisdiction to render: Norton v. Atchison etc. R. R. Co., 97 Cal. 388, 33 Am. St. Rep. 198. See, also, Mullins v. Rieger, 169 Mo. 521, 92 Am. St. Rep. 651; Toy v. Haskell, 128 Cal. 558, 79 Am. St. Rep. 70.

The Conclusiveness of an Officer's Return of Service of Summons is the subject of a note to Reiger v. Mullins, 124 Am. St. Rep. 756; and the admissibility in evidence of such return is the subject of a note to Driggers v. United States, 1 Okl. Cr. 167, 21 Okl. 60, 129 Am. St. Rep. 823.

HARVEY v. DENVER AND RIO GRANDE RAILROAD COMPANY.

[44 Colo. 258, 99 Pac. 31.]

PAYMENT—Manner of Pleading.—Payment is an Affirmative Defense which must be specially pleaded. (p. 123.)

RELEASE—Manner of Pleading.—A Release or an Accord and Satisfaction must be specially pleaded in order to be available. (pp. 124, 125.)

ASSUMPSIT—Express or Implied Contracts.—Under a Complaint presenting an indebitatus assumpsit, evidence of either an express or implied contract is admissible. (p. 125.)

EVIDENCE—Parol to Vary Contract.—Extrinsic Evidence is not admissible either to contradict, subtract from, add to or vary a written instrument. (p. 128.)

PAYMENT—Acceptance of Part as Satisfaction.—Where a claim is disputed and unliquidated, the acceptance of part in settlement thereof is a satisfaction of the demand, and a release in full given upon the settlement is conclusive. (p. 129.)

Thomas B. Stuart and Charles A. Murray, for the plaintiffs in error.

Wolcott, Vaile & Waterman and E. N. Clark, for the defendant in error.

259 MAXWELL, J. The complaint in this case stated two causes of action.

The first cause of action alleged a balance of \$564.04 due plaintiffs from defendant upon a written contract, entered into on the tenth day of September, 1901, for the construction of certain foundations, abutments, walls and stone work upon and along the line of defendant's railway.

The second cause of action alleged that between the twentieth day of September, 1901, and the seventh day of March, 1902, plaintiffs rendered services and furnished appliances and materials to the defendant, at defendant's special instance and request, of the reasonable and agreed aggregate value of \$3,330.90, setting forth in a bill of particulars, consisting of twenty-four items, the several amounts alleged to be due, aggregating the amount above stated.

It was further alleged that the amount had been due the plaintiffs from the defendant since the seventh day of March, 1902, and that the defendant had wholly failed and refused to pay the same, or any part thereof, although often requested so to do.

The demand was for a judgment for the total of the two amounts, to wit, \$3,894.94.

The answer to the first cause of action admitted on the tenth day of September, 1901, plaintiffs entered into a written contract with defendant whereby plaintiffs were to perform certain services and furnish materials and appliances, and that plaintiffs performed certain services and furnished materials under that contract, and became entitled to and were paid a large sum of money therefor, and that plaintiffs, under the terms and conditions of said contract, became entitled to payment in the further sum of **260** \$564.04, upon condition that plaintiffs would sign and deliver to defendant "a full and valid release and complete discharge of and from any and all claims and demands whatsoever for all matters growing out of or in any way connected with said contract"; and further alleged that it had never refused to pay said

sum of money to plaintiffs, but had frequently offered the same upon the signing and delivery of the release and discharge above referred to, and that defendant was now ready and willing to pay the same upon the signing and delivery of such receipt; and to keep such tender good, that the defendant had deposited in court the sum of \$564.04, payable to the order of plaintiffs upon the signing and delivery of the release and discharge provided for by the terms of the contract.

To the second cause of action the defendant answered, a general denial of each and every allegation thereof, except such as were expressly admitted, and for a second and further defense denied that any agent of defendant company had authority to request or procure the plaintiffs to render the services or furnish the materials referred to; denied that defendant requested or procured the plaintiffs to render such services or furnish such materials; denied that the plaintiffs rendered or furnished the services or materials, and alleged that on the tenth day of September, 1901, plaintiffs and defendant entered into a written contract for certain work in the construction of certain bridge abutments, subject to the covenants, conditions and limitations in said contract set forth, a copy of which contract was set forth in haec verba in the answer.

The answer further alleged that all services rendered and appliances and materials furnished defendant by the plaintiffs, as alleged in their second cause of action, if any such were rendered or furnished, ²⁶¹ were rendered and furnished under and in accordance with the terms, conditions, covenants and agreements of said contract, and not otherwise, and that, under the terms and conditions of said contract there is due the plaintiffs the amount of money sued for in the first cause of action; that payment of said amount of money was conditional upon the execution and delivery by plaintiffs to defendant of a full and valid release and complete discharge of and from all claims and demands whatsoever growing out of, or in any way connected with, said contract, and that plaintiffs had failed and refused to execute and deliver to defendant such release and discharge.

A reply put in issue the allegations of new matter in the answer.

The trial was to the court and a jury.

Upon the conclusion of all the evidence offered, upon defendant's motion, the court directed the jury to return a verdict in favor of the plaintiffs for the sum of \$564.04, be-

ing the amount sued for in the first cause of action and admitted to be due by the answer.

The following facts are uncontroverted:

The only written contracts between the parties during the period of time covered by the matters in controversy herein were the contracts of September 3 and September 10, 1901. Previous to the commencement of this suit the balances due plaintiffs from defendant under these contracts were ascertained and determined by the parties; the balance due under the contract of September 3d does not appear from the evidence, but was included in the sum of \$12,412.57, as shown by the receipt, release and discharge signed by plaintiffs dated April 21, 1902 (defendant's exhibit 4 of the record). The balance due under the contract of September 10th was ascertained to be \$564.04, as alleged in the complaint and ²⁶² admitted by the answer. About March 7, 1902, the plaintiffs presented a claim and made a demand on defendant for some \$3,000, for work done near Pueblo and at Fountain. Under date, April 21, 1902, the plaintiffs executed and delivered to defendant a receipt, release, discharge and acquittance for \$1,294.60, a voucher and a receipt for the same amount, and a receipt, release, discharge and acquittance for \$12,412.57 (exhibits 1, 2 and 4).

Plaintiff objected to the introduction in evidence of these exhibits, upon the ground that they had not been pleaded.

The answer to the second cause of action, hereinbefore outlined, was a general and specific denial of the allegations of the complaint, and a further answer to the effect, that if plaintiffs rendered the services and furnished the materials sued for, the same were rendered and furnished under the contract of September 10th, and not otherwise, and that payment of the balance admitted to be due upon said contract was subject to the condition that plaintiffs execute and deliver to defendant a full and valid release and complete discharge of all claims and demands whatsoever, "and that said plaintiffs have failed and refused, and still fail and refuse, to execute and deliver to this defendant such release and discharge as aforesaid."

Under this state of the pleadings defendant contends that the complaint having alleged nonpayment, proof of payment was admissible under the general issue raised by the answer, and authorities are cited in support of this position.

Whatever may be the rule in other jurisdictions, it is settled in this state that payment is an affirmative defense, and must be specially pleaded: *Esbensen v. Hoover*, 3 Colo.

App. 467, 33 Pac. 1008; *Perot v. Cooper*, 17 ²⁶³ Colo. 80, 31 Am. St. Rep. 258; *Thomas v. Carey*, 26 Colo. 485, 58 Pac. 1093; *Florence O. & R. Co. v. First Nat. Bank*, 38 Colo. 119, 88 Pac. 182.

Exhibits 1 and 4, by their express terms stating, "This receipt, release, discharge and acquittance made and executed," etc, clearly indicate that they were something more than simple receipts evidencing payment. An examination of exhibit 1, which was the one principally relied on to defeat a recovery in this action, shows that it was a release and an accord and satisfaction.

In *Alden v. Carpenter*, 7 Colo. 87, 1 Pac. 904, it is said: "In New York it is held that evidence of payment, release, accord and satisfaction, and such like defenses, is not admissible under a general denial, but must be specially pleaded, and this ruling is put upon the ground that the general denial, under the code, is wholly unlike the general issue at common law."

If a party intends to rely upon an accord and satisfaction, it should be set up as a defense in the answer: *Berdell v. Bissell*, 6 Colo. 162.

"In California it is held that a general denial puts in issue an allegation of nonpayment in the complaint. But in that state the averment of nonpayment seems to be essential, and without it there is no cause of action stated, so that a denial of that is a denial of a material allegation": *Esbenzen v. Hover*, 3 Colo. App. 467, 33 Pac. 1008.

Notwithstanding this rule in California, with reference to a release and an accord and satisfaction, Mr. Justice Field, writing the opinion in *Coles v. Soulsby*, 21 Cal. 47, said: "In our practice, a denial, whether general or special, only puts in issue the allegations of the complaint. The difference between a general and special denial in this respect is only in the extent to which the allegations are traversed. New matter ²⁶⁴ must be specially pleaded; and whatever admits that a cause of action, as stated in the complaint, once existed, but at the same time avoids it—that is, shows that it has ceased to exist—is new matter. It is that matter which the defendant must affirmatively establish. Such are release, and accord and satisfaction. Defenses of this character must be distinctly set up in the answer, or evidence to establish them will be inadmissible.

"Under the codes and practice acts a release or discharge must be specially pleaded in order to be available, since it

is an affirmative defense of new matter": 18 Ency. of Pl. & Pr. 89.

No authorities have been cited, and we have found none, which hold contrary to the doctrine announced above, as to the necessity of pleading a release or an accord and satisfaction.

Under the above authorities, exhibit 1, whether it be considered a simple receipt evidencing payment or a release or an accord and satisfaction, should have been pleaded to entitle it to admission in evidence.

Defendant contends that error was committed by the court in allowing one of the plaintiffs to testify, over the objection of defendant, in substance, that after the contract of September 3d had been signed, defendant's engineer stated that he wanted plaintiffs to prepare to get out a large quantity of crushed stone; that he wanted great quantities of riprap; that he wanted fifty thousand cubic yards between that time and the following June, before the spring floods came; and that the introduction of this testimony and the written contracts constituted a variance which changed the issues presented by the pleadings from an action on an implied contract to an action on express contracts, thereby justifying ²⁶⁵ the admission of exhibits 1 and 2 under the new issue thus presented.

The complaint presented an indebitatus assumpsit on a quantum meruit.

In *Hockaday v. County Commrs.*, 1 Colo. App. 362, 29 Pac. 287, it is said: "The action . . . was an action of indebitatus assumpsit at common law, and by the code the common-law remedy has not been restricted, but enlarged. This action will lie for 'the breach of all parol or civil contracts, whether verbal or written, or express or implied, for the payment of money': 1 Chitty's Pleadings, 112; Stephen's Pleadings, 49; *Curtis v. Fiedler*, 2 Black, 461, 17 L. ed. 273; *United States v. Russell*, 12 Wall. 623, 20 L. ed. 274; *Town of Queensbury v. Culver*, 19 Wall. 83, 22 L. ed. 100; *Barker v. Cory*, 15 Ohio, 9."

The second cause of action stated in the complaint was for services rendered and appliances and materials furnished to defendant at its special instance and request, and was broad enough to admit evidence of either an express or an implied contract. The court did not err in admitting the testimony, and its admission did not change the issues presented by the pleadings.

The error committed by the court in admitting exhibits 1, 2 and 4, over the objection of plaintiffs, for the reasons stated, will necessitate a reversal of the judgment.

Plaintiffs say that error was committed in the ruling refusing to allow them, upon rebuttal, to prove that there was no consideration for the execution of the receipts and releases dated April 21, 1902, known as exhibits 1, 2 and 4, other than the balance due on the contract of September 3, 1901.

A determination of the question thus presented involves an examination of these exhibits.

Exhibit 1, after reciting the execution, by the ²⁶⁶ parties thereto, of the contract of September 3d, and other matters immaterial to this discussion, proceeds:

“Whereas, the said final payment has heretofore been made to the said parties of the first part, and a full release to the said party of the second part, as in said contract provided; and

“Whereas, it is now claimed by the said William Harvey and Benjamin Fisher Threewit that the said parties of the first part to said contract are justly entitled to additional compensation for extra and extraordinary services, and the furnishing of labor, materials, superintendence, etc., outside of the terms of said contract, and in addition to such extra and extraordinary services and the furnishing of labor, materials and superintendence heretofore paid for by the said railroad company, and receipted for by the said parties of the first part; and

“Whereas, the said railroad company denies any further legal liability to said parties of the first part, by reason of said contract or otherwise, but is, notwithstanding such non-liability and the execution of a full release heretofore by the said parties of the first part, willing to pay to the said parties of the first part the additional compensation herein referred to, upon the execution of this additional release, by the said William Harvey and Benjamin Fisher Threewit;

“Now, therefore, the said William Harvey and Benjamin Fisher Threewit do hereby acknowledge the receipt, at the hands of the said The Denver & Rio Grande Railroad Company, of the further sum of twelve hundred and ninety-four 60/100 dollars (\$1,294.60), and that said amount is a full and final payment of all sums due or payable, or to become due or payable or claimable, by them under the terms of said contract, or on any account whatsoever, and of ²⁶⁷ all claims and demands of any and every character whatsoever for extra or extraordinary services or the furnishing of labor,

materials, superintendence, etc., at any time and in any manner, and on any account whatsoever by them under the terms of said contract hereinbefore referred to, and outside of the terms of said contract, and including the performance of additional work or the furnishing of additional labor, materials, superintendence, etc., during the course of the execution of said contract, and all contracts and in any manner whatsoever."

Exhibit 2, as found in the transcript of the record, appears to be an "Auditor's Voucher" upon a printed blank form, which sets forth that plaintiffs received of defendant the sum of twelve hundred and ninety-four and sixty one-hundredths dollars (\$1,294.60), "in full payment, accord and satisfaction of all and all manner of claims and demands of any and every character whatsoever arising out of or predicated upon the doing of extra or additional work or furnishing of additional labor, materials and superintendence in connection with the carrying out and performance of said contract and the specifications in said contract . . . and upon any and all other contracts between the parties named therein." The above language is repeated, in substance, several times in the instrument.

Exhibit 4, after reciting the execution by the parties thereto of the contract of September 3, 1901, as in exhibit 1, proceeds:

"Whereas, the said contract has been duly performed except in respect to the execution and delivery of the aforesaid release and discharge;

"Now, therefore, the said William Harvey and Benjamin Fisher Threewit do hereby acknowledge the receipt, at the hands of The Denver & Rio Grande Railroad Company, of the sum of twelve ²⁶⁸ thousand four hundred and twelve dollars and fifty-seven cents (\$12,412.57), and that said sum is a full and final payment of all sums due or payable, or to become due and payable, under the terms of said contract," etc.

From the above excerpts it is apparent that exhibit 4 is an instrument separate and distinct from exhibits 1 and 2, and that it was executed pursuant to that requirement of the contract of September 3d, to the effect that the plaintiffs, before receiving final payment, should sign and deliver to defendant "a full and valid release and discharge of and from any and all claims and demands whatsoever for all matters growing out of or in any way connected with this contract."

It is equally apparent that exhibits 1 and 2 were executed by plaintiffs upon receipt from defendant of the sum of money therein stated, in full payment, accord and satisfaction of a demand or demands which they were making against defendant for extra work, services and materials, outside of the terms of said contract; that defendant disputed this claim, and denied legal liability thereon; that the claim or demand of plaintiffs was unliquidated, and that the amount paid and receipted for must have been arrived at by a composition.

This conclusion is fortified by the testimony of Mr. Harvey, to the effect that about March 7, 1902, plaintiffs presented a claim against defendant for about \$3,000.

Exhibits 1 and 2 are clear, unambiguous and intelligible, and require no extrinsic evidence to explain or elucidate any of their terms.

The standpoint of all parties to the transaction is manifest from the language employed in the several instruments, and no evidence is necessary to ²⁶⁹ explain the circumstances under which they were executed or the nature of the transactions involved.

It is not possible to believe that plaintiffs misunderstood the force, effect and import of the releases which they signed, or that they did not know that they thereby released, satisfied and discharged, for the consideration therein named, all claims and demands whatsoever which they had against defendant growing out of any and all contracts and transactions previous to the date of the releases.

No authorities are necessary in support of the rule that extrinsic evidence is not admissible to either contradict, subtract from, add to or vary a written instrument.

For some purposes the consideration stated in a deed may be shown to be different from that expressed, but this cannot be done for the purpose of avoiding the deed or varying its effect.

No pretence is made that exhibits 1 and 2 were procured by fraud, mistake or misrepresentation. The testimony sought to be introduced, as stated in the offer, was to prove "that there was no consideration whatever for the receipt and release dated April 21, 1902, offered in evidence by the defendant, other than the acknowledgment of payment of the balance due plaintiffs under the contract of September 3, 1901."

In support of their contention counsel cite a number of authorities in support of the well-settled principle that pay-

ment of a sum of money less than the full amount due upon an undisputed matured debt will not operate as a defense to a suit for the balance of the debt.

The authorities cited are not in point, for the reason that the evidence in this case, and exhibits 1 and 2, conclusively show that the debt, claim or ²⁷⁰ demand, which is covered by such exhibits, was disputed and unliquidated.

This case comes within the rule announced by the courts of this state.

In *Rio Grande Co. v. Hobkirk*, 13 Colo. App. 180, 183, 56 Pac. 933, the court said: "It is always the law that where the sum in controversy is disputed and a party offers a fixed sum in satisfaction, attaches to the offer the condition that if taken at all it must be received in full settlement, it will operate as an accord, and the receipt of the money will be a satisfaction. Proof of the condition and the acceptance of the money in satisfaction must be clear. This is a familiar rule which has often been expressed and was plainly put in *Berdell v. Bissell*, 6 Colo. 162."

In *Chicago etc. Ry. Co. v. Mills*, 18 Colo. App. 8, 69 Pac. 317, it is said: "It is laid down in the books in general terms that a receipt for money is only prima facie evidence of payment, and may be explained or contradicted by parol evidence. But the rule is applicable only to cases where the money is due and the amount is undisputed. If there is no disagreement as to the amount, a receipt for a less sum, in full of the entire demand, does not bind the creditor, because it is without consideration. . . . Neither is the rule applicable to the settlement of an unliquidated demand effected fairly, and with full knowledge of all the facts; and a receipt in full given upon such settlement is conclusively against the party giving it."

Guldager v. Rockwell, 14 Colo. 459, 24 Pac. 556, was a suit by a widow for damages for negligence in causing the death of her husband. The defendant pleaded accord and satisfaction, and in support of the plea produced a paper signed by the parties which, inter alia, recited that on the day of the date of the instrument ²⁷¹ the parties "had a full and final settlement," and then recited certain transactions and the payment to plaintiff by defendant of a sum of money, and concluded with the words, "which is in full demands of every name and nature whatsoever from one party to the other." At page 465 the opinion proceeds: "The paper in question being a contract entered into by plaintiff deliberately, and

with full knowledge of her rights, being sufficient in its terms to comprehend the claim in question, having been entered into for the purpose of settling all matters of difference, and being so fully understood by both parties, it is clear that its effect cannot be avoided except upon the ground of fraud or mistake."

The rule is thus stated in 1 American and English Encyclopedia of Law, 419: "If the debt or claim is disputed or contingent at the time of payment, the payment, when accepted, or a part of the whole debt, is a good satisfaction. Where the claim settled is not a money demand, or, if so, is unliquidated, or if liquidated, is doubtful in fact or in law, any sum, however small, given and received in satisfaction of the demand, however large, will legally satisfy it": Citing *Berdell v. Bissell*, 6 Colo. 162; *Union Pacific Ry. Co. v. Anderson*, 11 Colo. 293, 18 Pac. 24, and a long list of cases.

Plaintiffs further contend that exhibit 1 is expressly limited by its language to the contract of September 3, 1901, and that the court misconstrued this instrument in applying it to the matters alleged as the basis of plaintiff's second cause of action.

While it is true exhibit 1 refers to the contract dated September 3, 1901, this reference is merely incidental and by way of recital, and it is clearly apparent from those portions of exhibit 1 above quoted that the particular matter recited, and which ²⁷² was under the contemplation of the parties and intended to be satisfied, released and discharged, was the claim and demand of plaintiffs "for extra and extraordinary services and the furnishing of labor, materials, superintendence, etc., outside of the terms of said contract"; and it was such matters which were satisfied, released and discharged by this "additional release."

The court committed no error in these rulings.

For the reason first above stated, the judgment must be reversed and the cause remanded, with directions to the court below to permit the parties to amend their pleadings as they may be advised.

Chief Justice Steele and Mr. Justice Helm concur.

Such Defenses as Payment or Accord and Satisfaction cannot, according to some authorities, be set up under a general denial: *Gossett v. Southern Ry. Co.*, 115 Tenn. 376, 112 Am. St. Rep. 846; *Landry v. Baugnion*, 17 La. 82, 36 Am. Dec. 606; *McKyring v. Bull*, 16 N. Y. 297, 69 Am. Dec. 696. See, also, *Hancock v. Yaden*, 121 Ind. 366, 16 Am. St. Rep. 396; *Renihan v. Wright*, 125 Ind. 536, 21 Am. St.

Rep. 249. In some jurisdictions, however, a different rule prevails: *Crews v. Bleakley*, 16 Ill. 21, 61 Am. Dec. 58, and note. It is held in *Robertson v. Robertson*, 37 Or. 339, 82 Am. St. Rep. 756, that if an issue is formulated by the allegation of an amount due and a denial thereof, evidence tending to prove payment is admissible, though payment was not specially pleaded as a defense.

Accord and Satisfaction is the subject of a note to *Harrison v. Henderson*, 100 Am. St. Rep. 390. The general rule is that the acceptance of part of a disputed or unliquidated claim, given and received in satisfaction of the demand, constitutes a complete accord and satisfaction: *Canton etc. Co. v. Parlin & Orendorff Co.*, 215 Ill. 244, 106 Am. St. Rep. 162; *Laughhead v. Frick Coke Co.*, 209 Pa. 368, 103 Am. St. Rep. 1014. However, the simple payment and accord of a sum less than that due will not sustain a plea of accord and satisfaction. To make the receipt of a part of a debt discharge the whole, there must have been a new consideration, or a voluntary compromise of a disputed demand, or an accord and satisfaction by which a new contract is substituted: *Canadian Fish Co. v. McShane*, 80 Neb. 551, 127 Am. St. Rep. 791.

LEWIS v. JEROME.

[44 Colo. 459, 99 Pac. 562.]

ADMINISTRATION—Estoppel of Heirs Who Conceal Their Rights.—Where a vendee dies, leaving his contract incomplete, and his widow, appointed administratrix, pays the purchase price of the land and takes the conveyance to herself, and also pays debts of the estate without their formal approval, making the payments in both cases from her own funds, supposing herself to be the sole heir, and she does not have her widow's allowance formally allowed by the court, when if the claims she paid had been approved and her widow's award set apart by the court in the formal manner prescribed by statute, the estate would have been insolvent, heirs of whose existence she was ignorant, but who knew of the contract and of the pending administration, yet concealed their rights until the estate was closed, cannot maintain an action for damages against her grantor for conveying the land. (p. 138.)

ADMINISTRATION—Heirs Concealing Their Rights.—Where an action is brought by heirs, who concealed their rights until the estate was closed, against one who had contracted to convey land to their ancestor and who subsequently conveyed to his widow after her appointment as administratrix, she is the proper party defendant, and in her answer may apply to have the estate reopened. (p. 139.)

C. M. Campbell, for the appellant.

Young & Leuthi, for the appellees.

⁴⁶⁰ CAMPBELL, J. The plaintiffs, who are appellees here, as children and heirs of Benjamin A. Jerome, deceased, brought this action against the defendant Lewis, who is the appellant, to recover of him \$3,000 as damages, which they

claim to have sustained by reason of his wrongful act in selling and conveying to Kitty M. Jerome a certain forty-acre tract of land, to a conveyance of which their father in his lifetime had secured the right by a contract entered into between him and defendant. ⁴⁶¹ The answer admits the execution of the writing which, on its face, purports to be an agreement whereby defendant Lewis, for a consideration named, agrees to convey the land in question, but avers that Jerome, though acting in his own name, was the agent, and made the contract for the sole use and benefit of his wife, Kitty M. Jerome, to whom defendant, after Jerome's death, made the conveyance, and that she, and not plaintiff's ancestor, paid the entire consideration therefor; that the conditions of the contract to be kept by the proposed grantee were not performed during Jerome's lifetime, and that the contract had become forfeited as to him, but that after his death, and after his widow had been appointed and had entered upon her duties as administratrix of his estate, the defendant, waiving the forfeiture as to her, received from her a sum satisfactory to him; whereupon he conveyed to her the premises. It was also said that Mrs. Jerome, as administratrix of the estate, which had already been settled, had made an application in the appropriate county court for the purpose of setting aside the final settlement of the estate and reopening administration thereof, upon the ground that the settlement had been improperly procured by fraud practiced upon her. This particular defense was stricken out on plaintiff's motion, and new matters in the answer were denied by a replication. The court impaneled a jury and submitted for their finding two questions of fact: 1. Whether plaintiffs are the lawful children of Benjamin A. Jerome, deceased? 2. What was the fair market cash value of the land in question at the time of its conveyance by defendant to Mrs. Jerome? To these questions the jury answered that plaintiffs were the lawful children, and that the property was worth \$2,000. No specific findings of fact were made by the court upon ⁴⁶² the other issues in the case, but it apparently found the issues generally for plaintiffs, as it gave judgment against defendant in the sum of \$1,000, being one-half the value of the property, which was the share to which plaintiffs, as heirs, would be entitled. Defendant appealed.

At the risk of some repetition, but in order fully to elucidate the merits of the controversy, we deem it fitting to state the situation of the parties as set forth in the pleadings, and the facts which the evidence tends to prove, without indicat-

ing the weight of that evidence or that it establishes all or any of the ultimate facts which will be recited. This precautionary statement is made since we are compelled to reverse the judgment, and do not wish our comments upon the evidence unnecessarily to embarrass the lower court in its findings of fact at another trial.

Benjamin A. Jerome was a married man living with his wife and three children in the state of Missouri. These three children are the plaintiffs in this action. In 1880 Jerome came to Colorado. A few years afterward his wife procured a divorce from him in the courts of Missouri, and about that time he was again married in Pueblo, Colorado, and shortly thereafter his divorced wife in Missouri remarried. Jerome and his second wife removed from Pueblo to Boulder county in the year 1894, and in December of that year a contract of purchase and sale was entered into between him and defendant Lewis, whereby, for an agreed consideration, evidenced by a small cash payment and Jerome's note for the balance of the purchase price, Lewis agreed to convey a forty-acre tract of land. Jerome and his wife at once entered into possession and occupied the premises as their home until his death in June, 1899. In July of that year Mrs. Jerome, the wife, was appointed and entered upon her duties as administratrix ⁴⁶³ of the estate of her deceased husband. At the time of his death Jerome carried a life insurance policy in favor of his wife in the sum of \$2,000, on which she realized \$1,500. In the process of the settlement of the estate the administratrix filed an inventory, in which, as one item of assets, she listed under the head of real property Benjamin A. Jerome's interest under this contract of sale with defendant. Appraisers were appointed to appraise the value of the estate, and appraisers also set apart or estimated the value of the property to be allowed to Mrs. Jerome as her widow's allowance in the sum of \$987. This award seems not to have been formally made to her by an order of the county court. From time to time she made sales of personal property of the estate, the total of which amounted to \$1,326. Under the belief that she was the sole heir and as such entitled under our statute to the entire estate, and acting upon the advice of her attorney, in order to save expense, the administratrix paid various claims of indebtedness against the estate, aggregating about \$800, without having the same filed in, or allowed by, the county court in which the estate was being administered. She also paid \$243 which was allowed by the court as the expense of the ad-

ministration. The total amount of debts which she paid, including those formally allowed, and those not filed, and the expenses incurred in the administration, was about \$1,043. If this sum was all the credit to which she was entitled, there would be a balance against her and to the credit of the estate of about \$283. For the same reasons above mentioned the administratrix did not secure a formal allowance of her widow's award of \$987, but she never surrendered or waived her right to the same. If she was entitled to a credit for widow's allowance and the amount of the debts ⁴⁶⁴ paid by her, but not formally approved and allowed by the county court, the entire assets of the estate would fall short several hundred dollars of meeting the same. If, however, she is entitled to credit herself only with the actual expense in administering the estate, and the amount of the claims which were allowed, and the funeral expenses which were paid, there would be a balance to the credit of the estate for distribution among the heirs, of which she herself was entitled to one-half, and the plaintiffs collectively to the other half of some amount, the exact sum not appearing from the record. The estate was finally settled and the administratrix discharged in August, 1900, and not until November or December following did the administratrix or defendant know of the existence of plaintiffs, or that Benjamin A. Jerome had ever been married before his marriage to Kitty M. Jerome in Colorado. When defendant conveyed to her, she then being the administratrix, she paid him the balance of the purchase price due under the contract of sale. The plaintiffs claim that this payment was made by the administratrix out of funds belonging to the estate, while she says it was her own money. In her testimony there is some uncertainty or apparent inconsistency as to where she obtained this money. In one place in her testimony she says that it was a part of the insurance money, and in another place that at least a portion of the payment came from the grantee to whom she conveyed the premises on the same day she obtained her conveyance from defendant. In legal effect, however, we think there is no doubt that, as between her and plaintiffs, this was a part of the money which she had received on the insurance policy. If any portion of it was obtained from her grantee, she at the time intended, as was, or might be, her right, to reimburse herself out of the same for a like or greater ⁴⁶⁵ amount of the insurance money which she had applied to the payment of the debts of the estate, or for the amount of the widow's allowance which

never was formally set off to her. It is unquestioned that when defendant conveyed to Kitty M. Jerome, both he and she believed that she was not only the widow, but the sole heir at law of her deceased husband. Neither of them knew that Jerome had been married in Missouri or left surviving him children of the first marriage.

In the spring or summer of the year 1900, while Benjamin A. Jerome's estate was in process of administration, and several months before it was closed, and several months after the conveyance by defendant to Mrs. Jerome, two of the plaintiffs in this case came to Boulder county, Colorado, to make an investigation as to the condition of the estate of their deceased father, consulting at that time with an attorney. If it does not appear directly, it is a fair inference from facts and circumstances in evidence, that they knew of this contract of purchase, and that it was listed as one of the assets of the estate, and that defendant Lewis had already conveyed the property to the administratrix. They did not then make known their presence, or their claim to an interest in the estate, either to defendant or the administratrix, and neither of the latter was apprised of such claim until after the estate was closed and the administratrix discharged, and not until this action was begun several months thereafter. Neither in their complaint nor at the trial did defendants offer to pay their portion, or any portion, of the purchase price under the contract of sale, but, as already stated, they based their rights to recover upon the asserted fact that the evidence discloses that the entire purchase price under this contract was paid by the administratrix out of the assets of the estate, ⁴⁶⁶ one-half of which belonged to them collectively. After the court had pronounced judgment in plaintiff's favor, defendant filed a motion for new trial, and in connection therewith asked leave to file an amended answer, setting up an additional defense which, as we consider it very material, is somewhat fully stated. Defendant denominates it a plea of subrogation. He asserts therein that plaintiffs' presence in Colorado after defendant's conveyance to the administratrix, and before final settlement of the estate, when they ascertained the condition of the estate, and their concealment from defendant and the administratrix of their presence, and the furthering thereby of a settlement of the estate, without making known their claims as heirs, which caused the administratrix to settle the estate without procuring an actual setoff of her widow's allowance, and an order approving her payments of the debts of the estate,

whereas if plaintiffs had before final settlement made known such claim, defendant and she could and would have proceeded regularly under the statute in these respects, the result of which would have left the estate insolvent with no sums to be distributed to any of the heirs, in equity and good conscience ought to estop plaintiffs from asserting the claim which they make here as against the administratrix were she a party to the action; and that defendant, in equity, is entitled to be subrogated to, and has the right to assert in this action, all the defense which the administratrix might set up were she a party. By affidavit the defendant shows, and it seems not to be controverted, that the facts constituting this defense were not known to him at the time of the filing of his answer, and not until the trial of the cause. The court denied the request to file the answer, overruled the motion for new trial, and entered judgment against the defendant in the sum of \$1,000. ⁴⁶⁷ Other facts of more or less importance were elicited at the trial, but we have not deemed it necessary, in the view we take of the case, to give them in detail, for we think that the facts stated require a reversal of the judgment for the reasons which we proceed to give.

While it does not directly appear what the court's findings were upon the issues of fact not submitted to the jury, but reserved for the determination of the court itself, we conclude, in view of the oral opinion which the court gave in pronouncing judgment, and which has been brought up in the record, that the court found against defendant, generally, including that defense of the answer which sets up that the contract of purchase was made for the use and benefit, not of Benjamin A. Jerome, but of his wife. In its opinion the court states that up to the time of the conveyance by defendant to Mrs. Jerome, neither of them knew of the existence of plaintiffs, but both supposed that she was the sole heir at law of Benjamin A. Jerome. It is altogether clear from that opinion that judgment went in favor of plaintiffs; because, in the settlement of the estate, admitted debts, which unquestionably the administratrix paid, had not been formally allowed, and because the widow's award had not been formally approved by the court and set off to her, as the statute requires; and for the additional reason that plaintiff's conduct in concealing their heirship, as heretofore recited, does not operate as an estoppel. It is equally clear that if these formal orders had been made, as they properly should have been, the assets of the estate would have been insufficient to pay the just debts and the widow's allowance, and there

would have been, instead of property to be distributed to the heirs, an insolvent estate. If, therefore, it had not been for this irregularity or noncompliance ⁴⁶⁸ with the statute on the part of the administratrix, who acted under the advice of her counsel, and upon the assumption that she was the sole heir at law, these orders would have been formally made. If this action had been against Mrs. Jerome, or if she had been a party to this action, it would not be just to permit this irregularity, which defendant offered to prove was the result of plaintiff's inequitable conduct in concealing from the administratrix their heirship, to operate as a superior equity to hers. Yet the trial court held that since the administratrix by reason of her failure to have entered the proper orders concerning the allowance of debts and the setting aside of the widow's award, was not entitled, as against the estate or the plaintiffs, to credits for the amount thereof, the defendant had no standing in this case to assert that there were no assets of the estate to which plaintiffs were entitled, and therefore the principle of subrogation did not apply, because Mrs. Jerome, as against the plaintiffs, had no rights to which defendant could be subrogated.

We think it already sufficiently appears to any reasonable mind that the judgment of the trial court resulted in a hardship to defendant to which he should not be subjected if a proper remedy can be afforded him in accordance with sound equitable principles. We apprehend that there is no legal difficulty in awarding the proper relief. It may be that the complaint itself tenders no equitable issue; but the answer certainly does, particularly that defense which defendant sought to present by way of amendment after the trial. That issue is that plaintiffs' inequitable conduct prevented the administratrix, who was defendant's grantee, from procuring the necessary orders which she would have obtained had plaintiffs seasonably advised her of the nature of ⁴⁶⁹ their claim of heirship, and that if plaintiffs had not so conducted themselves, no harm would have resulted to defendant, their sole reliance being upon the asserted fact that property which legally and equitably belonged to them had been received by defendant through the administratrix for the purchase price of the property. If such asserted fact did not in law or equity exist, they would have no right to recover in this action. When plaintiffs appeared in Boulder county and learned the condition of their father's estate, they knew that there had been listed as one of its assets his interest in this contract of purchase with defendant; they also knew that,

before they came to Colorado, defendant had conveyed this property to their father's widow; they also knew that appraisers had ascertained and certified to the court the amount of the widow's allowance; they also knew the value of the estate as shown by the appraisers; and they must have known that the administratrix was proceeding in its settlement upon the belief that she was the sole heir at law. If at that time, or at any time before final settlement, they had advised defendant or the administratrix of their claim, it is fair to presume that the former would and could have taken steps to correct the informalities in the administration of the estate, and would have and could have secured the allowance by the court of the just claims and debts against the estate which the administratrix had paid partly out of its assets and partly out of her insurance money, and that she would have secured a formal allowance by the court for the amount of the widow's award. They did not do this, however, but stood silently by and concealed their claim of heirship until after the estate had been settled and the administratrix discharged, with the record in the condition to which we have alluded. True it is that in the final report of ⁴⁷⁰ the administratrix, at its close, is the statement that plaintiffs are heirs of the estate, from which plaintiffs argue that she knew of their claim before her discharge. But in view of her testimony and that of her attorney, it is entirely clear that such statement was not in the report when it was signed and verified by the administratrix, and was not there until after it was filed in the county court; that she never authorized its insertion, and did not know of such statement, until after this action was brought. Instead of this circumstance being in favor of plaintiffs, we are of the opinion that it is against them, and tends strongly to prove that they purposely withheld from the administratrix and defendant their relation to the decedent to obtain an unfair advantage to themselves.

We think that upon these facts, assuming that there was evidence tending to prove them, plaintiffs would not, as against the administratrix, be entitled to assert the claim which they here make. That is to say, they would have no standing as against her to say that they were entitled to any assets of the estate, assuming that she could, if the opportunity was still open, secure an order for her widow's award and a formal order of allowance of the claims against the estate, which she has paid in large part out of her own money. As against defendant they ought not to be heard, if their election to postpone announcement of their heirship deprived

him of the opportunity to protect himself, regardless of the assets of the estate. If either plaintiffs or defendant are to lose, plaintiffs, who are at fault, should bear the loss rather than defendant, whose good faith is apparent. If the administratrix could make such showing, and there certainly is evidence tending to substantiate her claim in that particular, the estate would be insolvent; and if so, it necessarily follows that no ⁴⁷¹ money belonging to plaintiffs was used by the administratrix in paying to defendant the balance of the purchase price under the contract. Whether this equity which defendant seeks to set up by an amendment to the answer is technically the right of subrogation, we do not decide. It seems to us that it is an equity which he is entitled to assert and upon which he is entitled to be heard the same as if this action was against Mrs. Jerome. There is the same reason for an estoppel against plaintiffs, arising from their unconscionable conduct, after, as there would have been if it had occurred before, the conveyance. Plaintiffs chose to defer announcement of their heirship until after it was too late for defendant and the administratrix to protect themselves against the claim here asserted, when they might have imparted the information before final settlement, when such protection could have been secured. The principle upon which the estoppel is based is well illustrated in *Fallon v. Worthington*, 13 Colo. 559, 16 Am. St. Rep. 231, 22 Pac. 960, 6 L. R. A. 708, and authorities there cited.

In conclusion, we observe that there does not seem to have been any request by either party to have the administratrix brought into court. We think this request might well have been made, that, in its absence, the court, in order to settle the entire controversy of all the parties affected, might, of its own motion, order her to be brought in. We do not reverse this case because she was not made a party, but suggest that in the event of a new trial, either party, or the court of its own motion, may make her a party. The court should also permit the respective parties to amend their pleadings as they may be advised, to correspond with the views stated in this opinion. In case Mrs. Jerome should be made a party, that portion of the answer which was stricken out, alleging that the administratrix had ⁴⁷² made application to have the estate reopened, certainly ought to be retained; and if disposition has not already been made thereof, the district court might well postpone the hearing until final decision has been had by the county court upon that application. And if she is not made a party, that defense is ma-

terial, provided it be also averred that she, in good faith, proposes to press such application.

The judgment is reversed and the cause remanded, with instructions that if further proceedings be had they be in accordance with the views herein expressed.

Chief Justice Steele and Mr. Justice Gabbert concur.

Estoppel Against Heirs who disclaim their rights in an estate is considered in the recent cases of *Peyton v. Stephens*, 130 Ga. 338, 124 Am. St. Rep. 170; *Succession of Gabisso*, 119 La. 704, 121 Am. St. Rep. 529. The general rule is that the distribution of an estate is conclusive against all persons claiming therein: *Daly v. Pennie*, 86 Cal. 552, 21 Am. St. Rep. 61; *Estate of Rowland*, 74 Cal. 523, 5 Am. St. Rep. 464; *Cunha v. Hughes*, 122 Cal. 111, 68 Am. St. Rep. 27; although relief may be had therefrom, other than by appeal, in case of fraud, mistake and the like: *In re Ingram*, 78 Cal. 586, 12 Am. St. Rep. 80; *Sohler v. Sohler*, 135 Cal. 323, 87 Am. St. Rep. 98.

The Fundamental Element of an Estoppel is that the party sought to be estopped has said or done something in reliance on which the person, in whose favor the estoppel is invoked, has acted or relied to his prejudice: *Maryland Tel. & Tel. Co. v. Ruth*, 106 Md. 644, 124 Am. St. Rep. 506. Whoever conceals facts required by good faith and fair dealing to be disclosed acts inequitably, and will not be permitted to assert these facts to the injury of one misled by such conduct: *Chemical Nat. Bank v. Kellogg*, 183 N. Y. 92, 111 Am. St. Rep. 717. See, also, *Scottish-American Mortgage Co. v. Bunckley*, 88 Miss. 641, 117 Am. St. Rep. 763; *Crisman v. Lanterman*, 149 Cal. 647, 117 Am. St. Rep. 167; *Beechley v. Beechley*, 134 Iowa, 75, 120 Am. St. Rep. 412.

STERNBERGER v. MOFFAT.

[44 Colo. 520, 99 Pac. 560.]

TAX SALE—Affidavit of Advertisement.—It is the fact of publication and posting, not the proof thereof, that gives the treasurer jurisdiction to make a tax sale. Hence the statutory affidavits may be filed at any time, even upon the trial of an action to cancel the tax deed, when it becomes necessary to prove the publication and notice. (p. 142.)

TAX SALE—Conclusiveness of Treasurer's Affidavit of Posting.—The probative force of the treasurer's affidavit of posting the delinquent tax list and notice of sale cannot be impaired by his subsequent oral testimony. (p. 143.)

David Mitchell, for the plaintiff in error.

Hicks & Wells, for the defendant in error.

521 CAMPBELL, J. In this action to cancel a tax deed defendant appealed from the decree which adjudicated the same void and ordered its cancellation.

The only objections of importance which plaintiff urges against defendant's title thereby evidenced is that proper proof of the publication of the delinquent tax list and notice of sale and the posting thereof was not made, or filed in the office of the county clerk, as our law requires: 2 Mills' Ann. Stats., secs. 3883, 3884. The tax deed, introduced in evidence by defendant, is valid on its face and by section 3902, 2 Mills' Annotated Statutes, it is *prima facie* evidence, *inter alia*, that the property was advertised for sale in the manner and for the length of time required by law. To overcome this presumption plaintiff showed that when this action was begun there was not on file with the county clerk an affidavit of the county treasurer of the posting of the delinquent tax list and notice of sale, as required by section 3885, 2 Mills' Annotated Statutes, and while there was an affidavit by the publisher of a newspaper of the publication therein of such list and notice, as required by section 3884, the same was under decisions of this court in *Rustin v. Merchants' & Miners' Tunnel Co.*, 23 Colo. 351, 47 Pac. 300, and *Morris v. St. Louis National Bank*, 17 Colo. 231, 29 Pac. 802, fatally defective. After this showing as to the absence from the files of the treasurer's, and the insufficiency of the publishers', affidavit, which, unless overcome or supplemented ⁵²² by other proof, would make the tax deed void, defendant produced, and over plaintiff's objection the court admitted in evidence, another affidavit of the publisher of the newspaper which was verified and filed with the county clerk during the progress of the trial, and was, as to form and substance, in harmony with the statute; and also an affidavit by the treasurer of the posting by him of the list and notice of sale, which was made and filed after the trial began, and which defendant, apparently considering insufficient, subsequently withdrew and substituted a second affidavit of the treasurer, which, filed with the county clerk, did conform to the statute. With the court's permission, but over defendant's objection, plaintiff then called the county treasurer as a witness, with a view, by his oral testimony, to discredit or destroy the effect of his own previous affidavit of posting. The treasurer testified that the facts set out in that affidavit were not within his memory at the time, but that from the public records he believed them to be true, and so verified them, because it was his invariable custom as treasurer to post such lists and notices of sale as the statute required him to do. Upon these facts plaintiff contends, first—and this applies both to the affidavit of the publisher and those of the treasurer—that

their making and filing with the county clerk are conditions precedent to a valid sale and the subsequent execution of the tax deed, and they cannot be made or filed afterward; hence their admission in evidence by the court constituted prejudicial error; second—and this applies only to the second affidavit of the treasurer—that its character as proof is entirely destroyed by the oral evidence of that officer that he had no independent recollection of its facts.

⁵²³ 1. The first objection has been ruled against plaintiff by this court in *Bertha G. M. & M. Co. v. Burr*, 31 Colo. 264, 73 Pac. 36. It was there held that it is the fact of publication and posting, and not proof thereof, that gives the treasurer jurisdiction to make a tax sale and execute a tax deed, and that the filing of the statutory affidavits may be made whenever it becomes necessary to prove the facts of publication and notice. We also observe that though plaintiff objected to the introduction of these affidavits upon various grounds, he saved no exception to the ruling of the trial court admitting them, and for that reason alone his cross-errors assigned to such rulings do not call for consideration. We prefer, however, to base our ruling upon the previous decision of this court, which shows that the objection is untenable.

2. It is established by the *Rustin and Burr* cases, that the publisher's affidavit of publication and the treasurer's affidavit of posting, when filed with the clerk, constitute the exclusive proof respectively of the facts of publication and posting, and that evidence thereof is incompetent, unless the affidavits have been filed and subsequently lost or mislaid, and then only that such affidavits had in fact been filed and lost or mislaid and that they complied with the statute. These affidavits being properly in evidence, and that of the publisher being in strict compliance with the law, and its force in no respect being weakened, the fact of publication has been established as our revenue law requires.

The remaining question, therefore, and it presents the sole contention of plaintiff which has any merit, relates to the affidavit of the treasurer. The plaintiff admits that if it was properly in evidence, it shows a proper posting of the delinquent tax list and notice of sale; but he maintains that, since the treasurer admits that when he subscribed and verified it ⁵²⁴ he did not have an independent recollection of the facts which it recites, it is entirely worthless as evidence; hence there is no proof of the essential fact of posting. Defendant's position is that when the affidavit of the treasurer showing a compliance with the statute is filed with the county

clerk, it imports absolute verity and cannot be contradicted. We are not called upon to decide that question under the facts of this case. It will be observed that plaintiff did not attempt by competent evidence to show, as matter of fact, that the treasurer did not post the list and notice. He merely sought to weaken the force of his affidavit by his own oral admission that his recollection of its facts was not distinct or was wholly wanting at the time he subscribed it. Disclaiming expression of opinion as to whether the treasurer's oral testimony weakens, or overcomes, the probative force of his filed affidavit, we think a public officer may not thus render nugatory his official acts to the injury of those who have a right to rely upon public records: 20 Am. & Eng. Ency. of Law, 1st ed., p. 511. If the county treasurer's oral testimony that when he made this affidavit he had no independent recollection of the facts is competent and admissible, the solemn record of a public officer that he performed his official duty could be nullified by his subsequent oral contradictory statements. We do not say that the treasurer's affidavit, when put upon the record, may not be shown by competent evidence by a party injuriously affected thereby to be false in fact—that is to say, that he did not discharge his official duty. We limit our decision to the case, as attempted to be made, and not to another state of facts.

As there is no other ground than the alleged lack of proof of posting by the treasurer upon which can rest the decision of the court below adjudicating the tax deed void, and as our conclusion on the evidence ⁵²⁵ is that such proof was made and was not overcome, it necessarily follows that the decree was wrong, and it is therefore reversed.

Chief Justice Steele and Mr. Justice Gabbert concur.

A Notice of Tax Sale Published in a Newspaper is not invalidated through the failure of the owner or manager to file with the county auditor an affidavit setting forth the paper's qualifications as required by statute: *Blakemore v. Cooper*, 15 N. D. 5, 125 Am. St. Rep. 574.

CASES
IN THE
SUPREME COURT
OF
DELAWARE.

PUSEY & JONES COMPANY v. LOVE.

[6 Penne. (Del.) 80, 66 Atl. 1013.]

CORPORATIONS—Stockholders' Liability, When Contractual. A liability created against stockholders of a corporation under a constitution or statute for its debts is contractual in its nature, though statutory in its origin, and an action therefor can be maintained thereon in any court of competent jurisdiction. (p. 149.)

CORPORATIONS—Stockholders' Liability, Statutes Impairing are Prospective Only.—A statute undertaking to deprive creditors of a corporation of their right to maintain actions against its stockholders is, if applied to pre-existing indebtedness, in violation of the constitution of the United States declaring that no state shall pass any law impairing the obligation of contracts. (p. 157.)

Benjamin Nields, for the plaintiffs in error.

Harry Emmons, for the defendants in error.

⁸⁰ NICHOLSON, C. This was an action brought in the superior court for New Castle county by Charles Love and Grant Hornaday, assignees of the Bank of Fort Scott, plaintiffs below, against the Pusey ⁸¹ & Jones Company, a corporation of the state of Delaware, asserting its liability, under the provisions of the constitution and laws of the state of Kansas, for a debt due to the plaintiffs below, as assignees of the Bank of Fort Scott, from the Parkinson Sugar Company, a corporation of the state of Kansas, in which the defendant was a stockholder—being the owner and holder of six shares of the capital stock of the par value of one hundred dollars each.

The constitution of the state of Kansas provided (article 12, section 2) as follows: "Dues from corporations shall

be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law, but such individual liabilities shall not apply to railroad corporations, nor corporations for religious or charitable purposes."

The General Statutes of 1868 of that state, chapter 23, contained the following provisions: "Section 32. If any execution shall have been issued against the property or effects of a corporation, except a railway or religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

Section 40 (as amended in 1883), Laws of 1883, chapter 46, page 88: "A corporation is dissolved, first, by the expiration of the time limited in its charter; second, by a judgment of dissolution rendered by a court of competent jurisdiction; but any such ⁸² corporation shall be deemed to be dissolved for the purpose of enabling any creditors of such corporation to prosecute suits against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year, or that any corporation now so suspended from business shall for three months after the passage of this act fail to resume its usual and ordinary business."

"Section 44. If any corporation, created under this or any general statute of this state, except railway or charitable or religious corporations, be dissolved, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit; and if judgment be rendered, and execution satisfied, the defendant or defendants may sue all who were stockholders at the time

of dissolution, for the recovery of the portion of such debt for which they were liable, and the execution upon the judgment shall direct the collection to be made from the property of each stockholder respectively; and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of deficiency shall be divided equally among all the remaining stockholders and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved."

The plaintiffs' amended declaration, after reciting the above constitutional and statutory provisions, alleges as follows:

"That the said the Parkinson Sugar Company was incorporated and organized for manufacturing purposes and was not a railway, religious or charitable corporation; that it had a capital of one hundred and seventy-five thousand dollars (\$175,000), divided into seventeen hundred and fifty shares of the par value of one hundred dollars each; that the said the Pusey & Jones Company, the defendant in this action, at the time of the dissolution of the said the Parkinson Sugar Company, hereinafter mentioned, and for ten years last past, was and has been the owner and holder of six shares of the capital ⁸³ stock of the said the Parkinson Sugar Company. That on or about the fifteenth day of August, 1896, an action was commenced in the district court of Bourbon county, in the state of Kansas, in which the said the Parkinson Sugar Company, was defendant; that said action was founded upon certain promissory notes held by said plaintiff against the said defendant, to secure the payment of which said notes certain mortgages were executed and delivered by said defendant to said plaintiff; which said mortgages were secured upon certain pieces and parcels of lands, situate in Bourbon county aforesaid; that on the twenty-fourth day of September, 1896, a judgment was entered upon said action in said court, in favor of said plaintiff, the Bank of Fort Scott, and against the said defendant, the Parkinson Sugar Company, for the sum of fifteen thousand eight hundred and seventy dollars and eighteen cents (\$15,870.18), with interest thereon from said date at the rate of ten per centum per annum; and said mortgaged premises were charged with the payment of said judgment; that on the sixteenth day of November, 1896,

an order of sale was issued upon said judgment, known under the Kansas practice as a 'special execution,' for the purpose of selling the real estate described in said judgment; that on the twenty-first day of December, 1896, said order for sale was enjoined by an injunction issued by Honorable Frederick Scoville, probate of Bourbon county, state of Kansas, which said injunction was afterward dissolved; that on the twenty-fifth day of August, 1899, the Bank of Fort Scott regularly assigned its aforesaid judgment against the said the Parkinson Sugar Company unto the said Charles Love and Grant Hornaday, the plaintiffs in this action; that on the fourth day of September, 1899, an alias order of sale was issued to sell the real estate described in said judgment of said plaintiffs against the said the Parkinson Sugar Company, under which alias order said real estate which constituted all the property of the said the Parkinson Sugar Company was sold for the sum of thirteen thousand and fifty dollars (\$13,050.00), which said sum of thirteen thousand and fifty dollars, less two hundred and thirteen dollars and thirty cents (\$213.30), costs, was on the ⁸⁴ eighth day of October, 1899, applied as a credit upon said judgment, leaving a balance of seven thousand four hundred and ninety-seven dollars and five cents (\$7,497.05) due thereon; that on the eighteenth day of June, 1900, the first general execution was issued upon said judgment to collect the balance due thereon, and on the thirteenth day of August, 1900, the sheriff made return of said execution, as follows: 'Received this writ June 18, 1900, I made diligent search and inquiry for property of the within defendant, on which to levy and there cannot be found any property whatever to levy this execution belonging to the within defendant, the Parkinson Sugar Company. I return this execution wholly unsatisfied. No property found. This thirteenth day of August, 1900, W. E. Brooks, Sheriff; J. E. Ball, Deputy Sheriff.' That the said the Parkinson Sugar Company continued in business until the ninth day of October, 1899, on which date it suspended business, which it has never since resumed."

Upon this statement of facts the plaintiffs claim that under the provision of the constitution and statutes of the state of Kansas, above recited, they are entitled to recover from the defendant the sum of six hundred dollars (that being the par value of his stock in the said the Parkinson Sugar Company), with interest thereon from the first day

of September, 1901, as and for the said defendant's individual liability as a stockholder of the said sugar company for the dues or debts of the said company.

The defendant, by leave of the court, filed special pleas to the plaintiffs' amended declaration, setting forth at length the provisions of an act passed by the legislature in December, 1898, and approved January 7, 1899, by which the defendant claims that the legislature of Kansas amended the above-recited act of 1868 so as to repeal the provisions upon which the defendant's liability depends, and denies any liability under the provision of the constitution of Kansas, above quoted, independently of legislation.

⁸⁵ The amending statute is quoted as follows:

"Section 14. That section 32, chapter 23, of the General Statutes of 1868, be and the same is hereby amended to read as follows: Sec. 32. If any execution shall have been issued against the property or effects of a corporation, and there cannot be found any property upon which to levy such execution, such corporation shall be deemed to be insolvent, and upon application to the court from which said execution was issued or to the judge thereof, a receiver shall be appointed, to close up the affairs of said corporation. Such receiver shall immediately institute proceedings against all stockholders to collect unpaid subscriptions to the stock of such corporation, together with the additional liability of such stockholders equal to the par value of the stock held by each. All collections made by the receiver shall be held for the benefit of all creditors, and shall be disbursed in such manner and at such times as the court may direct. Should the collections made by the receiver exceed the amount necessary to pay all claims against such corporation, together with all costs and expenses of the receivership, the remainder shall be distributed among the stockholders from whom collections have been made, as the court may direct; and in the event any stockholder has not paid the amount due from him the stockholders making payment shall be entitled to an assignment of any judgment or judgments obtained by the receiver against such stockholder, and may enforce the same to the extent of his proportion of claims paid by them.

"Section 15. That section 46, chapter 23, of the General Statutes of 1868, be and the same is hereby amended to read as follows: Sec. 46. The stockholders of every corporation, except railroad corporations or corporations for

religious or charitable purposes shall be liable to the creditors thereof for any unpaid subscriptions, and in addition thereto for an amount equal to the par value of the stock owned by them, such liability to be considered an asset of the corporation in the event of insolvency, and to be collected by a receiver for the benefit of all creditors."

⁸⁶ "Section 17. Sections 6, 9, 24, 32, 41, 44 and 46 of chapter 23 of the General Statutes of 1868 are hereby repealed."

The plaintiffs demurred to all the special pleas and the court sustained the demurrer, and on election of the defendant's attorneys a final judgment was entered in favor of the plaintiffs.

A precisely similar action was brought in the circuit court of the United States for the southern district of New York prior to the passage of the act of 1898-99, which amended the statute of 1868 as above, and final judgment was entered for the plaintiff: *National Bank of Oxford v. Whitman*, 76 Fed. 697. That judgment was affirmed by the circuit court of appeals: 51 U. S. App. 536, 83 Fed. 288, 28 C. C. A. 404. The defendant thereupon applied for and obtained a writ of certiorari (168 U. S. 710), and finally in the supreme court all the questions involved were exhaustively discussed and settled in an elaborate opinion by Mr. Justice Brewer: *Whitman v. Oxford Nat. Bank*, 176 U. S. 559, 20 Sup. Ct. Rep. 477, 44 L. ed. 587. It was held by the supreme court in that case that the liability, which, by the constitution and laws of Kansas (Stats. 1868) was declared to rest upon the individual stockholder, was not "open to judicial condemnation," was "contractual in its nature though statutory in its origin," and that "an action therefor could be maintained in any court of competent jurisdiction."

That case leaves nothing open to discussion with regard to the liability of the defendant prior to the passage of the act of 1898, and the only question before us under this writ of error is as to how far, if at all, the act of 1899 could validly operate to repeal the right of action in favor of creditors given by the Kansas statute of 1868, so far as creditors are concerned, whose debts accrued prior to the repeal.

If construed so as to affect such creditors, would it "impair the obligation of the contract" in violation of the constitution of the United States, and be to that extent invalid as contended by the plaintiff below, respondent above? In

other words, must the statute of 1898-99 be given prospective operation only?

⁸⁷ The accepted principles by which all courts are guided in the application of that provision of the federal constitution are given by Judge Cooley on pages 344-346 of his treatise on Constitutional Limitations: "Any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only as a remedy, is directly obnoxious to the prohibition of the constitution": *McCracken v. Hayward*, 2 How. 608, 11 L. ed. 397. "Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligations contracted; and it does not impair it provided it leaves the parties a substantial remedy, according to the course of justice as it existed at the time the contract was made: Cooley's Constitutional Limitations, 6th ed., p. 346; *Bronson v. Kinzie*, 1 How. 311, 11 L. ed. 143, and a multitude of authorities cited in the notes."

Cases applying these principles are as numerous as the statutes that seem to be near the dividing line so described—a line which, in the very nature of things, it is most difficult to draw in many cases.

In the case before us the constitutional question is left open for this court to pass upon, because, although it has been presented to the only tribunal which can conclusively decide it—the United States supreme court—that court declined to express an opinion upon it, deciding the case presented upon other grounds: *Evans v. Nellis*, 187 U. S. 271, 23 Sup. Ct. Rep. 74, 47 L. ed. 173.

We also find that the courts of Kansas have not passed upon it. In the first of the two cases in which the present question is raised in the state of Kansas—*Waller v. Hamer*, 65 Kan. 168, 69 Pac. 185—action was brought by the receiver under the act of 1898-99, and the court says: "One other question is argued by counsel for plaintiff in error which may arise upon a future trial. It is contended that the act of 1898, as applied to the facts in this case, is retroactive in its operation, and impairs the obligation of the contract sued on in this case. Suffice it to say that, as to the plaintiff in error, it does not impair his obligation or deprive him of any right he had prior to its passage."

In the second and last Kansas case—*Henley v. Stevenson*, ⁸⁸ 67 Kan. 4, 72 Pac. 518—the court says: "As the judgment against the corporation in the case at bar was not

rendered until February 15, 1900, or more than a year after the remedy by motion for order awarding execution against stockholders in corporations for the collection of corporate judgments was repealed, and as the record in this case is silent as to any contractual liability existing between Stevenson and the corporation prior to the taking effect of the act of 1898, it follows of necessity that the order was without authority of law, is erroneous, and must be reversed."

Now, although this may be construed to be an intimation on the part of the Kansas supreme court that its decision would have been different had the judgment been entered, or had a contractual liability been shown to exist prior to the taking effect of the act of 1898-99, yet it cannot be taken as an authority for the proposition that the act of 1898 could have no retroactive effect.

These two cases—the only Kansas cases in which the effect of the statute of 1898 is involved—contribute so little to the solution of the question, that it is not worth while to state them at greater length; but in the case of *Woodworth v. Bowles*, 61 Kan. 569, 60 Pac. 331, the reasoning of the court in holding another somewhat similar statute to be invalid, so far as it was meant to be retroactive, would seem to involve a similar ruling upon the statute now before us.

This case of *Woodworth v. Bowles* is cited at considerable length in the only case in which the precise question before us under this writ of error is discussed and decided—*Evans v. Nellis*, 101 Fed. 920; the same case that was referred to above as having been carried to the supreme court: 187 U. S. 271, 22 Sup. Ct. Rep. 74, 47 L. ed. 173. This was an action brought in the circuit court of the United States for the northern district of New York by the receiver of a Kansas corporation appointed in accordance with the provisions of the act of 1898-99, and in every essential particular is identical with the case before us, raising the same ⁸⁹ issues; the only difference being that in the case of *Evans v. Nellis* the action was brought against a stockholder of an insolvent Kansas corporation under the statute of 1898-99, while in the case before us it was brought under the statute of 1868. *Crissey and Streeter* were the two judgment creditors of the insolvent corporation in that case, and the court, after stating the points decided by the supreme court in the case of *Whitman v. Oxford Nat. Bank*, 176 U. S. 559, 20 Sup. Ct. Rep. 477, 44 L. ed. 587, proceeds to analyze and contrast the statutes of 1868 and 1898-99

as follows: "Applying the law of the Whitman case directly to the facts now before the court, it will be seen that the defendant was only under obligation to pay the Crissey and Streeter judgments and such other debts as were reduced to judgment. If he had a defense against any of these judgment creditors he could assert it. If he were required to pay, he could himself compel other stockholders to contribute. Having paid all the judgment creditors his obligation ceased: *Hoyt v. Bunker*, 50 Kan. 574, 32 Pac. 126. On the other hand, Crissey and Streeter were vested with certain important and valuable rights under the contract between them and the stockholders. They, as individuals, could enforce their judgments against any stockholder wherever found. They were not called upon to share the amount so recovered with simple contract creditors or to pay any part thereof to a receiver, or as costs and fees of the officers of the court. If one of these judgment creditors were the first to sue a solvent stockholder whose liability was equal to the amount of the judgment, his debt was safe. This, then, was the situation when the law of 1899 went into operation. The new law wrought a sweeping radical change. New liabilities are created and new remedies are provided. Section 23, as amended, provides for the appointment of a receiver upon an execution being returned nulla bona. The receiver so appointed shall close up the affairs of such corporation, and shall immediately institute proceedings against all the stockholders to collect unpaid subscriptions and the additional liability. The money thus collected shall be held for the benefit of all the creditors, and shall be used, under the direction of the court, to pay the costs and ⁹⁰ expenses of the receivership and all claims against such corporation. Any judgment obtained by the receiver against a stockholder who has not paid the amount due from him may be assigned to the stockholders who have paid, and enforced by them against the delinquent stockholder for his proportionate amount. Section 46, as amended, provides that the stockholders shall be liable to the creditors for unpaid subscriptions, and in addition thereto an amount equal to the par value of the stock owned by them, such liability to be an asset of the corporation to be collected by a receiver for the benefit of all the creditors. Under the former law the stockholder's additional liability was an obligation to pay the judgment creditor who was unable to collect his debt from the corporation. Under the present law this liability

is an asset of the corporation for the benefit of all the creditors. Under the former law the right to collect his judgment rested with the judgment creditor. He could act immediately. Nothing but his own laches could impair this right. Under the latter law the judgment creditor has no advantage over the most negligent and supine contract creditor. All alike must trust to the discretion of the receiver; if he fails in duty, the debt of the judgment creditor is lost. In one case the entire indebtedness of the stockholder was applied without diminution upon the judgment. In the other case the entire amount collected may, by order of the court, be devoted to the payment of the receiver's commissions, costs and expenses. Under the former law the stockholder could avail himself of any defense, counterclaim or setoff he might have against the pursuing creditor. These defenses no longer exist. Under the former law, when he had paid the judgment creditors the liability of the stockholder ended; now he must pay the entire amount to the receiver even though it be twice the amount necessary to pay the corporation's debts. Whether any of the balance be returned or not depends largely upon the economy, prudence and honesty of the receiver. In short, the new law destroys absolutely all rights which the judgment creditor, qua a judgment creditor, possessed; takes away all right of independent action, and compels him to share pro rata with all the creditors. As to the stockholder, it deprives ⁹¹ him of defenses which would defeat the former action, compels a full payment when a partial payment was oftentimes sufficient, and devotes the amount recovered to the payment of obligations not mentioned in the former statute. It is not difficult to suppose a case where a stockholder absolutely safe from pursuit under the former act may be financially ruined under the present act. For instance, where a stockholder was sued for, say ten thousand dollars, by the only judgment creditor: If the judgment creditor owed the stockholder the sum of ten thousand dollars, it is manifest that he could not recover. Or, assume a situation where the entire amount recovered is consumed in paying the expenses of the receivership. In the first of these instances the receiver takes money which could not be collected under the former act; in the second, he applies the money collected to the payment of obligations which are created for the first time by the act of 1899, and which are not 'dues from corporations': *Ward v. Joslin* (C. C. A.), 100 Fed. 676. It is true that under the prior

statute in certain circumstances an equal amount might be recovered, but the stockholder might discharge his entire obligation by paying much less than the full amount. Under the present law his liability is increased by compelling him to pay the full amount and by applying it in payment of an entirely new class of obligations.'

"Since the trial of this action the supreme court of Kansas, in the case of *Woodworth v. Bowles*, 61 Kan. 569, 60 Pac. 331, has declared unconstitutional similar provisions of the Kansas statute relating to the liability of stockholders in banks. Section 55 of chapter 47 of the act of 1897 provides that the receiver shall, after the expiration of one year, institute the proper proceedings in the name of the bank for the collection of the liability of the stockholders to be distributed pro rata among the creditors. No action by creditors against stockholders shall be maintained unless it shall appear to the satisfaction of the court that the receiver has failed to begin the action as required by law. The court held that if the statute were given a retroactive construction, it was invalid, because it deprived creditors of their ⁹² right to maintain proceedings against the stockholders, or, at least, postponed that right for a year. The court says: 'The act of 1897 does not assume to abrogate the contract or relieve the stockholder from liability, but it does assume to do two other things: First, to suspend for one year the pursuit by the creditor of the special remedy afforded by the laws in existence at the time of the making of the contract; and, second, to deprive the creditor of such remedy altogether if the receiver at the end of the year should institute an action for him and for the other creditors, in which last-mentioned case the fund collected by the receiver is to be distributed pro rata between all creditors. . . . If, however, the new enactment, although not designed to affect the substantial right, does nevertheless embarrass or substantially delay the creditor in the collection of the debt, it will be held to have impaired the obligation of the contract. We deem section 55 of the law of 1897, in its application to existing contracts between stockholders and creditors, to be an enactment of the latter kind. . . . If the receiver should institute an action and collect the liability, even though every stockholder should be solvent and should discharge his liability in full, the creditor might, nevertheless, not receive full payment of his claim. He must share with other creditors. . . . Vigilance and diligence on the part

of a creditor in pursuit of one or the other of his remedies, in one or another of the contingencies stated, might avail to secure the payment of his claim in full. Under the statute as it now exists, vigilance and diligence may avail nothing.'

"It is thought that the logic of this opinion when applied, in similar circumstances, to the law of 1899 in its retroactive aspect must result in a similar judgment. In *Bronson v. Kinzie*, 1 How. 311, 11 L. ed. 143, the supreme court decided that where a mortgage contained a power to the mortgagee to sell on breach and thereby pay the debt, a subsequent law giving the mortgagor twelve months to redeem and prohibiting the property from being sold for less than two-thirds its appraised value so altered the remedy as to impair the obligation of the contract: *Barnitz v. Beverly*, 163 U. S. 118, 16 Sup. Ct. Rep. 1042, 41 L. ed. 93 93. It is true that a law will not ordinarily be declared unconstitutional on the objection of one whose interests are not injuriously affected by the objectionable features. If the accusations against the act in question were only those which might be presented by the judgment creditors, whose rights have manifestly been invaded, there might be more difficulty in declaring it invalid. There are, however, exceptions to the general rule, which are stated by Judge Cooley to be found in cases 'where it is evident, from a contemplation of the statute and of the purpose to be accomplished by it, that it would not have been passed at all, except as an entirety, and that the general purpose of the legislature will be defeated if it shall be held valid as to some cases and void as to some others': *Cooley's Constitutional Limitations*, 4th ed., 219. It would, indeed, be a strange anomaly if the statute in question were held valid when attacked by stockholders and invalid when attacked by judgment creditors. Such a construction would lead to endless confusion and injustice. But, as has been seen, the contractual rights of the stockholders have been impaired equally with those of the judgment creditors. It is undoubtedly true that whatever belongs merely to the remedy may be changed as the legislature may direct, but the court cannot believe that this familiar rule is applicable to a law which makes such fundamental changes in the terms of the contract."

The court concludes "that the law in question (statute of 1899) impairs the obligation of the defendant's contract,

if construed to act retroactively, and to that extent is invalid."

The case of *Evans v. Nellis*, 187 U. S. 271, 22 Sup. Ct. Rep. 74, 47 L. ed. 173, came afterward, as we have already seen, to the United States supreme court from the circuit court of appeals for the second circuit, instructions being desired upon the following questions certified by the circuit court of appeals to the supreme court:

"1. Are sections 14 and 15 of the laws of Kansas of 1899 valid in view of the provision of the constitution of the state of Kansas respecting the individual liability of the stockholders of corporations, or are they invalid as subjecting such stockholders to liabilities other than 'dues from corporations'?

⁹⁴ "2. Do sections 14 and 15 aforesaid contravene the constitution of the United States by impairing the contractual liability of the defendant previously existing as a stockholder of a corporation of the state of Kansas?

"3. Is the plaintiff, as a receiver appointed as aforesaid, entitled to maintain an action in the circuit court of the United States for the northern district of New York?"

Mr. Justice White delivered the opinion of the court and considers only the third question; he concludes: "The third question will be answered no, and it is unnecessary to answer the other questions."

This conclusion of the supreme court sustains the court below, whose opinion is quoted above at such length, and in declining to pass upon the constitutional question, the court only observed the general rule that a court will not "pass upon a constitutional question and decide a statute to be invalid unless a decision upon that point becomes necessary to the determination of the case": *Cooley's Constitutional Limitations*, 196.

This lengthy review and analysis of the contrasted statutes of 1868 and 1899 renders it unnecessary to enter into further detailed discussion of them.

The statute of 1899 "is not open to judicial condemnation" any more than was the statute of 1868, which received that negative approval from the supreme court in the case of *Whitman v. Oxford Nat. Bank*, 176 U. S. 559, 20 Sup. Ct. Rep. 477, 44 L. ed. 587, cited above. Its merits or demerits, however, are not in question before us, for it is manifest from simple inspection that it wiped out completely every remedy against stockholders that existed at the time the contract came into force under the statute of

1868, and left no vestige of a remedy of any sort that existed prior to its passage; while, on the other hand, the new remedies which it provided for the enforcement of the constitutional liability failed to include any proceeding that can be set in motion by any individual creditor or any number of creditors.

The hands of creditors are completely tied by it, and the proceedings it prescribes are analogous to those provided in insolvency and bankruptcy acts, or to proceedings in courts of equity for the winding up of insolvent corporations.

⁹⁵ This analogy will assist us to a clearer apprehension of the arguments against the validity of the act in relation to contracts existing prior to its passage. In fact, in the light of that analogy the arguments seem conclusive.

When Chief Justice Marshall, in the great leading case of *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. ed. 529, put upon the constitutional provision which prohibited the states from passing laws "impairing the obligation of a contract" an interpretation which once for all rendered invalid the insolvent laws of the states, so far as they sought to affect pre-existing contracts, debts existing at the time of their passage, he also first laid down and defined the distinction between statutory provisions affecting only the remedy and those affecting the substance of the contract by materially impairing the power of enforcement.

On the other hand, federal bankruptcy statutes are valid as to debts contracted before the passage of the law as well as afterward, only because the federal constitution does not forbid Congress to pass laws impairing the obligations of a contract.

And finally, when we come to consider the scope of the jurisdiction of courts of equity in the matter of insolvent corporations, we find that there could be no question of retroactive or prospective effect in such cases, because the court of chancery has been so long appointing receivers with those powers from which has been gradually evolved the whole complicated modern system, that practically we may say that its jurisdiction has existed for that "time whereof the memory of man runneth not to the contrary."

We think that from these considerations and from the reasoning of the cases we have cited the conclusion is inevitable that the statute of 1899 does impair the obligation of the defendant's contract, if considered to be retroactive in violation of the constitution of the United States,

and is to that extent invalid, as is contended by the plaintiff below, respondent above.

We think there was no error in the rulings of the court below, and therefore the judgment of the court below is affirmed.

The Liability of Stockholders for the Debts of the Corporation is usually regarded as contractual: *Pacific Elevator Co. v. Whitbeck*, 63 Kan. 102, 88 Am. St. Rep. 229, and cases cited in the cross-reference note thereto. The rule, as stated in *Kulp v. Fleming*, 65 Ohio St. 321, 87 Am. St. Rep. 611, is that the liability of stockholders arises upon contract where, before they become such, there is a statute declaring what is the personal liability of stockholders in corporations. Compare, however, *Knickerbocker Trust Co. v. Iselin*, 185 N. Y. 54, 113 Am. St. Rep. 863.

The Effect of Statutes Changing the Liability of Stockholders is considered in *McGowan v. McDonald*, 111 Cal. 57, 52 Am. St. Rep. 149; *Knickerbocker Trust Co. v. Iselin*, 185 N. Y. 54, 113 Am. St. Rep. 863. A corporation cannot release a stockholder from liability to existing creditors for his unpaid subscription by rescinding the transaction whereby the stock was acquired and restoring him to his original status as creditor of the corporation: *Moore v. United States Barrel Co.*, 238 Ill. 544, 128 Am. St. Rep. 153.

NATIONAL DREDGING COMPANY v. FARMERS' BANK.

[6 Penne. (Del.) 580, 69 Atl. 607.]

BANKING—Right to Charge Payments Against a Depositor.—In the absence of either prior or subsequent negligence or misleading conduct on the part of a depositor, a bank or banker cannot charge the depositor with any payments except such as are made in conformity with his order, for the relation of a bank and its depositors is one simply of debtor and creditor, and it matters not what care is exercised and what precautions are taken by the bank, no payments made otherwise can be charged against the depositor. (p. 165.)

THE RELATION OF A BANK and Its Depositors is that of debtor and creditor. (By the editor.) (p. 165.)

BANKING—Forgeries, Payments Made Because of.—Payments made by a bank on forgeries so skillfully executed as to deceive the most expert, or because of false pretenses so adroit and plausible as to be likely to impose on experienced bank officers, are, nevertheless, not chargeable against the depositor. (By the editor.) (pp. 165, 166.)

BANKS—Payments Caused by Unauthorized Erasures.—Where the erasure of the words "or order" or "the order of" and the insertion of the words "or bearer" in a check without the authority of the depositor making it results in its payment by the depositor's bank to a person other than the payee, such payment is not payment to the payee—is not payment in conformity with the orders of the

depositors, and, therefore, the depositor cannot be charged with it. (pp. 165, 166.)

BANKS—Passbooks—Effect of Writing upon in Returning with Vouchers.—The object of the depositor's bankbook or passbook is to inform him from time to time of the condition of his account as it appears on the books of the bank. The sending of his passbook to be written up, and returned with the vouchers is in its effect a demand to know what the bank claims to be the state of his account, and the returning of the book with the vouchers is the answer to the demand, and imports in effect a request by the bank that the depositor will in proper time examine the account so rendered and either sanction or repudiate it. The depositor cannot, therefore, without injustice to the bank, omit all examination of his account when rendered at his request. His failure to make it or have it made within a reasonable time after opportunity given for the purpose is inconsistent with the object for which he obtains and uses his passbooks. (p. 166.)

BANKS—Negligence on the Part of the Depositor in not Examining His Passbook.—Where a suit is brought by a depositor to recover from the bank money deposited by him, which the bank has paid out otherwise than in conformity with his orders, and the bank sets up the defense that it is nevertheless entitled to charge the depositor with such payments because of the conduct of the depositor subsequent to such payment, the preliminary question to be determined is whether the bank was or was not guilty of negligence in making the payment. If it were negligent, if its officers be found to have failed to exercise due and reasonable care in detecting the forgery or fraud, then the negligence of the depositor, his failure to perform his duty in examining his passbook and vouchers with reasonable care and report to the bank within a reasonable time any errors or mistakes would constitute no defense. (p. 168.)

BANKING, Failure of Depositor to Notify Bank of Forged Checks, Effect of on Subsequent Payments of Similar Checks.—Where a suit is brought by a depositor to recover from a bank payments made on forged or fraudulently altered checks, which constitute a series of successful forgeries, held, that after the depositor's passbook has been balanced and returned to him with any of the forged or fraudulently altered checks, and it appears that there was no negligence or want of due and reasonable care on the part of the bank in paying the said forged or fraudulently altered checks, the failure of the depositor to notify the bank within a reasonable time that such checks have been forged or fraudulently altered will, if the delay be caused by his negligence in not using due care and diligence in examining the passbook and vouchers, or in giving notice, if he had discovered the forgeries, constitute a defense for the bank to the depositor's suit for money subsequently paid out on similar checks. (pp. 169, 171.)

BANKING, Failure of Depositor to Notify Bank of Forged Checks, Effect of Antecedent Payments.—With respect to the payments made before such settlement, however, where a depositor has failed in his duty in respect to the examination of his passbook and vouchers with reasonable care and diligence, held, that in the absence of negligence or want of due and reasonable care on the part of the bank in making such payments, the depositor becomes liable to the bank for all damages sustained by the bank in consequence of such omission of duty. The extent of the liability of the depositor is commensurate with the loss sustained by the bank in consequence of his neglect of duty—no more, no less. (p. 171.)

BANKING—Liability of Depositor not Notifying Bank of Payment of Forged or Altered Checks.—Neither the doctrine of

fication nor estoppel can be invoked, but the damages sustained by the bank as a result of the neglect of duty by the depositor are susceptible of proof and measurement as in any other case of breach of duty imposed by contract. (p. 170.)

BANKING—Payment of Checks Fraudulently Altered, Failure of Depositor to Give Notice.—As to all the subsequent payments, the bank is entitled to invoke the equitable doctrine of estoppel. As to these it may be fairly said the bank was induced to pay, and did pay, in consequence of the silence of the plaintiff when it was his duty to speak. The bank was misled to its injury by the fault of the depositor. (p. 171.)

BANKING—Depositor's Failure to Give Notice of Fraudulently Altered Checks, When the Proximate Cause of a Loss.—Where the acts and conduct and methods of conducting business or filling up of checks on the part of a depositor were such as to warrant a bank in paying forged or fraudulently altered checks, held, that such conduct on the part of the depositor was the proximate cause of the loss, and the bank is not liable for payments made on such checks.

BANKS—Depositor's Duty to Examine Passbooks and Return Checks.—Where forged or fraudulently altered checks have been paid and charged in the account returned to a depositor, he is under no duty to the bank so to conduct the examination that it will necessarily lead to the discovery of the fraud. If he examines the forgeries personally and he is himself deceived by the skillful character of the forgery, his failure to discover it will not shift upon him the loss which in the first instance is the loss of the bank. (p. 177.)

BANKING—Depositor, When Guilty of Negligence in not Examining Passbooks and Discovering Forgeries.—Where the fraudulent alterations of the checks, for the payment of which suit is brought by the depositor, were apparent, and it is obvious that if the treasurer of the depositor, a dredging company, had at any time looked over the checks or vouchers returned with the passbook their alteration to "or bearer" would have stared him in the face and disclosed the fraud at once; and where it is admitted that he did not look over them, but assigned the duty to the secretary of the company, depositor, who was himself the perpetrator of the fraud, held, that no question of fact arises in regard to what amount of diligence was exercised or required by the plaintiff in order to detect the forgeries, and that inasmuch as it is apparent that any, even a cursory, examination by an honest clerk or employé would have discovered the alterations, therefore, although the knowledge of the forgeries possessed by the secretary, from the fact that he himself was the forger, to whom the examination was intrusted, is in no respect to be attributed to the dredging company, yet it is chargeable with such knowledge as an examination of the checks would have imparted to an honest clerk or employé previously unaware of the forgeries. And as it would have been chargeable with negligence or failure of such clerk or employé to discover and report such palpable alterations, it must be equally chargeable with the default of its secretary. Its position may be no worse because of the knowledge possessed by the forger, qua forger, but it can be no better off. (p. 178.)

BANKING—Negligence on the Part of a Bank in Paying Fraudulently Altered Checks, When a Question for the Jury.—Where the depositor, a dredging company, whose business was conducted in different parts of the United States widely remote from each other, had its chief place of business and office in the city of Wilmington, Delaware, where was situated the bank which was its sole depository.

and banker, and the secretary of the dredging company made all the deposits and filled up all the checks of the company, which the treasurer signed, and under a by-law of the company was alone authorized to sign, which by-law was known to the bank; and the secretary fraudulently altered checks filled up and sent by him to the treasurer, who signed and returned them to him for distribution, by striking out the words "or order" or "to the order of" in the checks, and inserting the words "or bearer" in such a manner that the alterations were plain and palpable, so as to indicate that they were made after the checks were made out and signed, and got the cash on those checks; and where there was furthermore evidence that such alterations excited the suspicions or curiosity of the bank officers sufficiently to cause them to ask why they were made, and the only reason given by the secretary who got the money was that "the payee desired the currency," held, that it was not for the court to say whether the evidence bearing upon the question of the negligence or want of due and reasonable care on the part of the bank in the payment of the altered checks was strong or weak, when taken in connection with other evidence tending to show that the method in which the business of the dredging company was conducted was such as to justify the officers of the bank in believing that the secretary was authorized to so alter checks and get the money on them, was such conduct as was calculated to mislead the bank, and so facilitate the perpetration of the fraud, and constituted the proximate cause of the loss, but that the evidence should go to the jury under careful instruction from the court. (p. 178.)

(Syllabi, unless stated to be by the editor, are by the judge writing the opinion. We find no language in the opinion corresponding to syllabus 11.)

Anthony Higgins and William S. Hilles, for the plaintiff.

Herbert H. Ward and Henry Ridgely, Jr., for the respondent.

583 NICHOLSON C. This was an action of assumpsit in the superior court for New Castle county, brought by the National Dredging Company, plaintiff in error, as plaintiff below, against the Farmers' Bank to recover an alleged balance of account.

The plaintiff's bill of particulars contained an itemized list of the deposits made by the plaintiff with the defendant, subject to check, from February, 1897, to April 2, 1903, amounting in the aggregate to one million nine hundred and fifty-one thousand eight hundred and twenty-three dollars and forty-two cents (\$1,951,823.42), and a list of checks alleged by the plaintiff to be wrongfully charged by the defendant to the account of the plaintiff within the same period, amounting in the aggregate to thirty-one thousand five hundred and six dollars and eighty-six cents (\$31,506.86).

A motion for a nonsuit was submitted by counsel for the defendant at the close of the plaintiff's testimony and was

granted by a majority of the court. Counsel for the plaintiff refused to take a nonsuit, and a majority of the court thereupon directed the jury to return a verdict for the defendant.

Spruance, J., delivered a dissenting opinion, saying in conclusion, "with proper instructions from the court as to the law, ⁵⁸⁴ I believe that a more just and satisfactory result would be reached by the verdict of the jury than by the determination of both facts and law by the court."

The assignment of errors was as follows:

"1. That the court erred in directing the jury to return a verdict for the defendant in the above-stated cause.

"2. That upon the refusal of the plaintiff to accept a nonsuit in the above-entitled cause, the court erred in charging the jury as follows: 'For the reasons which the majority of the court gave in their decision to grant a nonsuit in this case, we direct you to return a verdict for the defendant.'

"3. That the court erred in not submitting to the jury, under the testimony adduced on the part of the plaintiff and contained in the bill of exceptions, the question as to whether the defendant was indebted to the plaintiff in the said action."

Obviously, it will be necessary to consider the evidence in detail, in order to arrive at a correct understanding of the question presented to this court, but a general preliminary outline of the facts in the case may be best given by quoting from the opinion of the learned chief justice in the court below as follows:

"In disposing of this motion for a nonsuit we will first briefly summarize the facts disclosed by the testimony of the plaintiff.

"The National Dredging Company, the plaintiff, is a corporation of the state of Delaware, and during the time covered by this suit was engaged in operations and in work in different parts of the United States, involving the expenditure of large sums of money. The Farmers' Bank at Wilmington, the defendant, is also a corporation of this state engaged in the banking business, and during the time above named was the depository and banker for the said company.

"The chief place of business and office of the company was in the city of Wilmington, as was also the banking-house of the defendant.

⁵⁸⁵ "From February 23, 1897, to January 14, 1903, the company had on deposit with the bank subject to check a large sum of money, amounting to nearly two millions of

dollars. This amount has been properly paid out by the bank upon checks of the company, except the sum of thirty thousand eight hundred and thirty-one dollars and fifty-two cents. This amount the company claims was wrongfully paid by the bank upon altered or forged checks, which are one hundred and fourteen in number, and extend from July 7, 1897, the date of the first, to December 17, 1902, the date of the last of the disputed checks, as disclosed by the plaintiff's bill of particulars.

"The money of the company was deposited from time to time in the bank by William H. Churchman, who was the secretary of the company, in charge of its office and its representative in this city. All such deposits were entered upon the bank passbooks of the company, which book the company kept. The money so deposited was paid out only upon checks signed by the treasurer, who was George G. Barker. The passbook was written up and settlements made, and the company's balance in the bank ascertained, twelve times during the period covered by this controversy, as follows, viz.: June 14, August 28 and December 22, 1897; August 6, 1898; August 4, 1899; August 11 and November 8, 1900; June 9, March 1, November 11 and December 11, 1901; and January 14, 1903.

"At each one of these settlements the checks theretofore paid by the bank were surrendered and delivered with the passbook to William H. Churchman, and remained in the possession of the company up to the commencement of this action. The first two of the disputed checks, dated respectively July 7 and August 8, 1897, were so delivered in the second settlement of August 28, 1897. Like deliveries of the disputed checks were so made in each of the succeeding settlements and so remained in the possession of the company.

"All the disputed checks were signed by the treasurer, George G. Barker. The alterations or forgeries consisted in ⁵⁸⁶ drawing two lines through the words 'the order of' before the name of the payee in each check, and in writing after the name of the payee the words 'or bearer.' It is alleged that these alterations were made after the checks were signed and without authority. The handwriting in the body of all the checks, except six, is that of William H. Churchman, the secretary of the company. The remaining six are either in his handwriting or in that of someone in the office under him.

"The method of the company in paying its bills seems to have been this: The secretary, William H. Churchman, re-

ceived the bills, filled out the checks, and sent them to George G. Barker, the treasurer, wherever he might be from time to time. The checks were signed by the treasurer and returned to Churchman for distribution among the creditors.

"With respect to this bank account, the evidence shows that William H. Churchman, the secretary, made the deposits; kept the bankbook at the office of the company in this city; had the book settled from time to time; received the checks surrendered by the bank at such settlements. It is proved that all the money paid out by the bank on these altered checks was paid to the said William H. Churchman, personally, who was not only the secretary of the company, but, under the by-laws of the company, in the absence of the president and vice-president, acted as president.

"The company claims that the alterations of those checks were so manifest upon the face of the check itself, by reason of the different ink used, the manner and place of the additions to the checks and the character of the same, that the bank was grossly negligent in paying them. The company claims, therefore, that it is entitled to recover in this action, even though there may have been negligence on its part in not sooner discovering and notifying the bank of the alterations."

The bank claims, on the other hand, that the course of conduct and the business methods of Barker, the president and treasurer of the plaintiff company (depositor), in connection ⁵⁸⁷ with the transactions in controversy, as disclosed by the testimony of the plaintiff, constituted such gross negligence and so misled the bank as to relieve the defendant from all responsibility from the loss occasioned by its payment of the altered checks to Churchman.

This defense is formulated by counsel in the three following paragraphs:

"First. Our first point is, therefore, that plaintiff cannot recover because its prior or original negligence occasioned the loss in question.

"Second. Our second point is, therefore, that plaintiff was guilty of gross negligence subsequent to the payment of the several checks in question by the bank.

"Third. Our next contention is that the acts and conduct of plaintiff company warranted defendant bank in believing that William H. Churchman was authorized to make the alterations appearing on the checks in controversy."

There is no question of fraud or intentional misconduct on the part of either the plaintiff or defendant, but in order to

determine which of the parties to the suit must bear the loss resulting from the crime of William H. Churchman, it is, of course, necessary for the issues of negligence which are presented to be decided; and the question for this court to determine is whether it was proper for the court below, under the evidence before it, to withdraw the case from the jury.

In the absence of either prior or subsequent negligence or misleading conduct on the part of a depositor, a bank or banker cannot charge the depositor with any payments, except such as are made in conformity with his orders, for the relation of a bank and its depositors is one simply of debtor and creditor, and it matters not what care is exercised and what precautions are taken by the bank, no payment made otherwise can be charged against the depositor, even though it be made in consequence of forgeries so skillfully executed as to deceive the most expert, or ⁵⁸⁸ by false pretenses so adroit and plausible as to be likely to impose upon experienced bank officers.

These are the fundamental principles which are either formulated or implied in the discussion of every well-considered case that involves the question whether upon the given state of facts it is the bank or its depositor which must bear the loss resulting from successful forgery and fraud: *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. Rep. 657, 29 L. ed. 811; *Shipman v. Bank of the State of New York*, 126 N. Y. 318, 22 Am. St. Rep. 821, 27 N. E. 371, 12 L. R. A. 791. In the latter case the court say, after alluding to these principles: "These rules are so familiar and so well established and illustrated by the adjudged cases that a bare reference to them is all that is needful here: *Crawford v. West Side Bank*, 100 N. Y. 53, 53 Am. Rep. 152, 2 N. E. 881; *Aetna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82, 7 Am. Rep. 314; *Corn Exchange Bank v. Nassau Bank*, 91 N. Y. 74, 43 Am. Rep. 655; *Phoenix Bank v. Risley*, 111 U. S. 125, 4 Sup. Ct. Rep. 322, 28 L. ed. 374; *Bank of British North America v. Merchants' Nat. Bank*, 91 N. Y. 106; *Marine Bank v. Fulton Bank*, 2 Wall. 252, 17 L. ed. 785; *First Nat. Bank v. Whitman*, 94 U. S. 343, 24 L. ed. 229; *Citizens' Nat. Bank v. Importers and Traders' Bank*, 119 N. Y. 195, 23 N. E. 540."

It is also clear (as a general principle, and in the absence of negligence on the part of the depositor) that when the erasure of the words "or order" or "the order of" and the insertion of the words "or bearer" in a check without the authority of the depositor making it results in its payment

by the depositor's bank to a person other than the payee, such payment is not payment to the payee—is not payment in conformity with the orders of the depositor, and therefore the depositor cannot be charged with it.

This rule is familiar and obvious, but reference may be had to a couple of Massachusetts cases directly in point: *Belknap v. National Bank*, 100 Mass. 376, 97 Am. Dec. 105; *Dana v. National Bank of the Republic*, 132 Mass. 156.

There is one other well-settled principle, a statement of which seems necessary in order to supplement the two already set forth, and as tending to shorten and facilitate the discussion of ⁵⁸⁹ the disputed questions before us, which have been so ably and exhaustively argued by the eminent counsel engaged in this cause. It is stated by Justice Harlan, as follows:

“While it is true that the relation of a bank and its depositor is one simply of debtor and creditor (*Phoenix Bank v. Risley*, 111 U. S. 125, 4 Sup. Ct. Rep. 322, 28 L. ed. 374), and that the depositor is not chargeable with any payments except such as are made in conformity with his orders, it is within common knowledge that the object of a passbook is to inform the depositor from time to time of the condition of his account as it appears upon the books of the bank. It not only enables him to discover errors to his prejudice, but supplies evidence in his favor in the event of litigation or dispute with the bank. In this way it operates to protect him against the carelessness or fraud of the bank. The sending of his passbook to be written up and returned with the vouchers is, therefore, in effect, a demand to know what the bank claims to be the state of his account. And the return of the book with the vouchers is the answer to that demand, and, in effect, imports a request by the bank that the depositor will, in proper time, examine the account so rendered, and either sanction or repudiate it. In *Devaynes v. Noble*, 1 Mer. 530, 535, it appeared that the course of dealing between banker and customer, in London, was the subject of inquiry in the high court of chancery as early as 1815. The report of the master stated among other things that for the purpose of having the passbook ‘made up by the bankers from their own books of account, the customer returns it to them from time to time as he thinks fit; and, the proper entries being made by them up to the day on which it is left for that purpose, they deliver it again to the customer, who thereupon examines it, and if there appears any error or omission, brings or sends it back to be rectified; or, if not, his

silence is regarded as an admission that the entries are correct.' This report is quite as applicable to the existing usages of this country as it was to the usages of business in London at the time it was made. The depositor cannot, ⁵⁹⁰ therefore, without injustice to the bank, omit all examination of his account when thus rendered at his request. His failure to make it or to have it made, within a reasonable time after opportunity given for that purpose, is inconsistent with the object for which he obtains and uses a passbook": *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. Rep. 657, 29 L. ed. 811.

The majority of the court below based its peremptory instructions to the jury to return a verdict for the defendant upon the assumption that the company plaintiff had failed to perform this duty, and was thereby guilty of subsequent negligence, the effect of which was to defeat its right to recover from the bank. The chief justice said: "The payment of these alleged altered checks by the bank commenced in June, 1897, and continued until December, 1902. The checks are one hundred and fourteen in number. They were regularly charged against the account of the company by the bank, and the amounts so charged with the altered checks themselves as vouchers were returned to the company in ten separate settlements during that period of time. With such evidence in its possession no examination of the accounts and vouchers was made or attempted to be made by the company until after the death of Churchman, the secretary, in January, 1903.

"It seems, therefore, to a majority of the court, under the circumstances of this case, that the negligence of the plaintiff company was so gross as to defeat its right to recover in this suit as a matter of law, and that we would not be justified in submitting the facts to be determined by the jury."

Boyce, J., concurring, concludes as follows: "This case as it now stands before us (the plaintiff having disregarded its duty to the bank for upward of five years) has passed beyond the stage in the transactions between the plaintiff and the bank where the alleged negligence of the bank in the payment of the altered checks might be a question of fact for the jury, had the plaintiff exercised reasonable diligence both ⁵⁹¹ to discover the alterations and consequent forgeries of the checks in question and to give notice thereof to the bank."

Assuming that the court below was correct in thus determining the fact of subsequent negligence on the part of the plaintiff company (depositor), it still remains for us to con-

sider whether it was also correct in its determination of the legal effect of such negligence.

Spruance, J., in his dissenting opinion quotes upon this point the language of Justice Harlan, who delivered the opinion in *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. Rep. 657, 29 L. ed. 811, cited above, as follows: "Of course, if the defendant's officers, before paying the altered checks, could by proper care and skill have detected the forgeries, then it cannot receive a credit for the amount of these checks, even if the depositor omitted all examination of his account."

If this is a correct statement of the law, such subsequent negligence on the part of the depositor is not a bar to recovery, unless it be also determined that there was no negligence on the part of the officers of the bank in paying the fraudulently altered checks, and therefore Judge Spruance is correct when he states elsewhere in his opinion, "The first and important question is whether there is any evidence that would warrant the jury in inferring and finding that the bank did not use due and reasonable care and diligence to discover that these checks, or some of them, had been fraudulently altered."

In every case where suit is brought by a depositor to recover from a bank money deposited by him, which the bank has paid out otherwise than in conformity with his orders, and the bank sets up the defense that it is nevertheless entitled to charge the depositor with such payments, because of conduct of the depositor subsequent to such payment, the preliminary question to be determined is whether the bank was or was not guilty of negligence in making the payments. If it were negligent, if its officers be found to have failed to exercise due and reasonable ⁵⁹² care in detecting the forgery or fraud, then the subsequent negligence of the depositor, his failure to perform his duty in examining his passbook and vouchers with reasonable care and report to the bank in a reasonable time any errors or mistakes, would constitute no defense.

It is needless to cite cases in which this doctrine is explicitly stated, because they are all in accord upon this point, and the doctrine is assumed in every case where it is not stated. It is not disputed by counsel for the defendant, and, in fact, is indisputable, being recognized in all the authorities, however much they may differ otherwise in the doctrines they apply to the questions arising in consequence of subsequent negligence on the part of depositors.

Most of the cases cited, in fact the majority of the suits brought by depositors to recover payments made on forged or fraudulently altered checks, result from the crimes of some trusted employé of the depositor, and usually the court has to deal with a long series of successful forgeries, as in the present case.

After his passbook has been balanced and returned to a depositor with any of the forged or fraudulently altered checks, the authorities practically agree that in the absence of negligence on the part of the bank the failure of the depositor to notify the bank within a reasonable time that such checks have been forged or fraudulently altered will, if the delay be caused by his negligence in not using due care and diligence in examining the passbook and vouchers, or in giving notice, if he had discovered the forgeries, constitute a defense by the bank to the depositor's suit for the money subsequently paid out on similar checks.

With respect to the payments made before such settlement, however, the authorities differ, and although in the greater number of cases no distinction is made, in others a different principle is held to apply, and the distinction is insisted upon with force and earnestness in the case of *Critten v. Chemical* 593 *National Bank*, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529. The court in that case concludes its consideration of this point as follows: "This question is well discussed by the supreme court of Alabama in the case of *First Nat. Bank v. Allen*, 100 Ala. 476, 46 Am. St. Rep. 80, 14 South. 335, 27 L. R. A. 426, and we concur in the view expressed by that court, that the liability of the depositor for neglect of his duty to examine and verify his account with the bank is limited to damages sustained by the bank in consequence of such neglect."

In the Alabama case referred to the pleas of the bank state facts showing that it acted with due care in the payment of the forged checks, and averred subsequent negligence on the part of the plaintiff in the examination and comparison of its passbook, check stubs and returned checks. A demurrer to these pleas was overruled and the case tried by the court below without the intervention of a jury. It appeared that the forgeries were so skillfully executed as to deceive even the plaintiff himself, and it was assumed throughout the opinion of the court that there had been no want of due care, caution and diligence on the part of the officers of the bank in their scrutiny and consideration of the forged checks before paying them.

The Alabama court discusses the principles applicable to payments made before settlement as follows:

“Some of the courts have held that if the injury results to the bank by the negligence of the depositor, he will be held to have adopted and ratified the payment of the forged checks.

“By others under like circumstances the doctrine of estoppel has been applied, and the depositor held to be estopped from asserting a claim to the money paid on the forged checks. We do not think that either the doctrine of ratification or estoppel can be applied as a just and equitable principle in all cases. Ratification refers to a past act or transaction, and as now being considered, refers to the unauthorized act of an agent, or the adoption of a past act or transaction as his own act made or executed by another who was an agent. It would strain the doctrine of ratification to hold that a person had ⁵⁹⁴ ratified or adopted as his own the unauthorized act of another, of which he had no information, or which was promptly repudiated as soon as brought to his knowledge. So where a bank pays a forged check drawn in the name of one of the depositors, and the depositor is wholly free from neglect or fault, the bank owes the amount to the depositor. There was no act, omission to act, or silence in such a case on the part of the depositor which induced the bank to pay the forged check or influenced the action of the bank in the payment of the check. No principle of the law or of estoppel can be invoked by the bank against the depositor under such circumstances. The depositor owed the bank a duty, which was to examine the pass-book and vouchers with reasonable care and diligence. If the depositor failed in his duty in this respect, and the bank was injured in consequence of such omission of duty, the depositor became liable to the bank for all damage. The extent of the liability of the depositor is commensurate with the loss sustained in consequence of his neglect of duty—no more, no less. It would be unjust, unfair to the depositor, not sanctioned by any correct principle of law, to permit the bank to invoke the doctrine of ratification or estoppel which would exempt the bank from all liability incurred by its own neglect in the payment of the forged check, and in many cases inflict upon the depositor greater loss than that caused to the bank by his neglect of duty. The damages sustained by the bank as the result of neglect of duty by the depositor are susceptible of proof and measurement, as arise in any other case of breach of duty imposed by contract. The pleadings may be framed to present the issue in a proper manner”:

First Nat. Bank of Birmingham *v.* Allen, 100 Ala. 476, 46 Am. St. Rep. 80, 14 South. 335, 27 L. R. A. 426.

With respect to payments made after the settlement, the true reason of the generally adopted rule is admirably stated as follows (it being assumed, of course, that there was no negligence on the part of the bank: "The evidence shows that several checks were forged by Tomlin and paid by the bank subsequent to the time that Allen, ⁵⁹⁵ the plaintiff, was chargeable with notice that his clerk was making such unauthorized use of his name. As to all such subsequent payments of forged checks, the bank is entitled to invoke the equitable doctrine of estoppel. As to these it may be fairly said the bank was induced to pay, and did pay, in consequence of the silence of the plaintiff when it was his duty to speak. The bank was misled to its injury by the fault of the depositor. A very interesting and instructive collection of leading cases on the questions under consideration may be found in the twenty-sixth volume of the American Law Review for March and April, 1892, page 274": First Nat. Bank of Birmingham *v.* Allen, 100 Ala. 476, 46 Am. St. Rep. 80, 14 South. 335, 27 L. R. A. 426.

Both the reasoning and conclusions of the Alabama court meet with our unqualified approval, and we do not deem it necessary to give further consideration to the doctrine of ratification and estoppel in this connection. We do not consider that they apply to the payment of forged checks prior to the settlement, and our views in respect to such payments are in accord with those of the New York and Alabama courts.

The Leather Manufacturers' Bank *v.* Morgan, 117 U. S. 96, 6 Sup. Ct. Rep. 657, 29 L. ed. 811, is the most notable case in opposition to these views. It was decided in 1885, about eight years before the Alabama case we have cited, and about seventeen years before the New York case. The opinion delivered by Justice Harlan, from which we have already quoted, is long, elaborate and painstaking, reviewing nearly all the leading authorities up to that time bearing upon all the leading questions at issue in this cause.

Upon the particular point we are now considering, however, the reasoning upon which he rests is contained in the following paragraph: "If he had discovered that altered checks were embraced in the account, and failed to give due notice thereof to the bank, it could not be doubted that he would have been estopped to dispute the genuineness of the checks in the form in which they ⁵⁹⁰ were paid; upon the

principle stated by Lord Campbell in *Cairncross v. Lorimer*, 3 Macq. 827, 830, that 'if a party having an interest to prevent an act being done has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license.' This, however, could not be if, as claimed, the depositor was under no obligation whatever to the bank to examine the account rendered at his instance, and notify it of errors therein in order that it might correct them, and, if necessary, take steps for its protection by compelling restitution by the forger. But if the evidence showed that the depositor intentionally remained silent after discovering the forgeries in question, would the law conclusively presume that he had acquiesced in the account as rendered, and infer previous authority in the clerk to make the checks, and yet forbid the application of the same principle where the depositor was guilty of neglect of duty in failing to do that, in reference to the account, which he admits would have readily disclosed the same fraud? It seems to the court that the simple statement of this proposition suggests a negative answer to it": *Leather Mfrs. Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. Rep. 657, 29 L. ed. 811.

In other words, no difference in legal effect is recognized between the concealment of a forgery on the part of the depositor with deliberate intention and actual knowledge of the fact, on the one hand, and, on the other, his neglect to use the due and reasonable care and diligence in the examination of his passbook and vouchers which might have enabled him to discover it.

This argument does not carry conviction to our minds, for the former instance necessarily imports a deliberate ratification by the depositor of the forgeries, which, as in any other case of deliberate ratification, would be conclusive against him; whereas in the latter instance, for reasons already quoted from the Alabama ⁵⁹⁷ case, ratification cannot be implied, and an analysis of the proposition quoted from Lord Campbell shows that it is not applicable to facts and conduct so essentially different.

The New York court in *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 63 N. E. 969, 57 L. ed. 529, refers to the courts taking the opposite view of this point, as follows: "In the cases cited from the supreme court of the United States, from that of Massachusetts and that of Pennsylvania, it is conceded

that, if the bank has been guilty of negligence in paying the forged checks, then the doctrine of ratification and estoppel does not apply. It seems to us that the exception is somewhat inconsistent with the principle on which the doctrine rests. Moreover, we see no reason why the bank should be entitled to anything more than indemnity for the loss the depositor's negligence has caused it."

This question may not be of great importance in this case, so far as practical results are concerned, but it is none the less necessary for us to pass upon it, and we have therefore given to it most careful consideration, and we have deemed it proper to elaborate the general principles governing the relation of bankers and their depositors in view of the fact that this is the first case which has arisen in this state involving those principles.

We are now brought to the consideration of the important question whether there was any evidence that would have warranted the jury in inferring and finding that the bank did not use due and reasonable care and diligence to discover that the checks in controversy, or some of them, had been fraudulently altered.

The alterations of the checks, making them payable to bearer, were not claimed by the defendant to be other than patent, and there was evidence that in most of the checks, after the name of the payees, room was not left in which to write the words "or bearer" without deflecting or crowding them, and that those words were evidently written in different ink than the balance of the check and at a different angle of writing, thus tending to ⁵⁹⁸ raise the inference, although not conclusively, that the alterations were made after the signature; at the very least, it was sufficient to excite in the minds of the bank officers the suspicion that such was the case.

It also appeared from the evidence that the money was not paid on such altered checks to the payee, but to Churchman, who presented the checks and got the money, and that the alteration in every instance was made in his handwriting.

There was also evidence that the suspicion or curiosity of the bank officers was sufficiently aroused to cause them to ask of Churchman an explanation, and that the only explanation given by him was that "the people for whom these checks were drawn, in whose favor these checks were drawn, wanted the currency."

It also appeared by the by-laws of the company that no one but the treasurer had the authority to sign checks; and that

some time prior to the payment of the checks in controversy Mr. Barker, the treasurer, had shown to Mr. Robinson, an officer of the bank, the following by-law:

“Article 11. The treasurer of the company shall have charge of the funds of the company; shall deposit them in such bank to the credit of the company, as the directors may designate, and shall make payment only by checks, the stub of which shall state for what purpose the check is drawn.”

The occasion being, that the bank had paid a check signed by Mr. Coulton, at that time the president of the plaintiff company, and after being shown the by-law the bank officers “promised not to do it any more.”

All the checks altered in this way that were paid to Churchman prior to the first balancing of the company's passbook that contained any of the altered checks were made to H. H. Ferguson, and there is evidence tending to show that he was known by the bank officers to be an employé of the company, and had been receiving checks payable to his order shortly before the date of such altered checks, at Mobile, Alabama.

⁵⁹⁹ It also appears that up to and inclusive of May 3, 1899, checks made payable to his order were the only ones altered. Can it be contended that the inference might not be properly drawn by a jury from this evidence, considered by itself, that the bank officers did not use due and reasonable care and diligence in paying the checks, thus patently altered, to the secretary of the company, living in Wilmington, and in whose handwriting the alterations were made? It seems also apparent that if such inference should be drawn by a jury, it would follow that Churchman's success in successfully continuing a series of such forgeries would be as fairly attributable to the folly of the bank in paying those checks without making inquiry as to the authority for the alteration, as to any carelessness of the plaintiffs in failing to detect the alteration when the checks were returned to it from the bank; and upon the established principles which we have already laid down, such subsequent negligence on the part of the plaintiff could not release the bank from its responsibility for any of the payments made on such altered checks. On the other hand, there is evidence tending to show, although not conclusively, that the method in which the business of the plaintiff company was conducted was calculated to mislead the bank and justify its officers in believing that Churchman, its secretary, was authorized to make the alterations and receive the money instead of the payees. This is the third con-

tention made by the defendant's counsel, which we have quoted above, to wit: "That the acts and conduct of plaintiff company warranted defendant bank in believing that William H. Churchman was authorized to make the alterations appearing on the checks in controversy."

The evidence which is claimed by the bank defendant to have proved this is that Churchman was not a mere clerk of the company, but its secretary, and, in the absence of the president and vice-president, its acting president; that the sole office of the plaintiff company in the city of Wilmington was managed ⁶⁰⁰ by him; that with rare exceptions he alone dealt with defendant in relation to its bank account, indorsing all its checks for deposit, with the exception of government checks, which were indorsed by the treasurer and sent to Churchman for deposit; that Barker, the treasurer, is shown to have been in the city of Wilmington but two or three times in a year, and his duty to the company required him to be in remote parts of the country, now on the New England coast, now on the Alabama, Florida, or Texas coast, so that if they desired to notify him of the alterations, it might have taken days to have located him in order to send a description of the checks. This had been the case for some years prior to the date of the first altered check in controversy, and it is argued that all these circumstances were calculated to give the bank the assurance that it would be justified in making the payments to Churchman on such altered checks, especially in view of the fact that by delaying payment in order to make inquiry of Barker they might have shaken plaintiff's credit, causing damage and subjecting itself to an action of damages, besides gaining the hostility of both Churchman and Barker and losing this valuable account in case the suspicion proved to be unfounded.

It is also contended by the defendant's counsel that Barker's conduct, as appears from the evidence, in signing the checks sent him by Churchman upon Churchman's statement that they were bona fide bills, without verifying his statement by demanding the O. K.'d bills for payment of which Churchman stated the checks were drawn, or asking for the receipted bills, afterward furnished facilities for Churchman to successfully perpetrate the frauds, which renders this case analogous to the famous Vagliano case, finally decided against the plaintiff by the house of lords: *Bank of England v. Vagliano Bros.*, [1891] App. Cas. 171. It was heard in the house of lords on appeal from the judgment of the court of appeals, reported in 23 Q. B. D. 243, 58 L. J. Q. B. 357, in which the

judgment of Charles, J., reported in ⁶⁰¹ 22 Q. B. D. 103, 58 L. J. Q. B. 27, was affirmed by Cotton, L. J., Lindley, L. J., Bowen, L. J., Fry, L. J., and Lopes, L. J.; dissentiente, Lord Esher, M. R. The facts are briefly stated in the report as follows: "The plaintiff in the action claimed to be entitled to be credited by the defendant bank with a sum of seventy-one thousand five hundred pounds sterling, with which the bank had debited him in respect of certain bills, which bore the genuine signature, as acceptors, of the plaintiff's firm. The bills purported to be drawn by one Vucina, who was a correspondent of the plaintiff's firm, but they were in fact wholly fictitious bills fabricated by a clerk in the employ of the plaintiffs, who by placing them before Mr. Vagliano along with forged letters of advice obtained the acceptance of the firm. The payee named in the bills was 'Petridi.' There was a person of this name who had some business with the firm, but this person had no concern with the transaction. After obtaining the acceptance of the firm, the clerk forged the signature of the payee and obtained payment of the bills at the counter of the bank. Both the courts below had decided in favor of the plaintiff's claim against the bank."

Each of the eight lords participating in the decision delivered an opinion, Lords Bramwell and Field dissenting, and the others held partly that the payee was fictitious or non-existent within the meaning of the English bill of exchange act of 1882, section 7, subsection 3, which made bills of exchange payable to bearer which were drawn payable to a fictitious or nonexisting person; and partly that there was a want of due care and diligence on the part of the plaintiffs in the conduct of their business and the scrutiny of their accounts with Vucina, etc., which constituted the proximate cause of the payment of the forged checks.

All the judges, however, took occasion to cite with approval the leading case of *Robarts v. Tucker*, 16 Q. B. 560, and the only question of law decided by them was the meaning and effect of the words "fictitious or nonexisting persons," as used ⁶⁰² in the English bill of exchange act; their opinions, so far as they dealt otherwise with the question of plaintiff's negligence as the proximate cause of the loss, being concerned merely with the application of an undisputed principle to the particular state of facts before them.

The opinions delivered in all three courts are extremely interesting, and we have read them with great care. Counsel for the defendant in this cause have displayed great ingenuity in the effort to make the doctrine applied by the house of

lords to the bogus bills of exchange in that case, about which everything was forged and fictitious except Vagliano's acceptance, to checks signed by Barker for bills which had already been paid by other checks to the same payees, or for sums of money which were not at the time due and owing to the payee, in every instance being persons with whom the company had had habitual dealings. The analogy fails, however, not only because of the radical difference in the facts and circumstances of the Vagliano case, but also because that case was concerned with bills of exchange, which differ in some essential feature from checks, being a distinct species of the same genus of commercial paper.

The case of *Scholfield v. Earl of Londesborough*, [1896] App. Cas. 514, which also discusses *Robarts v. Tucker* and *Young v. Grote*, as well as the Vagliano case, is much more instructive in its theoretical discussion of the general principles of law governing bills of exchange.

Out of a great number of cases cited and reviewed by counsel, we have only referred to those which formulate or illustrate the principles of law involved. The greater number are only concerned with the application of admitted principles to the facts or circumstances before the court at the time which are necessarily set out at length. These we have deemed it unnecessary for the most part to cite.

We have already discussed the questions arising from the subsequent negligence of depositors, and stated the principles which determine its effect upon the responsibility of the bank ³⁰³ for money paid out on forged or altered checks, both before and after a settlement of the depositor's account containing any of such checks.

For the purpose of that discussion we assumed that a majority of the court below were correct in assuming that such negligence had been proved in the pending cause, and it still remains for us to consider whether in our judgment such an assumption was warranted by the evidence.

The general principle is that "where forged checks have been paid and charged in the account and returned to the depositor, he is under no duty to the bank so to conduct the examination that it will necessarily lead to the discovery of the fraud. If he examines the vouchers personally and is himself deceived by the skillful character of the forgery, his omission to discover it will not shift upon him the loss which in the first instance is the loss of the bank."

In the cause before us, however, no such difficulty is presented; no question arises as to the amount of diligence re-

quired, for one of the exceptional features of this case is the baldness and plainness of the fraudulent alterations and the absence of any apparent effort on the part of the perpetrator of the frauds to conceal the evidence of them. It is obvious and conceded that if Barker had at any time looked over the returned checks the alterations to "or bearer" would have stared him in the face and disclosed the fraud at once. This he did not do himself, and the employé or officer to whom this duty was assigned was Churchman, the perpetrator of the fraud. There is, therefore, no question of fact involved. Any, even a cursory, examination by an honest clerk would have resulted in the discovery of the plain alterations, and therefore the only question is whether the plaintiff is relieved from responsibility by the fact that the person charged by Barker, the treasurer, with the duty of making the examination was himself the forger, and, therefore, bound to conceal the alteration.

Upon this point we entirely agree with the following statement ⁶⁰⁴ of the rule and the reasons upon which it is based contained in *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529: "Of course, the knowledge of the forgeries that Davis possessed, from the fact that he himself was the forger, was in no respect to be attributed to the plaintiffs. But we see no reason why they were not chargeable with such information as a comparison of the checks with the check-book would have imparted to an innocent party previously unaware of the forgeries. The plaintiff's position may be no worse because they intrusted the examination to Davis instead of to a third person; but they can be no better off on that account. If they would have been chargeable with the negligence or failure of another clerk in the verification of the accounts, they must be equally so for the default of Davis, so far as the examination itself would have disclosed the facts."

It only remains to determine the one remaining question, which is also the first and most important one, but this can now be done in a very few words.

It is not for this court to say in the pending cause whether the evidence bearing upon the question of the negligence or want of due and reasonable care on the part of the bank in the payment of the altered checks was strong or weak when taken in connection with the evidence tending to show that the method in which the business of the plaintiff company was conducted was calculated to mislead the bank, was such as to constitute the proximate cause of the loss. We are only called

upon to say whether there was any legal evidence sufficient to be submitted to the jury for their consideration, and we are unhesitatingly of the opinion that the evidence should go to the jury under careful instruction from the court.

It results, therefore, that the court erred in the peremptory instruction to the jury to find for the defendant as a result of the evidence.

The judgment is therefore reversed and the case remanded to the court below.

The Duty of a Depositor, on the Return of His Passbook, is to do what a reasonable person would be expected to do, to see whether his account is correct; but if there is nothing to put him on inquiry as to the identity of persons to whom payments of checks have been made, he has no duty to investigate that subject, or to see that the indorsement of checks in the names of the payees are not forgeries: *Murphy v. Metropolitan Nat. Bank*, 191 Mass. 354, 114 Am. St. Rep. 595.

A Bank Depositor is Under Obligation to the Bank to Examine within a reasonable time, or have examined by some competent person, in good faith and with ordinary care, the account rendered in his passbook and the vouchers returned, and to report any errors discovered. Failing in this, he is negligent, and may be held liable for the payment of a forged check: *First Nat. Bank v. Richmond Electric Co.*, 106 Va. 347, 117 Am. St. Rep. 1014.

The Rights and Remedies of the Several Parties When a Forged check has been paid are discussed in the note to *People's Bank v. Franklin Bank*, 17 Am. St. Rep. 889; and the liability of one receiving payment on a forged indorsement is discussed in the note to *First Nat. Bank v. Bank of Rutherford*, 94 Am. St. Rep. 641.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

SELDEN v. ILLINOIS TRUST AND SAVINGS BANK.

[239 Ill. 67, 87 N. E. 860.]

WILL CONTEST—Who may Wage.—The Words “Any Person Interested,” in the statute designating who may contest a will, mean those having a direct pecuniary interest existing at the time of the probate of the will and detrimentally affected thereby. (p. 181.)

WILL CONTEST.—The Jurisdiction of Courts of Equity over will contests is derived solely from statute. It does not exist by virtue of their general chancery powers. (p. 183.)

WILL CONTEST—Who may Wage.—No Action to Contest a Will can be brought by anyone except a person interested at the time the will was admitted to probate. (p. 183.)

WILL CONTEST—Assignability or Descent of Right to Contest.—The right of action to contest a will is not assignable nor the subject of conveyance and does not pass by inheritance or descent. (pp. 183, 184.)

WILL CONTEST—Death of Contestant—Survival of Action.—The right to contest a will does not survive the death of the contestant, whether or not he filed a contest in his lifetime. (p. 184.)

WILL CONTEST—Constitutional Law.—Since the Right to Contest a will in chancery exists only by virtue of statute, the fact that the right may be given to certain persons but not to their heirs or devisees violates no constitutional right. (pp. 185, 186.)

M. Henry Guerin, for the appellants.

Wilson, Moore & McIlvaine, for the appellees.

⁷³ **FARMER, J.** Olive J. Cone, as the only heir at law of Daniel B. Shipman, was a “person interested” at the time of the admission of the will to probate, and as such had a right to, and did, ⁷⁴ file a bill to contest the will. The important question to be determined is whether upon her death the cause of action survived to her legal and personal representatives.

In this state the right to contest a will in chancery is a right conferred by statute, and independently of the statute no such right has ever been recognized by our courts, though a different rule has prevailed in some states. In *Calkins v. Calkins*, 229 Ill. 68, 82 N. E. 242, we said: "The jurisdiction of courts of equity to entertain bills to contest wills is exclusively derived from statute, and can only be exercised in the mode and within the limitations prescribed by the statute: *Luther v. Luther*, 122 Ill. 558, 13 N. E. 166; *Jele v. Lemberger*, 163 Ill. 338, 45 N. E. 279. Cases are to be found in some of our sister states which hold that the power of courts of chancery to entertain bills of this character is embraced in the general equity jurisdiction of these courts, but this rule has never been recognized in this state, and it is opposed by the great weight of authority both in England and America. . . . When a bill is filed to contest a will under the statute, the jurisdiction invoked is not the general equity powers of the court but the special statutory jurisdiction, and, so far as the scope or extent of the jurisdiction extends, it is to be determined by the same rules that would apply if the jurisdiction was conferred upon some particular tribunal created to exercise this special jurisdiction and no other. A court of general jurisdiction may have a special statutory jurisdiction conferred upon it not exercised according to the course of the common law and which does not belong to it as a court of general jurisdiction." In *Waters v. Waters*, 225 Ill. 559, 80 N. E. 337, this court said: "Courts of equity in this state have no jurisdiction to contest a will except such jurisdiction as has been conferred by the statute. Indeed, the statute conferring jurisdiction is the only source of power intrusted to a court of equity in this state. Such being the case, a court of equity can only entertain a bill in the mode and within ⁷⁵ the time prescribed by the statute." Other cases to the same effect are *Sharp v. Sharp*, 213 Ill. 332, 72 N. E. 1058; *Wheeler v. Wheeler*, 134 Ill. 522, 25 N. E. 588, 10 L. R. A. 613; *Sinnet v. Bowman*, 151 Ill. 146, 37 N. E. 885; *Keister v. Keister*, 178 Ill. 103, 52 N. E. 946; *Chicago Title etc. Co. v. Brown*, 183 Ill. 42, 55 N. E. 632, 47 L. R. A. 798.

This court held in *McDonald v. White*, 130 Ill. 493, 22 N. E. 599, that the words in the statute, "any person interested," meant those having a direct pecuniary interest affected by the probate of the will, and that such interest must exist at the time of the admission of the will to probate.

In that case the heir of a testatrix executed a conveyance of certain real estate which he claimed to own if the will of the testatrix was invalid. His grantee filed a bill to contest the will. It was held the bill could not be maintained; that the heir who made the conveyance had only a bare right to establish title to the property by successfully contesting the will, but that such right was not assignable and could not therefore be made the subject of a conveyance.

In *Storrs v. St. Luke's Hospital*, 180 Ill. 368, 72 Am. St. Rep. 211, 54 N. E. 185, a bill was filed by Emery A. Storrs, only heir at law of George M. Storrs, deceased, to contest the will of Caroline T. Storrs, mother of George M. Storrs and grandmother of the complainant. The bill was filed eight years after the probate of the will of Caroline T. Storrs, and to excuse the delay in filing it alleged that George M. Storrs was non compos mentis from the time of the admission of the will to probate until his death, which occurred four months before filing the bill. The court said: "The right to file the bill, which existed in George M. Storrs, did not descend to the appellant, Emery A. Storrs. George M. Storrs had the bare right to establish title by successfully contesting the will. That right was not assignable, as was held in *McDonald v. White*, 130 Ill. 493, 22 N. E. 599. If it was not assignable by a conveyance or written transfer, it could not pass by inheritance or descent. The right to dispose of property by will is always considered purely a creature of statute: *United States v. Perkins*, 163 U. S. 625, 16 Sup. Ct. Rep. 1073, 41 L. ed. 287; *Kochersperger v. Drake*, 167 Ill. 122, 47 N. E. 321, 41 L. R. A. 446. No statute exists in this state, so far as we are advised, which authorizes the right to file such a bill to pass by descent or to go to an heir by inheritance. The right of a widow to dower does not survive to the administrator: *Hitt v. Seammon*, 82 Ill. 519. An action to recover a statutory penalty does not survive the death of the defendant: *Diversey v. Smith*, 103 Ill. 378, 42 Am. Rep. 14. We are therefore of the opinion that appellant, Emery A. Storrs, had no such interest at the time of the probate of the will as would entitle him, in view of the decisions above quoted, to file a bill to contest its validity at the date at which the present bill was filed, and that such right as his father, George M. Storrs, had to file such a bill did not pass to him by descent."

In *Staude v. Tscharnier*, 187 Ill. 19, 58 N. E. 317, the testator left two brothers as his only heirs at law. The will

was admitted to probate in May, 1896. One of the brothers died in January, 1898, and the other in September, 1898, without either of them filing a bill to contest the will. The heirs of the brother who died in September, 1898, filed a bill February 26, 1900, to contest the will. The court said: "The complainants claim an interest in the estate through Robert Staude, who was one of the heirs of Augustus Staude at the date of the probate of the will, but none of them were heirs of Augustus Staude or interested in his estate at the time of such probate. Robert Staude and Franz Staude, the heirs at law of Augustus Staude, the testator, had a right given them by statute to contest the will, but neither of them contested it or attempted to do so. The right to file a bill to set aside the will and codicils and probate was not assignable, and did not pass by descent or inheritance to the complainants. They had no right to file the bill: *Storrs v. St. Luke's Hospital*, 180 Ill. 368, 72 Am. St. Rep. 211, 54 N. E. 185. The court was right in sustaining the demurrer."

" By the cases above referred to it is settled law (1) that it is not by virtue of the general chancery powers that courts of equity in this state are given jurisdiction of will contests, but that such jurisdiction is derived solely from the statute; (2) that no action to contest a will can be brought by anyone except a person who was interested at the time the will was admitted to probate; (3) that the cause of action is not assignable or the subject of conveyance, and does not pass by inheritance or descent.

It is not contended that, under our previous decisions, if Olive J. Cone had died before commencing the suit, the action would have survived to her heirs or executor, but counsel for appellants seeks to distinguish a case of the continuation of an action that has been commenced by a proper person from the survival of a right to bring the action when the same had not been begun before the death of the party entitled to bring it. The right to continue the prosecution of a suit or proceeding upon the death of a party plaintiff, as given by our statute (section 10 of the chapter on abatement), is limited to those cases in which the cause of action survives. We know of no instance where it has been held that a cause of action which belongs to the class of actions that does not survive either by common law or statute may be changed to an action that survives, by the party to whom the action is given bringing suit in his lifetime. This action cannot be held to survive by the common law, for it is purely

a statutory one, which can only be pursued in the mode and within the limitations prescribed by the statute, and under the construction we have given that statute there is no escape from the conclusion that the action does not survive. The tenth section of our statute on abatement gives the right to the heir, devisee, executor or administrator of a sole complainant in an action in equity who dies before final decree, upon the suggestion of the death, to be substituted as complainant "if the cause of action survive to the heir, devisee, executor or ⁷⁸ administrator of such decedent." Under this statute, where the action survives no bill of revivor is required, but the heir, devisee, executor or administrator may, on the suggestion of the death to the court, be permitted to be substituted as complainant and proceed with the suit. But the right to do this is only conferred when the cause of action survives. It has been held that where a right of action is so entirely personal that the party in whom it exists cannot by contract place it beyond his control, it will not survive (*Hegerich v. Keddie*, 99 N. Y. 258, 52 Am. Rep. 25, 1 N. E. 787); and that, as a general rule, assignability and survivability of causes of action are convertible terms: *Brackett v. Griswold*, 103 N. Y. 425, 9 N. E. 438; *Village of Cardington v. Fredericks' Admr.*, 46 Ohio, 442, 21 N. E. 766. "As a general test, an executor or administrator cannot come in and prosecute a suit unless he was in a condition to commence a like suit if it had not been begun by his testator or intestate": 1 Cyc. 49.

Our conclusion is, that had Olive J. Cone died at any time after the admission of the will to probate without having filed a bill to contest it, the right to institute said proceeding would not have survived to the appellants, and the fact that she did file the bill before her death gave them no greater rights than if said proceeding had not been begun and they were seeking to institute an original proceeding to contest said will. The justice and wisdom of the statute may be proper subjects for consideration by the legislature but not for the courts.

It is contended by appellants that Hannah Rogers Jones was a "person interested," and as such had a right to file a bill to contest the will, and having become a complainant in such bill before the expiration of one year from the date of the admission of the will to probate, she has a right to maintain said bill. It is clear she was not a "person interested" in the sense meant by the statute to give the right to contest

a will. The settlement of the estate of Daniel B. ⁷⁹ Shipman in accordance with the provisions of the will deprived her of no right she would have otherwise had, but, on the contrary, conferred upon her a benefit to the extent of giving her two thousand dollars, which she would have had no right to in the absence of the will. In *McDonald v. White*, 130 Ill. 493, 22 N. E. 599, it was said that a "person interested" is one who will be directly affected, in a pecuniary sense, by the settlement of the estate under the will, and this clearly meant one who was affected detrimentally by being deprived of a right he would have otherwise had in the absence of a will. The statute cannot be construed to confer the right upon one who is deprived of nothing by the will but is given benefits he otherwise could not have had, to contest the validity of a will, and *Wolf v. Bollinger*, 62 Ill. 368, and *Jele v. Lemberger*, 163 Ill. 338, 45 N. E. 279, relied on by appellants, do not sustain their position. In *Wolf v. Bollinger*, Catharine Bollinger was devised forty acres of land by the will. Shortly afterward the testator caused the name of Catharine Bollinger to be canceled by drawing lines through it with a pen, but leaving it still legible, and interlining above it the name of Christina Wolf. The will was not republished and the witnesses to the will were not present when the alteration was made. After the will was admitted to probate Catharine Bollinger filed a bill setting out the manner in which Christina Wolf's name had been substituted for hers, and prayed that the instrument as admitted to probate be declared null and void, and that the will as originally drawn and executed be established as the true will. This court held that Catharine Bollinger had the right to file and maintain the bill, and said the privilege of contesting the validity of a will is given to any person interested, "which may embrace a devisee as well as an heir at law." In *Jele v. Lemberger*, 163 Ill. 338, 45 N. E. 279, the right of a devisee to contest a will was in no way involved. In discussing the question who is embraced in the phrase "any person interested," as used in the statute, the court cited *Wolf v. Bollinger*, 62 Ill. 368, that it may embrace a ⁸⁰ devisee as well as an heir. There may be special circumstances, such as existed in *Wolf v. Bollinger*, where a person claiming to be a devisee must be held to be a "person interested," but no such circumstances exist in this case.

Our construction of the statute is not, as contended by the appellants, in conflict with the constitutional provision guar-

anteeing the right of trial by jury. The laws of descent and the laws governing the right to dispose of property by will are statutory enactments, as is also the right to contest a will in chancery. In *Sharp v. Sharp*, 213 Ill. 332, 72 N. E. 1058, it was said: "The legislature could have, had it seen fit, entirely abrogated said proviso [to section 7 of the Statute of Wills], and thereby swept away the entire remedy provided for by said proviso." Appellants were not interested in the property of Daniel B. Shipman at the time the will was admitted to probate, and could not be heard to question its validity. They were not then even the heirs or devisees of Olive J. Cone, for she was still alive. But for the statute she could not have contested the will, and the fact that that right was given to her but not to her heirs or devisees violates no constitutional or other right of appellants. No right can be violated where none exists.

We are of opinion the decree of the circuit court was right, and it is affirmed.

WHO CAN CONTEST A WILL.

- I. Introductory Remarks, 186.
- II. Statutory Regulations.
 - a. General Principles Controlling, 187.
 - b. Nature of Interest, 188.
- III. Illustrations Showing How General Principles have been Applied in Particular Cases.
 - a. Heirs and Next of Kin as Contestants, 189.
 - b. Devisees and Legatees as Contestants, 195.
 - c. Creditors as Contestants, 196.
 - d. Persons Having Rights Independent of Will, 202.
 - e. Persons Cited or Appearing in Probate Proceedings, 203.
 - f. Public Administrator and Attorney General as Contestants, 204.
 - g. Miscellaneous Cases, 204.
- IV. Estoppel to Attack or Contest.
 - a. In General, 208.
 - b. By Acceptance of Benefit Under Will, 212.
 - c. Restoration of Benefit Received Under Will as Condition Precedent to Right to Contest, 216.
 - d. Agreements Affecting Right to Attack or Contest, 218.

I. Introductory Remarks.

The question of who may oppose probate of a will is treated in the note appended to *Meyer v. Fogg*, 68 Am. Dec. 447, but as it can hardly be denied that the setting aside or rejecting probate of a will is the exercise of a very radical judicial prerogative, the subject requires more extended consideration than it has heretofore received; especially so since the present age of commercialism often results in the accumulation of such vast estates being disposed of by will that some unfavored relative is tempted to try and obtain, by a

contest of the will, some of the riches which resulted from the self-denial, industry and labors of his often more deserving ancestor.

And the right to set aside a will is not embraced in the general equity powers of a court of chancery, but is purely statutory. "It is well established," said the late Justice Field, "both in England and this country, that by the general jurisdiction of equity, independent of statutes, a bill will not lie to set aside a will or its probate": *Gaines v. Fuentes*, 92 U. S. 10, 23 L. ed. 524; and whenever this question has been mooted in the state courts, these courts have invariably recognized the statute as the only source from which jurisdiction is derived: *Luther v. Luther*, 122 Ill. 558, 13 N. E. 166; *Jele v. Lemberger*, 163 Ill. 338, 45 N. E. 279; *Storrs v. St. Luke's Hospital*, 180 Ill. 368, 72 Am. St. Rep. 211, 54 N. E. 185; *Sharp v. Sharp*, 213 Ill. 332, 72 N. E. 1058; *Selden v. Illinois Trust & Savings Bank*, 239 Ill. 67, ante, p. 180, 87 N. E. 860; *Evansville Ice & Cold Storage Co. v. Winsor*, 148 Ind. 682, 48 N. E. 592; *Clear Springs Twp. v. Blough (Ind.)*, 88 N. E. 511.

It is true, in a sense, that in some instances the contest of a will is, as a matter of law, different from an attack upon its validity; for example, upon an issue of *devisavit vel non*, the contest questions the execution of the will, and the matter involved is whether the instrument is or is not the last will and testament of the testator, while an attack upon its validity admits the execution of the will but questions the validity of some or all of its provisions.

But, as we shall presently see, the principles involved in resisting probate of a will and contesting its validity are the same so far as the right of a party to make the contest is concerned. In fact, the statute of wills embraces the same provision for contesting wills and resisting probate, and as the causes are the same, the probate courts, even in those jurisdictions where the probating power is limited to probate only, and does not extend to construction, apply the same rules for determining who may resist probate as do the courts of law or equity in determining who may contest the validity of a will, in those jurisdictions where the power of construction is vested by statute in those courts. In many of the states the superior or circuit courts are vested with exclusive jurisdiction of all matters relating to the probate and contest of wills and settlement of estates, and are therefore at once courts of probate, construction and administration, and possess general equity powers. So that, in our present discussion, which is confined solely to the question of who is entitled to contest a will, we have not deemed it necessary to separate the cases where the contest was upon an issue of *devisavit vel non* from those where the validity of the will was attacked by a bill in equity, since the decisions applicable to the one are also applicable to the other.

II. Statutory Regulations.

a. General Principles Controlling.—"Any persons interested," or words of similar import, is the language of the statutes with refer-

ence to those who are entitled to contest a will, either when it is offered for probate upon an issue of *devisavit vel non* or afterward by will to attack its validity. The time within which an attack may be made by a bill in equity varies according to the statutes of the different states, but this is not material to the point at which we are now aiming, namely, who is a "person interested" within the meaning of the statute. It is no longer a moot question that none but a person interested can contest a will either by resisting probate or afterward by bill in equity, for even where the statute was silent as to the word "interested," and allowed "any person" to institute an action to contest a probated will, it was held that the words "any person" were confined by construction to persons interested: *Niederhaus v. Heldt*, 27 Ind. 480; *Schmidt v. Bomersbach*, 64 Ind. 53; *Kinnaman v. Kinnaman*, 71 Ind. 417; *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336. Here, it was held in an early New York case that a mere stranger may enter a caveat against the proof of a will, because the caveat is a mere monitory act, but the court was careful to say that the power was limited to the act of entering it, and beyond the caveat, the parties interested were the only ones who could interfere: *Reid v. Vanderheyden*, 5 Cow. 719.

While there is no question, then, but that only persons interested are entitled to contest a will, it is not always easy to determine just who is a person interested within the purview of the statute, unless we understand thoroughly the nature of the interest contemplated.

b. Nature of Interest.—Speaking generally, of course, the heirs at law and next of kin of a testator would seem to have such interest as would entitle them to contest his will in which they were not named as beneficiaries, and as a rule they have, as we shall presently see, but as the statute contemplates a legal interest and not merely a grievance to the feelings of propriety or sense of justice, it is not in every case that even an heir at law can contest the will of his ancestor. An instance of this is shown in the case of *Jele v. Lemberger*, 163 Ill. 338, 45 N. E. 279, where an heir at law of the testator was refused permission to attack the validity of a will devising real estate to a stranger, upon the ground that such heir was an alien, and under the statute of Illinois not entitled to hold real property in that state.

Some of the courts have stated in a general way the tests to be applied in ascertaining the nature of the interest contemplated by the statute of wills. "The interest must be a direct pecuniary interest affected by the probate of the will, for the reference is to an existing interest, and not to an interest which may be subsequently acquired": *McDonald v. White*, 130 Ill. 493, 22 N. E. 599. "A person not directly and pecuniarily interested in the estate of a deceased person at the time of the probate of the will of such decedent is not entitled to file a bill in chancery for the purpose of contesting the will": *Jele v. Lemberger*, 163 Ill. 338, 45 N. E. 279; *Halde v. Schultz*, 17 S. D. 465, 97 N. W. 369. "To be a person interested, in the meaning of the statute,

he must be a person whose right or title is concluded by the probate": *Watson v. Alderson*, 146 Mo. 333, 69 Am. St. Rep. 615, 48 S. W. 478. "Any person who has such a direct, immediate, and legally ascertained pecuniary interest in the devolution of the testator's estate as would be impaired or defeated by the probate of the will, or be benefited by setting aside the will, is 'a person interested'": *Bloor v. Platt*, 78 Ohio, 46, 84 N. E. 604. In New York, "a person interested" was said by the surrogate court to be one "who would share in the estate in case of intestacy," and not one to whom a contingent interest was devised: *In re Ruppener's Will*, 15 Misc. Rep. 654, 37 N. Y. Supp. 429. "Only those will be allowed to contest the validity of a will who are directly interested as heir or distributee in the estate": *Lignon v. Hawkes*, 110 Tenn. 514, 75 S. W. 1072; and to same effect is *Meyer v. Fogg*, 7 Fla. 292, 68 Am. Dec. 441. "Any person interested" means "any person interested in the estate, not in the will": *Freeman v. Freeman*, 61 W. Va. 682, 57 S. E. 292. The supreme court of Tennessee, in a comparatively recent case, has perhaps been most happy in stating with simplicity, yet comprehensiveness, the rule deducible from the varying language employed by the different courts in announcing practically the same principle. "No one can question the validity of a will, or any provision in it, unless he stands in such relation to the testator that, in the event the provision is invalid, he will be entitled to an interest in the property involved in the controverted provision": *Bowers v. McGavock*, 114 Tenn. 438, 85 S. W. 893. Let us now see the practical results which have followed an application by the courts of the general rule to different persons who claimed to be "interested" within the provision of the statute of wills.

III. Illustrations Showing How General Principles have been Applied in Particular Cases.

a. Heirs and Next of Kin as Contestants.—As a general rule, the heirs at law of a testator are "persons interested" within the meaning of the statute of wills: *Hayes v. Bowden* (Ala.), 49 South. 122; *In re Benton's Estate*, 131 Cal. 472, 63 Pac. 775; *Meyer v. Fogg*, 7 Fla. 292, 68 Am. Dec. 441; *Selden v. Illinois Trust etc. Bank*, 239 Ill. 67, ante, p. 180, 87 N. E. 860; *Kinnaman v. Kinnaman*, 71 Ind. 417; *Murphy's Exr. v. Murphy*, 23 Ky. Law Rep. 1460, 65 S. W. 165; *Snow v. Hamilton*, 90 Hun, 157, 35 N. Y. Supp. 775; *Thomas v. Thomas*, 9 App. Div. 487, 41 N. Y. Supp. 276; *Reid v. Curtin*, 51 App. Div. 545, 64 N. Y. Supp. 833. Thus in *Hayes v. Bowden* (Ala.), 49 South. 122, it was held that an heir at law of the testator who took nothing under the will could maintain a suit in chancery to contest the probate of the will, because if the will was set aside, such heir would take as distributee, and was therefore interested in the estate of the testator.

Likewise, a widow who is an heir at law of her deceased husband has a right to contest her husband's will, notwithstanding she would

receive a larger share of the estate under the will than she would take as heir: *In re Benton's Estate*, 131 Cal. 472, 63 Pac. 775.

And in *Murphy's Exr. v. Murphy*, 23 Ky. Law Rep. 1460, 65 S. W. 165, it was held that an heir was entitled to contest testator's will which was probated, though he was also excluded by a previous will which had not been probated, for the reason, as given by the court, that "a person occupying the relation of heir of the decedent had the right to contest the will which was probated, without reference to the provisions of any previous will, which might never be offered for probate, or, if so offered, might also be the subject of contest."

But the doctrine of the last case was opposed by the supreme court of Tennessee in *Walker v. Cowan*, 117 Tenn. 135, 96 S. W. 967, where it was held that where an earlier will leaves no property to a party, he is not entitled to contest the later will, though an heir of the testator. The reason given for this holding is, that, even if the contest was successful and the later will revoked, then the earlier will would remain in force and the contestant would have no substantial interest in the estate. In reply to the contention that even though the heir took no interest under the former will, still he had as heir an apparent interest which entitled him to contest, the court said: "Let it be granted, however, to the petitioner, that *prima facie*, being one of the next of kin of the deceased, he had the right claimed for him by his counsel, yet we think this *prima facie* case is necessarily met and destroyed by the existence of the earlier, valid, but unprobated will. This leaves him a stranger to the estate, and as such without any right of contest."

In *Watson v. Alderson*, 146 Mo. 333, 69 Am. St. Rep. 615, 48 S. W. 478, it was held that, if a testator's widow is bequeathed absolutely all the household furniture and a life estate in the home place or residence, any of his heirs has a right to contest the probate of the will, because they are prejudiced thereby. Though they have an interest in the same property under the will, it is not the same interest therein to which they are entitled as heirs at law.

A husband interested in the personal property of testatrix, and her sister an heir at law of her real estate, may sue to determine the invalidity of the will under the statute, providing that "any person interested," etc., may cause the validity of a will to be established: *Wood v. Fagan*, 126 App. Div. 581, 110 N. Y. Supp. 938. Children of testator, as his next of kin, may contest his will as of common right, whether prejudicial to their interest or not: *Watson v. Alderson*, 146 Mo. 333, 69 Am. St. Rep. 615, 48 S. W. 478. But in *Wilcoxon v. Wilcoxon*, 165 Ill. 454, 46 N. E. 369, it was held that a son who took nothing under his father's will could not maintain a bill in equity to set aside a codicil to the will, which reaffirmed the bequests in the original will, but also provided for the disposition of certain property subsequently acquired by the testator to be effective only in the event the sole beneficiary of the will should die before the testator, the beneficiary having survived and the validity of the original will being admitted.

And where a will worked an equitable conversion into personality of all the real estate of a testator by devising it to a trustee, with power to sell and pay over the proceeds, an heir of the testator or one claiming under him could not maintain, in his capacity as heir, an action for the recovery of the estate or the proceeds thereof, based on the ground that the devises were invalid: *Garvey v. United States Fidelity & Guaranty Co.*, 77 App. Div. 391, 79 N. Y. Supp. 337. And as the right to dispose of property by will is always considered purely a creature of the statute (*Selden v. Illinois Trust etc. Bank*, 239 Ill. 67, ante, p. 180, 87 N. E. 860; *United States v. Perkins*, 163 U. S. 625, 16 Sup. Ct. Rep. 1073, 41 L. ed. 287), the right of an heir to contest a will is a personal privilege, and does not descend to his heirs or survive to his administrator. Thus, in *Storrs v. St. Luke's Hospital*, 75 Ill. App. 152, the grandson of testatrix filed a bill to contest the probated will of testatrix. Complainant's father was the son and only heir at law of the testatrix. The father became non compos mentis shortly after testatrix's death and died without having filed any contest of the will. This bill was filed by the grandson of testatrix and the administrator of the father's estate. That the father would have had the right to contest the will was not denied, but the question was whether this right descended to his son or survived to his administrator. It was held that it did not, that it was a personal privilege which could only have been exercised by the father or someone in his behalf, and this ruling was afterward affirmed by the supreme court: 180 Ill. 368, 72 Am. St. Rep. 211, 54 N. E. 185.

And in the principal case (*Selden v. Illinois Trust etc. Bank*, 239 Ill. 67, ante, p. 180, 87 N. E. 860), it was held that the right does not survive even when the contest had been begun by the heir before her death. But in *Murry v. Hennessey*, 48 Neb. 608, 67 N. W. 470, where the will offered for probate expressly gave all the property of testatrix to the proponent, and the testimony disclosed that the testatrix owned a farm and that contestants were children of a deceased brother of testatrix, and were her only "near relatives living, except cousins," it was held that a sufficient interest in contestants was shown to give them a standing to object to the probate of the will.

In *Middleditch v. Williams*, 47 N. J. Eq. (2 Dick.) 585, 21 Atl. 290, however, where an infant daughter of testator would take all the testator's property absolutely in case probate of the will was refused, an uncle and first cousin of such infant were held to have no standing to resist probate of the will for lack of interest in the result. "It may be," said the court, "that they might hope, by reason of their kinship to the daughter, to be benefited in some way should the property become the daughter's absolutely"; but added: "No legal right in the property would accrue to them, however, by the happening of such an event."

A widow who by an antenuptial agreement has relinquished her rights to her husband's estate has no right to object to the validity of the probate of his will: *Maurer v. Naill*, 5 Md. 324.

In New York an heir at law is not, as such, "a person interested in the estate," under a will relating to personal property only: *In re Bradley's Estate*, 70 Hun, 104, 23 N. Y. Supp. 1127; and in an action brought by a niece and next of kin of testatrix to declare invalid testatrix's will, where there was no allegation that testatrix died seised of any real property, and it appeared that she left no descendants, it was held that complainant had no standing to contest the will as an heir at law, nor as next of kin, since the entire estate would go to the surviving husband: *Miller v. Manjer*, 82 App. Div. 419, 81 N. Y. Supp. 575.

The interest of a divorced husband in the estate of his divorced wife, contingent on the death of their minor child, is not sufficient to authorize him to contest her will, under Revised Probate Code, section 43, permitting contest only by a person interested: *Halde v. Schultz*, 17 S. D. 465, 97 N. W. 369.

In *Bowers v. McGavock*, 114 Tenn. 438, 85 S. W. 893, it was held that the heirs at law and distributees of the widow of testator have not such an interest as entitles them to contest the validity of the husband's will, where the widow did not contest the will, but sought its execution. In this case, the testator died seised of a large estate. By his will he provided liberally for his wife during her life, but by the residuary clause of the will all of his property, both real and personal, upon his wife's death was given the state in trust for certain charitable institutions. During her lifetime the widow not only acquiesced in the provisions of the will, but refused to contest it, as did her administratrix after her death. This bill was brought by certain of the heirs and distributees of the widow, seeking to invalidate the residuary clause of the will. The first question which confronted the court was, whether the complainants occupied such relation that they could attack the validity of the provision in the will. It was contended on their behalf, that if the trust provision in the will was invalid, then the property covered by it passed to the widow as next of kin under the law of distribution. But the court said that as the widow had, by assenting to the will and refusing to resist it, elected, with full knowledge of its provisions, to take under the will, she took only a life estate, and therefore complainants could claim nothing under her; and moreover, even if the widow could properly be regarded as next of kin of the testator, and had dissented from the will, she would only take one-third of the estate, if the other provisions of the will were valid, and the other two-thirds would go to the heirs of the testator, and they would be the parties to take under the statute of distribution. It was then insisted by the complainants that even though the widow did not dissent from the will, she was entitled as distributee to the entire personal estate, and therefore complainants, as her heirs and distributees, had the right to contest. But the court said that in that event the widow would have taken it as next of kin, and would be the only party who could insist upon the invalidity of the will, and that as

to the trust property the testator died intestate, that by reason of her election, the estate, as next of kin, never vested in her, and that the property vested either in the charity designated by the will, or passed to the next of kin (after the widow) of the testator. To sustain their contention that though the widow had not asserted any claim to the personal property, still complainants had a right to do so, counsel relied on the cases of *State v. Holmes*, 115 Mich. 456, 73 N. W. 548, and *Mong v. Roush*, 29 W. Va. 119, 11 S. E. 906. In reviewing these cases the court said that in the Michigan case the testator gave his lands and property to his wife for life, and after her death to the state on condition that it would accept it, and within five years build a charitable or educational institution on the land. The will was held void because the condition to build was a condition subsequent and not to be performed in a life or lives, and a grandson who claimed the property on the theory that the testator had died intestate and that the widow had elected by acquiescence to take under the will, was held to take only his share, and the widow was held not to be estopped by her acquiescence from taking her share. That in the West Virginia case the testator set apart two thousand five hundred dollars to be invested by his executors, and the interest to be paid over to the trustees of a certain church, and by the residuary clause all the balance of the property was given to his widow. The widow lived twenty years and made a will giving all the property to certain relatives. It was held that the bequest to the church was void; and that unless the money was given to the next of kin of the widow, it would go to the trustees individually.

The court then said: "Without commenting upon the reasoning or correctness of these decisions, they are clearly to be differentiated from the present case," because in each there was "mere acquiescence of the widow," while in the case at bar the widow had "deliberately renounced and declined all interest in the estate except what the will gave her." Also, as the right of an heir to contest is a personal privilege, and cannot pass by inheritance or descent, it has been said that such right is not assignable.

And this seems to be the rule in Texas, for it was held in *Ransome v. Bearden*, 50 Tex. 119, that one who was only interested through a transfer from an heir of the testator was not "a person interested in the estate so as to be entitled to bring suit to contest the validity of the will." The reason for this holding, as given by the court was, "The statute makes no mention of assignees, donees, or purchasers from heirs, and by this silence, as well as by the use of the expression 'representative of such person,' seems to exclude them." But if we are to infer from this language that the court intended to hold that under no circumstances can an assignee, donee, or purchaser from an heir contest the will, then we do not believe this decision can be sustained either on principle or by the authorities. The broad statement made by the Illinois court in the *Storrs*

case (180 Ill. 368, 72 Am. St. Rep. 211, 54 N. E. 185), that the right of an heir to contest a will is not assignable, was only dictum, and referred as authority to the case of McDonald v. White, 130 Ill. 493, 22 N. E. 599, and in that case the purchaser did not acquire the heir's interest until long after the will had been probated, and it was held that he could not maintain the contest because he had no direct pecuniary interest at the time the will was offered for probate, and that the statute did not contemplate a subsequently acquired interest.

That the grantee of an heir, before the will is probated, can resist probate of the will or afterward attack its validity by bill is fully upheld in *Savage v. Bowen*, 103 Va. 540, 49 S. E. 668. Here, a purchaser from the son and sole heir of testatrix filed a bill to set aside and have declared void the probated will of the testatrix, which devised the land bought by complainant from the son to the grandchildren of the testatrix. It was insisted on the part of the grandchildren that complainant had no interest in the estate of the testatrix or the probate of her will and was not entitled to maintain the action, but the court said that the son, as heir, "would have had the right to impeach the will, and no reason is perceived why those claiming under and through him are not entitled to his rights in that respect." The complainant in this case had purchased the land from the heir, before the will was probated, but no reference was made to that, and from the language of the opinion it would seem that the court did not consider that an important question.

Quite an interesting case involving the right of one claiming the right as assignee of an heir of the testator to contest the will came before the appellate division of the supreme court of New York in *Re Evans' Will*, 65 App. Div. 100, 72 N. Y. Supp. 495, and the decision there rendered was later affirmed by the court of appeals: 171 N. Y. 645, 63 N. E. 1116. Two of the heirs had employed an attorney to contest the will, and each agreed in writing "to pay to the said Keane, as compensation for the services rendered and to be rendered, a sum equivalent to eight per cent of any amount of value that may come to him from the estate, . . . either as the result of legal proceedings, compromise, or settlement, or howsoever; and for better securing the compensation of the said Keane aforesaid said [party] for himself, his heirs and executors, hereby assigns eight one-hundredths of any sum or value which may come to him, or which he may be entitled to, from or in the estate; . . . and the payment of such sum is likewise hereby made a lien upon the claim or interest of the said party of the first part [heir] against his interest in the estate . . . as it may be made to appear to be." The agreement further recited that the client "shall be at liberty at any stage of the case, either before, during, or after suit commenced, to settle or compromise upon such terms as he may desire as to his interest."

After the two heirs had executed the agreements they agreed on a compromise with the other heirs of the testator, without the knowl-

edge of Keane (their attorney), by the terms of which the contest filed by Keane was dismissed and the will admitted to probate. Mr. Keane then sought to contest the will in his own behalf as a party interested, claiming that the words "his interest," used in the last clause of the agreement quoted, only permitted the client to settle what interest he then had, which would exclude, because he had parted therewith, what he had given to his attorney. But the right of the attorney to so contest was denied. But this ruling was not based on the ground that the interest of the heirs was not assignable so as to entitle the assignee to contest the will, but, on the contrary, this right seems to have been recognized by the court, for in rendering its decision, which rested entirely on the construction placed by the court on the written agreement held by the attorney, it said: "Mr. Keane did not become an absolute owner of any direct interest in the estate by an assignment of a distinct and separable part thereof, and was not, therefore, a person interested in the estate itself."

For the rights and remedies of pretermitted heirs, see pages 580 and 581 of the note appended to *Brown v. Brown*, 115 Am. St. Rep. 579.

b. Devisees and Legatees as Contestants.—A devisee or legatee of a former will, or one who is injured by the alteration of a will as originally made, is a person interested within the meaning of the statute so as to entitle him to contest the probate of the former or altered will. Thus, a devisee whose name has been erased and another's substituted without republication of the will is entitled to contest the validity of the probate of such will: *Wolf v. Bollinger*, 62 Ill. 368. And a legatee entitled to property passing under the residuary clause of a will, if admitted to probate in its original condition, but which has been altered by lines drawn through it, has such an interest in the estate of the testator as authorizes him to file a caveat for the revocation of the probate of the will as altered, and for the granting of the probate of the will in its original condition: *Home of the Aged of the Methodist Episcopal Church v. Bantz*, 106 Md. 147, 66 Atl. 701.

So, too, a legatee, though not cited, may appear and oppose the proof of a codicil which revokes a legacy given to him in the will, and he may at any time, *pendente lite*, appear and support and defend his own interests: *Walsh v. Ryan*, 1 Bradf. Sur. (N. Y.) 433. And a legatee under a will made prior to the one offered for probate, who is neither an heir at law or next of kin of the deceased, may intervene under the statute to oppose the probate of the subsequent will: *Turhane v. Brookfield*, 1 Redf. Sur. (N. Y.) 220; and to same effect is *In re Chillenden's Will*, Tuck. (N. Y.) 135.

An interesting case showing where one claiming as legatee has the right to contest is furnished in *Merrill v. Rolston*, 5 Redf. Sur. (N. Y.) 220. G. was informally adopted by his aunt C. and her husband M., took M.'s name, was educated by M. and by a will of M., made

in 1856, was to receive a large legacy and also all of M.'s property in case G. survived C. In 1856 C. made a will giving all to M. if he survived her, otherwise to G. From 1854 to 1861 C. showed great admiration and affection for G. In 1862 G. married an excellent woman against C.'s wishes. From the time of this marriage to C.'s death, though G.'s conduct continued exemplary, C. refused him her name, expressed hatred, mutilated her will, cut the mouth and thumb from G.'s portrait as an evidence of her displeasure, addressed baseless charges against his own and his wife's character, and also violent and senseless imprecations. M. died in 1857. In 1871 C. made a will in which she ignored G. Held, that G. had an interest which entitled him to contest the probate of the will.

So, also, under a statute giving the surrogate power to enforce the payments of debts and legacies, and declaring that the executor or any person interested in the estate may have such will proved before the proper surrogate, a person claiming to be a legatee under a codicil afterward revoked is entitled to a hearing: *Booth v. Kitchen*, 7 Hun (N. Y.), 260.

But where the sole interest of a beneficiary was under a will which testatrix had destroyed before making the will contested, the beneficiary should not be permitted to continue the contest in case it appeared that the testatrix purposely destroyed the prior will at a time when she had testamentary capacity: *In re Rayner's Will*, 93 App. Div. 114, 87 N. Y. Supp. 23.

c. Creditors as Contestants.—As the right of a creditor of a decedent is not affected by the latter's disposition of his property by will, it follows that one who is simply a creditor of a testator has no such interest as entitles him to contest the latter's will: *Montgomery v. Foster*, 91 Ala. 613, 8 South. 349; *State Nat. Bank of New Orleans v. Evans*, 32 La. Ann. 464; *In re Shepard's Estate*, 170 Pa. 323, 32 Atl. 1040. And this rule applies equally to the creditor of an heir at law of the testator: *Lockard v. Stephenson*, 120 Ala. 641, 74 Am. St. Rep. 63, 24 South. 996; *Watson v. Alderson*, 146 Mo. 333, 69 Am. St. Rep. 615, 48 S. W. 478; *In re Shepard's Estate*, 170 Pa. 323, 32 Atl. 1040.

In fact, there is no conflict among the cases, on the proposition that one who is simply a creditor of the testator or of an heir at law is not such a party in interest under the statute of wills as gives him the right to contest the will. But while there is no lack of judicial harmony on this proposition, there is sharp conflict of opinion where it is sought to apply this rule to the judgment creditor of an heir at law, to whom the real estate of his deceased ancestor would descend in the absence of the will. In some of the cases it is held that even a lien creditor of an heir is not a party interested so as to entitle him to contest the will: *Lockard v. Stephenson*, 120 Ala. 641, 74 Am. St. Rep. 63, 24 South. 996; *In re Shepard's Estate*, 170 Pa. 323, 32 Atl. 1040; *Bank of Tennessee v. Nelson*, 40 Tenn. (3 Head) 634. In others it is held that the interest of such a creditor in the probate of the will is identically the same in character as

that of the heir himself, and that no argument can be made depriving him of the right to contest a will on the score of want of interest that would not also deprive the heir of the same right: In re Langevin's Will, 45 Minn. 429, 47 N. W. 1133; Watson v. Alderson, 146 Mo. 333, 69 Am. St. Rep. 615, 48 S. W. 478; Bloor v. Platt, 78 Ohio St. 46, 84 N. E. 604.

In view of the fact that the courts on both sides of this question set forth very strong reasons in support of their directly opposite conclusions, it is interesting to note the arguments advanced by the leading opinions on each side.

One of the best reasoned cases among these which deny a lien creditor of an heir the right to contest is that of Lockard v. Stephenson, 120 Ala. 641, 74 Am. St. Rep. 63, 24 South. 996. A judgment creditor of a husband sought to impeach the will of the deceased wife upon the ground that it excluded the surviving husband of his distributive share in the wife's estate. It was strongly urged on the part of the creditor that the word "interested" as used in the statute included every person having any interest in the property attempted to be devised by the will, and therefore as a judgment creditor would have an interest in the property if the testatrix had died intestate, he had the right to contest the will. But conceding, for the sake of the argument, that the statute refers to persons interested in the estate and not in the will, the court said: "It is fair to presume, and indeed it appears as to one of the appellants, that when J. T. Stephenson contracted these debts the testatrix was in life. The property was hers, and she had the absolute right of disposition over it up to the very moment of her death. There was not the semblance of privity between her and her husband's creditors. She could make such disposition of her entire estate, by deed, gift, or will, as she chose. Her husband had only an expectancy, which might or might not ripen into a vested interest or right, dependent upon his surviving her, and her failure to dispose of her property during her life or by will, to take effect at her death. These expectations, while they may have inspired the hopes of his creditors, were not such an estate or interest as they could subject to the satisfaction of their demands. And however strong may have been the expectations of the husband or of those of his creditors, he had no legal estate in expectancy. Such an estate is a present vested right, contingent only as to possible future enjoyment. A mere expectation that the wife will make a will in her husband's favor, or will neither give nor grant the estate in her lifetime, and thereby a portion or all will descend to him, is without substance as a present right and incapable of estimate as to future value. It may be conceded that in a certain sense a creditor is interested in the acquisition of property by his debtor, for the latter's ability to pay depends upon the value of his assets which the debtor can appropriate to the payment of, or the creditor can, by legal instrumentalities, subject to the satisfaction of, his debt. In this sense the creditor is interested in the successful and business prosperity of his debtor.

Every enterprise or venture engaged in by him increases or diminishes the chances of the creditor to have his debt paid; yet, it cannot be seriously contended that the creditor has the right to institute suits against the debtors of his debtor to enforce the breaches of those contracts, or compel his debtor to do so, however much the collection of his debt may be prejudiced. He has in no sense of the words such a tangible interest as would confer upon him, as any person interested therein, the right of a suitor. Furthermore, if these creditors have any standing as parties interested, it must be by a theoretical substitution to the rights of the husband as one of the distributees in the estate of the wife had she died intestate.

"Assuming that on a contest at the instance of the husband the will could be set aside, how can he be compelled to institute or carry on such a contest? If the wife had tendered him as a gift either land or personalty, could his acceptance be compelled, in the interest of creditors, if he chose to decline the gift? Both of these inquiries must be answered adversely to appellants' contention. And the fact that appellants might have a lien upon the property described in the will, in the event the husband would contest it successfully, does not give them the legal right to coerce him to institute the contest; and his failure or refusal cannot subrogate them to his right."

Also in the well-considered case of *In re Shepard's Estate*, 170 Pa. 323, 32 Atl. 1040, where the creditors of testatrix's son sought to oppose probate of the will which excluded the son, the supreme court of Pennsylvania expressed similar views to those just quoted from the supreme court of Alabama. "Is the creditor of the son a 'party interested'?" said Justice Dean, and then, after remarking that a creditor is interested in the acquisition of property by his debtor, continued: "Does the fact that the debtor here would, under the law, if his mother had died intestate, have been an heir, place the creditor in any better position? In her lifetime, and immediately before her death, the mother was the absolute owner of her estate; there was not the semblance of privity between her and her son's debtor; she could make such disposition of her entire estate, by deed, gift, or will, as she chose; the son, however strong may have been his expectations or those of his creditors, had not even a legal estate in expectancy. Such an estate is a present vested right, contingent only as to possible future enjoyment. . . . No line can be drawn which will limit the grounds of contest, if a creditor of an heir be a party interested. Incapacity, undue influence, as well as fraud, may be alleged by any one of hundreds of creditors; such an interpretation would increase indefinitely the number of litigants. It would be in the power of any one to tie up large estates, although the interest of the debtor heir might be comparatively small. . . . If the estates of the dead are to be subjected to such perils, the legislature must open the door, and that by language of no doubtful import."

It is true that the exact nature of the creditor's claim in this case does not very clearly appear from the opinion, and it has been contended by some of the cases which uphold the right of a judgment creditor of an heir to contest that this case does not uphold a contrary doctrine. But the opinion speaks of the "lien" of the contesting creditor upon the real estate which the son would have inherited if the mother had died intestate, and this, in connection with the language quoted, leads inevitably to the conclusion that the decision is applicable to a judgment creditor.

In *Bank of Tennessee v. Nelson*, 40 Tenn. (3 Head) 634, the bank had recovered three judgments against one of testator's sons, prior to testator's death, and executions had been issued on the judgments and returned "no property found." By the will all the land was devised to testator's wife for life, with remainder to his children, including the debtor son. The bank first filed a bill to subject the son's remainder interest in the estate, and enjoin him from disposing of the same, and injunctions and attachments were issued. Afterward an amended bill was filed attacking the validity of the will and claiming that the land descended to the heirs, and that the interest of the debtor son should be made liable to complainant's judgments. But it was held that as the bank had no interest in the estate as heir or distributee, it could not contest the will. Said the court: "No one, without an interest in the estate, can contest a will or call for a re-probate. The complainant is only a creditor of one of the devisees, and can only act upon his rights. The debtor is content with the will, chooses to avail himself of no objection to it that may exist, although it reduces a fee in the land to which he would be entitled by law to a remainder interest. If he acquiesces in its validity by waiving his right to contest it, for the incompetency of attesting witnesses, or on any other ground, how can a creditor, who has to pass through him to reach the property, make the objection for him?"

It was further held, however, that as the testator's son had a vested remainder interest in the estate, the bank was entitled to a decree to sell that interest in satisfaction of its judgments.

Strongly opposed to the doctrine applied by the foregoing courts of Alabama, Pennsylvania and Tennessee are cases from Massachusetts, Minnesota, Missouri, and Ohio, and the reasons given by the latter for the faith that is in them seems none the less potent than those given by the former.

The first reported case in this country where the right of a lien creditor of an heir at law to contest the validity of a will disinheriting such heir was recognized is that of *Smith v. Bradstreet*, 33 Mass. (16 Pick.) 264, decided in 1834. In this case, it did not clearly appear at first that the contesting creditor had any lien, and the court was of opinion that as he had no vested right or interest to be established or defeated by the probate or rejection of the will, he had no right to contest it. But this opinion was changed

when it later appeared that the creditor had an attachment on the real estate which the excluded heir would have inherited, Chief Justice Shaw saying: "His [the creditor's] attachment constitutes a lien, a real interest in the land, which may be followed up to a perfect title. If the will is proved, it defeats this title; if rejected, it establishes it. The trial of this fact in the probate court is conclusive upon this question, and the appellant has no other time, place, or forum to try it in."

Again, in *Re Langevin's Will*, 45 Minn. 429, 47 N. W. 1133, where the right of a judgment creditor of an heir to contest was upheld, the court said: "A general creditor of an heir has no interest in the real estate falling to the heir, though his ability to collect his claim might be thereby increased. . . . But the case of a judgment creditor of an heir is different. . . . A judgment creditor has always a right, to assail or defend against anything which may devalue his lien."

The supreme court of Missouri seems to have given most serious consideration to this question, and the views expressed by that court are worthy of extended notice. In *Watson v. Alderson*, 146 Mo. 333, 69 Am. St. Rep. 615, 48 S. W. 478, a father, by his will, excluded two of his sons from all interest in his real estate. A creditor of one of these disinherited sons had a judgment against such son at the time of the father's death, and in a few days thereafter caused the interest of such son in his father's estate to be levied upon and sold, becoming the purchaser thereof at the sale and receiving a sheriff's deed therefor. Subsequently the will of the father was admitted to probate, and this action was brought by the creditor attacking the validity of the will and seeking to set aside its probate. The lower court sustained a demurrer to the petition upon the ground that the creditor had no such interest under the statute as entitled her to maintain the action. In holding this was error the supreme court said: "If Benjamin A. died intestate, then at the moment of his death the legal title to the undivided two-sevenths of said real estate descended to and vested in the said William A. and David P., and became subject to the lien of the judgments aforesaid, and, by the subsequent proceedings on the judgments, was vested in the said plaintiff Mary A. Watson. If, on the other hand, he died testate, and the instrument of writing admitted to probate in the probate court disinheriting the said William A. and David P. was in fact the will of the said Benjamin A., then the legal title to the undivided two-sevenths of said real estate never did vest in the said William A. and David P., nor become subject to the lien of said judgments, and by the proceedings on the same the said Watson acquired nothing. Is she, under such circumstances, a person interested in the probate of that instrument as the will of the said Benjamin A., within the meaning of the statute? . . . That she has a direct pecuniary interest in the final and conclusive determination of the question of fact whether or not said instrument is the last will of said deceased is self-evident, since upon such determination depends her title to valuable real estate. If determined in the affirmative, she has no

title; if in the negative, she has title, and it would seem to follow necessarily, if the words 'any person interested in the probate of any will' are to 'be taken in their plain, ordinary, and usual sense,' that she is such a person, and as such authorized to institute this proceeding, in which only can that question of fact be conclusively determined. Is there anything in this statute, its purposes, history, or the rulings under it, requiring that those words shall be construed in some other limited and technical sense that would exclude her from the right to contest the validity of this instrument, which, if established, would deprive her of the legal title to valuable real estate, which she would otherwise have?" The court then proceeded to say that there was nothing in the text of the act itself upon which such a requirement could be based, and that though the statute had been the same since the organization of the state government, this was the first time this question had ever come before the supreme court for adjudication; and further, that if the words "any person interested" were to be used in a restricted or technical sense which would exclude the creditor in this case, then the reason for it must be discovered from the nature of the act or its purposes as disclosed by the circumstances of its adoption. And as to the objects and purposes of the statute of wills, the court was of opinion that it was passed in place of and to remedy the defects of the common law and make the probate conclusive as to wills disposing of real as well as personal property, and not to deprive any person of the right to contest the validity of a will who would have had that right under the common law. Referring to the decision in the Massachusetts case (*Smith v. Bradstreet*, 33 Mass. (16 Pick.) 264), the court continued: "The logic of this position is unanswerable. The interest of such creditor in the probate of such a will is identically the same in character as that of the heir at law, and no argument can be made depriving him of the right to contest a will on the score of want of interest that would not deprive the heir at law of the same right. Descent is cast, and a will takes effect, by relation, at the moment of the death of the testator; neither heir nor devisee prior to that moment had any interest in the estate of the deceased. A lien creditor whose lien attaches the moment that title is vested in his debtor by descent cast, although by virtue of his lien judgment he had no interest in the estate of the deceased, has the same direct and immediate interest in the probate of a will by which that title would be divested that an heir at law has. It is not interest in the estate of the deceased that authorized any person to contest a will under the statute, but interest in its devolution, in the probate of a will that determines that devolution."

And the supreme court of Ohio is no less pronounced in its opinion on this question than the supreme court of Missouri, for in the late case of *Bloor v. Platt*, 78 Ohio St. 46, 84 N. E. 604, the court, speaking of the right of the judgment creditor of a son to contest the will of the deceased mother, by which the son and only heir at law had been disinherited, said: "But it is objected here that the

plaintiff's claim is not against the estate of the testatrix, but against the heir, who takes nothing under the will; and that the testatrix had the legal right to leave her property to whom she pleased, even to the extent of intentionally defeating the creditors of her only heir. Let all of this contention be granted; yet, if this paper, the probate of which is contested, is not the last will of the decedent, the plaintiff is interested and must prevail, because the title is then cast upon the heir by operation of law, and subject to the lien which attaches by relation to the time of the levy. Can it, therefore, be said with any show of justice or reason that where a paper purporting to be a will, and obviously designed with the purpose of defeating creditors of the heir, is offered for probate, a lien creditor cannot have his day in court to show that the paper is not a valid last will and testament? We think not."

The real estate in this case had been devised to the wife of testatrix's son, and from the language quoted it would appear that the court believed this was done by the testatrix for the purpose of protecting the son against his judgment creditors. But this does not, it seems to us, affect the real principle involved in the right of a lien creditor to contest, namely, whether a disinherited heir has any vested interest in the estate of his ancestor which could be the subject of a lien, so as to give the creditor any such interest as is contemplated by the statute of wills, and from the reputed cases this seems to be an open question, with the weight of authority, perhaps, sustaining the creditor's right.

d. Persons Having Rights Independent of Will.—It has been held that, inasmuch as a widow is not bound by the will of her husband, but can renounce the same and have her statutory dower and statutory share of his personal estate, she has no right to contest the validity of the will: *McMasters v. Blair*, 29 Pa. 298; *McMechen v. McMechen*, 17 W. Va. 683, 41 Am. Rep. 682. And in *Re Fallon's Will*, 107 Iowa, 120, 77 N. W. 575, where, under section 2452, Code of 1873, a widow's share cannot be affected by her husband's will, unless she consents thereto, it was held that testator's widow has no interest authorizing her to contest his will, though property given her child is with remainder to others in case of death of the child before attaining majority, and though the executor is given the management of the property devised to the child, and though under section 2354, in the absence of an executor, the widow would have the first right to act as administrator.

But in *Freeman v. Freeman*, 61 W. Va. 682, 57 S. E. 292, the supreme court of appeals of West Virginia held that the rule denying a widow the right to contest her husband's will does not apply where the testator leaves no children. In this case the deceased husband left no children, and disposed of his entire estate by will to others than his wife, who was denied the right to contest the will by the lower court. In holding this error, the appellate court said that this case was not within the spirit of the *McMechen* case (17 W. Va.

683, 41 Am. Rep. 682) and the Blair case (29 Pa. 298), because those cases proceeded upon the theory that by renunciation the widow would have obtained all that a successful contest would have given her, and in a practical sense, therefore, the contest would have been useless; but in the present case the widow would take the whole of the estate if the contest was successful, and hence the rule laid down by the two cases cited was inapplicable; the case at bar being an instance in which "circumstances alter cases."

Another illustration showing that one who has rights independent of a will is not authorized to contest it is shown in the case of McIntire v. McIntire, 64 N. H. 609, 15 Atl. 218, where it was held that, under a statute providing that a child living at the execution, who is not named or referred to in the will, and is not a devisee or legatee therein, takes the same portion of the estate as if decedent had died intestate, such child cannot contest the will on the ground that he is not named or referred to therein, because his rights are independent of the will; and to same effect is *In re Barker's Estate*, 5 Wash. 390, 31 Pac. 976, the court saying in the latter case that the remedy of the child was to move the court to proceed with the administration of the estate, and for a proper distribution thereof as if no will had been made.

e. Persons Cited or Appearing in Probate Proceedings.—Under a statute which requires notice of a proceeding for the probate of a will to be given to testator's next of kin, and an opportunity for them to contest in the probate court, and also provides that any person interested in any will who has not contested the same may contest the same by bill in chancery, a person who was duly served with notice of a proceeding in the probate court, but who did not contest the will there, may afterward contest it by bill in chancery: *Knox v. Paull*, 95 Ala. 505, 11 South. 156.

But where on probate of a will a person files a written opposition to its probate, to which a demurrer, on the ground that it does not contain facts sufficient to constitute a ground of opposition, is sustained, and no further opposition is made, the probate is "without contest" (Code Civ. Proc., sec. 1330), so as to entitle a party petitioning to revoke the probate to a trial by jury: *In re Robinson's Estate*, 106 Cal. 493, 39 Pac. 862.

A statute providing the probate of a will shall be conclusive until it is set aside in an original or appellate proceeding allows such an original proceeding to be brought by one who was a party to the probate, but was only notified thereof by publication and did not appear: *Gregg v. Myatt*, 78 Iowa, 703, 42 N. W. 461, 43 N. W. 760. And where a statute provides that within five years after probate proceedings a will may be impeached or established by petition in equity by one "not a party to the proceeding," one who represented himself as a contestant but afterward withdrew, whereupon the will was probated, was not a party to the proceeding: *Dillard v. Dillard's Exr.*, 78 Va. 208.

f. **Public Administrator and Attorney General as Contestants.**—A public administrator is not a person interested within the meaning of the statute of wills, so as to entitle him to contest a will, since the person contesting must be interested in the estate and not merely in the fees of administration: *In re Sanborn's Estate*, 98 Cal. 103, 32 Pac. 865; and to same effect is *In re Hickman's Estate*, 101 Cal. 609, 36 Pac. 118.

But in *Gombault v. Public Admr.*, 4 Bradf. Sur. (N. Y.) 226, it was held that where a testator leaves no heirs or kindred, probate of his will may be contested by the public administrator as to the personal property and by the attorney general as to the real estate. In *Hopf v. State*, 72 Tex. 281, 10 S. W. 589, however, it was held that the interest of the state in property which would escheat to it in case of intestacy is not sufficient to entitle the state to contest the probate of the will.

g. **Miscellaneous Cases.**—There are many cases where the expression "person interested," as used in the statute of wills, has been construed by the courts with reference to various classes of persons and under circumstances which prevent their classification under any of the distinct subdivisions of our topic. Many of these cases are doubtless as important to the profession as some of those reviewed, but with regard to most of them, at least, we must be content with giving only a synopsis of the principal point adjudicated, and leave the reader to examine at length any particular case where the circumstances seem to make it applicable to the case in hand.

In *Re Cornelius' Will*, 14 Ark. 675, where administration had been granted on the estate of a deceased person, it was held that, upon proceedings to establish a will subsequently produced, the administrator was entitled to be heard in the probate court, and to appeal to the circuit court, under the act of January 4, 1849. Also, where a widow renounced her rights in the community property after her husband's death, electing to take under the husband's will, and the heirs of the widow appeared as contestants of the husband's will, alleging the renunciation of the widow was obtained by fraud, the renunciation could not affect their right to be heard, at least on the issue of fraud in its procurement: *In re Wickersham's Estate*, 138 Cal. 355, 70 Pac. 1076. Some of the language used by the court in delivering its opinion in this case was modified on rehearing, but the decision as above announced was not changed.

In *Alden v. Johnson*, 63 Iowa, 124, 18 N. W. 696, testator devised his property absolutely to his widow, but with subsequent direction that any portion thereof which might remain at the death of the widow should go to the surviving children of the testator and his widow, but if there should be no such children, then the property remaining should go to his children by a former marriage. Subsequent to the execution of the will a child was born to the testator, and this action was brought by the children of the former marriage to set aside the probate of the will on the ground that the birth of

the child operated to revoke the will. Held, that plaintiffs' interest contingent upon the validity of the will entitled them to maintain the action. So, too, one may contest a will though not an heir, but claiming under a prior unprobated will, which by petition she claimed to be entitled to probate: *Kostelecky v. Scherhart*, 99 Iowa, 120, 68 N. W. 591.

Executors named in a will, who are not heirs or otherwise interested in the will, cannot, under Code, section 3459, authorizing action by trustees of an express trust for the benefit of the cestui que trust or otherwise, contest probate of the codicil revoking their appointment and appointing others: *In re Stewart's Estate*, 107 Iowa, 117, 77 N. W. 574.

However, a dictum opposed to the holding in the case last cited is found in *Re Coursen's Will*, 4 N. J. Eq. 408, where the court, though not making any positive ruling upon the question, because it was not necessary to be decided, said it was inclined to think that an executor had the right to be heard in opposition to the probate of a codicil to the will, which substituted a new executor, since the executor might be a person who would be injured by admitting the codicil to probate. And in *Re Greely's Will*, 15 Abb. Pr., N. S., 393, it was held that the executors under a will may oppose the probate of a later will, although the parties beneficially interested under the earlier have released their interest. In support of this ruling it was said by the surrogate: "Any interest, however slight, and even, it seems, the bare possibility of an interest, is sufficient to entitle a party to oppose a testamentary paper: *Will on Ex.*, 284; *Dayt. Surr.*, 158, 159. The executors named in the will of 1871 have clearly, by statute, an express right to have that will proved, if they can establish the fact that it is the last will, and they may rightfully contend against the validity of any alleged subsequent will as an obstacle in the way of establishing the will under which they claim. Their interest in this regard is very apparent. For, if they can succeed in establishing their will, the title to the movable goods of the testator, though in ever so many different and distinct places, vests in them in possession, etc.—indeed did so vest presently upon the testator's death."

In *Johnson v. Bard* (Ky.), 54 S. W. 721, it was held that where a copy of the will of a nonresident has been admitted to probate in the county where the testator owned land, one against whom suit in ejectment has been brought by purchasers from the devisees to recover the land has no such interest as entitles him to resist the probate proceedings by a plea of limitations, notwithstanding the probate of the will in the state of Kentucky was necessary to enable the plaintiffs to succeed.

And in *Floore v. Green*, 26 Ky. Law Rep. 1073, 83 S. W. 133, where a wife having power to dispose of her property by will devised some of her real estate to a niece of her former husband, it was held that the surviving husband had no such interest in the estate devised

to the niece as authorized him to raise the question of the validity of such devise.

Also, on an application by the niece of the decedent to set aside a will, where the presumption arises from the evidence that the plaintiff's father is still alive, she has no such capacity or interest as will entitle her to attack the will: *Boe v. Filleul*, 26 La. Ann. 126.

But while one who was not an heir had no right to attack a will in so far as it related to the disposal made by the testator of his property, she might sue to annul it in so far as it interfered with her rights to have the tutorship of her grandchildren: *Succession of Payne*, 25 La. Ann. 202.

And when a will appoints guardians to a minor, anyone may contest it who would be entitled to be heard upon an application for guardianship. The minor's next of kin may therefore contest such a will: *Taff v. Hosmer*, 14 Mich. 249. But a person who takes more under a will than he would as heir is not a "person interested" within Code, section 1822, authorizing such persons to contest a will probated without notice: *Biles v. Dean* (Miss.), 14 South. 536.

Where a caveat was filed against proving a will by a person who claimed to be attorney in fact for legatees under a former will, who, if living at all, lived in a distant state, and no power of attorney was produced from such legatees, it was held that the fair presumption was, under the circumstances of this case, that no power of attorney was in existence, and that it was the duty of those opposing the will on behalf of such legatees to give some evidence of their still being alive, and of the authority to appear for them if they wished to attack the present will because of their not being mentioned in or provided for by it: *Pancoast v. Graham*, 15 N. J. Eq. 294.

A receiver of a husband in supplementary proceedings has no interest which will authorize him to contest the will of the wife of the debtor, which deprives the husband of all interest in her estate: *In re Brown*, 47 Hun (N. Y.), 360.

In New York, Code of Civil Procedure, sections 2647, 2648, authorized the maintenance of a proceeding "by a person interested in the estate of a decedent," to revoke the probate of a will. Section 2653a was added to the same article without any words repealing the prior provisions, or in terms affecting their force, and provided that "any person interested in a will" admitted to probate in the state might cause the validity of the probate to be determined in an action in the supreme court, the issue to be confined to the question whether or not the writing produced was the will of the testator. It was held that section 2653a refers only to persons interested in sustaining the will, and does not authorize the proceeding to be brought by persons not named in the instrument, and claiming in hostility thereto, they being already empowered by the former sections, as persons interested in the "estate of a decedent" to attack the validity of the will: *Lewis v. Cook*, 150 N. Y. 163, 44 N. E. 778.

In *Jones v. Kelly*, 63 App. Div. 614, 72 N. Y. Supp. 24, the appellate division of the supreme court held that Laws of 1860, chapter

360, forbidding a testator having a husband, wife, child, or parent, from giving to any charitable institution more than one-half of his estate after payment of debts, is peremptory, and hence any person who would derive a benefit from the estate could challenge the bequest though not one of the relatives designated. But a directly opposite ruling was made by the same court a few months later, in *Frazer v. Hoguet*, 65 App. Div. 192, 72 N. Y. Supp. 840, where it was held that the right under this statute was limited to those relations named or those who would take through them; and this decision but followed the ruling of the court of last resort in *Trustees of Amherst College v. Ritch*, 151 N. Y. 282, 45 N. E. 876, 37 L. R. A. 305.

The decision in *Jones v. Kelly*, 63 App. Div. 614, 72 N. Y. Supp. 24, was based on the case of *Harris v. American Bible Society*, 4 Abb. Pr., N. S., 421, where it was held that the right to challenge bequests under the act of 1860 was not confined to the relatives specifically named therein; and the court said the decision in the *Ritch* case (150 N. Y. 282, 45 N. E. 876, 37 L. R. A. 305) was not to the contrary because it cited with approval the *Harris* case. But examination of the opinion in the *Ritch* case will show that it was not cited with approval, but was construed by the court of appeals as a case which "simply extends the list as to such as have rights to waive or retain at their election."

However, whatever may have been the differences heretofore among the courts of New York on this question, the decision in *Jones v. Kelly*, 63 App. Div. 614, 72 N. Y. Supp. 24, was affirmed in 1902 by the court of appeals (170 N. Y. 401, 63 N. E. 443), and as this is the latest decision of the highest court of the state on the subject, its ruling must be regarded as the law of New York state at the present time.

In *Re Widdowson's Will*, 189 Pa. 338, 41 Atl. 977, it was held that, since the fact that a will may have been tampered with and changed without the testator's knowledge with regard to the amounts of some of the legacies, which could be called in question on the distribution, would not render the will invalid, a person not named in the will and who, in any event, would take nothing by it, has no interest in the amount of such legacies, and cannot contest the will because of such changes in the legacies.

But a convict has interest in the intestate personalty of his deceased wife, though he cannot administer it, which entitles him to contest the validity of her will: *Kenyon v. Saunders*, 18 R. I. 590, 30 Atl. 470, 26 L. R. A. 232.

That objection to the probate of a will may be made by others than the surviving wife, in whose interest alone a will is revoked by operation of law, is illustrated in *Re Larsen's Estate*, 18 S. D. 335, 100 N. W. 738, where testator by his will during marriage gave all of his property to his wife and her son. Thereafter the wife died and the testator married again without having made any other will, leaving his second wife surviving, having had no issue by either

marriage. Probate of the will was resisted by a brother of the testator, and it was held that probate was properly refused upon the ground that the will was revoked by operation of law.

In *Cornwell v. Cornwell*, 30 Tenn. (16 Humph.) 485, it was held that a petition by testator's grandson, which does not show that petitioner's father is dead, does not show sufficient interest to entitle him to contest.

Likewise, where testatrix devised her property to her granddaughter, with remainder to another in event of the granddaughter's death before majority, after the death of the granddaughter, who had taken under the will, and who died before majority, the father of the granddaughter, who was the son in law of the testatrix, had no such interest as entitled him to contest the will: *Ligon v. Hawkes*, 110 Tenn. 514, 75 S. W. 1072.

But though a widow, not being bound by her husband's will, cannot contest it, her children, who are testator's heirs, may, by her as next friend, contest such will and appeal from its probate: *McMechen v. McMechen*, 17 W. Va. 683, 41 Am. Rep. 682.

IV. Estoppel to Attack or Contest.

a. In General.—It has clearly appeared from the foregoing rules and illustrations that the heirs at law and next of kin of a testator who have been excluded by the will are persons interested so as to entitle them to contest the will. We have also seen that a devisee or legatee under a former will, or a will which has been altered without the testator's knowledge, whereby his beneficial interest under the former or altered will has been injuriously affected, has the right to contest the later or altered will. But it not infrequently happens that though a person falls within the class of those interested within the meaning of the statute of wills, yet he may, by some act on his part, be estopped from making a contest. Thus, where an heir entitled to contest the will of his ancestor joined his wife in a mortgage on certain property devised by the will to her, such act precluded him from thereafter attacking the will, he knowing that his wife was claiming the property by virtue of the will: *Starkey v. Starkey*, 166 Ind. 140, 76 N. E. 876.

In *Shortridge v. Bartlett*, 53 Ky. (14 B. Mon.) 248, B., then residing in Kentucky, by his will devised land to his son E., charging it with the payment of six hundred dollars to his granddaughter T., and also bequeathed to him one slave and all his personal estate except the rest of his slaves, which he devised to his other children. Shortly afterward he conveyed the said land to his said son E. and removed to Missouri, where he afterward made another will, revoking all others, by which he made no disposition of any of the property previously given to his son E., but made a different disposition of the slaves he took to Missouri, and pretermitted his granddaughter T., dying soon after. E. then proved the first will, qualified as executor, and acted as such. The granddaughter brought suit against him to recover the six hundred dollars which he was charged to pay

her by the first will, and recovered judgment. The son and executor then filed this bill to enjoin the collection of the judgment on the ground of the revocation of the first will, but the bill was dismissed, the court saying that notwithstanding the first will had undoubtedly been revoked by the second, the complainant had obtained the property with the intention and expectation of the father that he should, in consideration thereof, pay the granddaughter six hundred dollars, and "it is inequitable and unconscientious to refuse payment."

But an heir is not estopped from controverting the will of a married woman by acquiescing in her expressed intention to revoke a will, and by recognizing it as valid for some time after her death; there being no evidence that he induced her to revoke the will, or resorted to any other means to induce her to refrain from disposing of her property by deed of herself and husband: *Mitchell v. Holder*, 71 Ky. (8 Bush) 362.

In *Reichard v. Izer*, 96 Md. 495, 54 Atl. 79, the petitioners sought to contest a will on substantially the same grounds which had been alleged in a caveat previously filed by other of testator's heirs. The petitioners in the present action had filed a petition protesting against the caveat, in which they alleged that they had peculiar means of knowledge of the circumstances attending the making of the will, and that all the allegations against the validity of the will were untrue, to their personal knowledge. The caveat was dismissed. In explanation of their action in opposing the caveat, the petitioner in the present suit alleged that at that time they were ignorant of the true facts surrounding the execution of the will, and signed the petition protesting against the caveat at the instance of the executors, and having taken their position with the caveatees, they were not then in a position to ascertain facts which had since come to their knowledge. It was also alleged that one of the executors had stated that he knew the will could be set aside, but that it was better that the caveat should be dismissed, as long litigation would have resulted; but it was not alleged when this statement was made or to whom. It was further alleged that, after signing the petition protesting against the caveat, one of the executors was required to produce vouchers for certain sums claimed by him, and that when he filed them "petitioners were aroused as to the importance of an investigation, and they immediately filed an exception to said account." The account, as filed, contained some charges which should not have been allowed, but they amounted to but a few dollars, and had no relation to the issues raised in this case. It was also alleged that the petitioners had learned from letters written by one of the executors of undue influence exercised by him to induce the testator to make the will, but the only letter relied on in support of this claim was in possession of the caveators at the time the first petition was filed. In holding that the petitioners were estopped by their former petition from prosecuting the present contest, the court said: "If parties to proceedings in court are to be permitted to

thus shift their positions as some whim or caprice may lead them to do, the end of litigation would be as uncertain as such unstable litigants can make them; and although it is to be regretted if the doctrine we have announced does at any time prohibit investigation in a meritorious case, it is one which is well established by the authorities, and of great importance to the proper administration of the law—especially in matters affecting wills.”

But the fact that heirs have been parties to the probate proceedings does not estop them from contesting the will. Such was the ruling in *Gueydan v. Montagne*, 109 La. 38, 33 South. 61, where the testator's children by a former marriage sought to have annulled and set aside the will and the probate thereof on the ground that the testator had bequeathed to his second wife, who survived him, a greater portion of his estate than he was allowed by law to dispose of. It was pleaded by the surviving wife and executrix that the plaintiffs had been parties to the probate proceedings and were therefore estopped from maintaining this contest, but the court said the plea was not good; and referring to the probate proceedings said: “The plaintiffs did not in those proceedings set up their present contention, and were under no obligation to do so.”

And it was also held in *Re Soule*, 46 Hun (N. Y.), 661, that one interested is not estopped to file a petition to revoke the probate of a will by the fact that he appeared at the probate of the will and consented thereto.

In *Clamorgan v. Lane*, 9 Mo. 446, testatrix recited in her will that she wished to place all her children on an equal footing as to their worldly advancement, and inasmuch as her son H. had been better provided for by the will of his uncle C. than she could do for the other children, she therefore gave him nothing. It was held that although the will of C. was void, and the property devised by him to H. was in fact the property of the testatrix, the above recital was not a ratification of the will of C., and did not adopt such devise, and that the heirs of the testatrix were not estopped by it to deny the validity of the will of C.

So, also, in *Carder v. Commissioners of Fayette County*, 16 Ohio St. 353, it was held that the election of a widow to take under the will does not estop her from contesting the will, denying the validity of its devises, or setting up her claims as heir. The court said that as the widow's right to elect was the creature of statute, the statute must be looked to for the estoppel it is to work; that the statute made her election to take under the will a bar to dower and her distributive share of the personal estate due to her as widow, and to nothing else; that under the statute the widow was compelled to make an election in one year, while the heirs had two years in which to begin a contest. “How can the widow know, at the time of making her election, whether there will be a contest? And if she could know that, must she, at her own peril, predetermine the rights of the parties thereto? There would be no safety to her in such a construction of the law. She might validate the will by an

election, and the heirs invalidate it by a contest. It would then seem to be a will as to her, and no will as to them. On the other hand, should she decide that the will was invalid, and would be set aside, and therefore decline to take under it, the will might ultimately be established, and she be made to lose all benefit, however great, of its provisions in her favor. Thus an election, which was intended for the benefit of the widow, would become a means to entrap her, and would render her right uncertain and impracticable. Such is not the law. If there is no valid will, there is no valid election, and of course no estoppel or bar. And it matters not whether the invalidation takes place before or after the election, or at whose instance it takes place. It is only in the event that the document probated becomes or remains established as a valid will, that her election can have any effect whatever; and when such is the case, the effect of the election is confined to her rights as widow, and cannot reach her rights as heir to property not effectually and legally disposed of by the will. The will, and its devises and bequests to other persons, stand unaffected by her election, either to take or to refuse its provisions in her favor. The whole effect, in the one case, is to destroy her rights as widow, and in the other to destroy her rights as devisee or legatee, and in their place to give her the rights of the widow of an intestate."

Likewise, neither the widow's dissent to the will, nor her having had a year's support assigned to her, nor her having asked the county court to appoint one person rather than another administrator cum testamento annexo will estop her to contest the will: *Miller v. Miller*, 52 Tenn. (5 Heisk.) 723.

But in *Wynne v. Spiers*, 26 Tenn. (7 Humph.) 394, a husband sought to contest the will of his wife which had been made in pursuance of a deed of compromise, which had been agreed to be entered as a decree in the chancery court, in a bill for divorce brought by the wife against the husband. The wife died before the divorce case was heard, having made her will, which was duly probated. In the chancery court the death of the wife was suggested, and by consent of parties the case was revived against her executor, and the deed of compromise by which the husband was excluded from interest in his wife's estate was by like consent set forth at length and made the decree of the court. It was held that the form and matter of the decree entered in the divorce case estopped the husband from contesting the wife's will.

The heirs at law of a deceased minor are not estopped from contesting his will on the ground of such minority by reason of their having assented to his receiving his distributive portion of his father's estate, and because they had dealt with and treated him as a person of full age and capable of acting sui juris: *Moore v. Moore*, 23 Tex. 637.

Nor does the fact that a transaction between a husband and wife in relation to the latter's will was such as to create a trust in the husband in favor of the wife's children, in property devised to the

husband, estop the children from contesting the will for fraud practiced by the husband on his wife in the transaction in question, since, though the children would have the right to enforce the trust, instead of annulling the will, they are not thereby deprived of their right to choose their remedy: *Morrison v. Thoman*, 99 Tex. 248, 89 S. W. 409.

And so, too, the mistaken view of parties, who agreed to make wills in each other's favor, as to the legal effect of a marriage upon a previous will, cannot be held to estop the heirs of the person making it to assert its invalidity, by reason of the statute revoking a will on the testator's marriage, especially where there is no fraud, and no one has altered his position to his disadvantage: *Hale v. Hale*, 90 Va. 728, 19 S. E. 739.

b. **By Acceptance of Benefit Under Will.**—It was said by the court of appeals of the District of Columbia, in *Utermehle v. Norment*, 22 App. D. C. 31, that "The doctrine is too well established to need either argument or citation of authority in support of it, that one who takes a benefit under a will cannot thereafter be heard to dispute or deny the validity of the will," and also by the court of appeals of Kentucky in *White v. Mayhall*, 25 S. W. 881: "Ordinarily, we may assume as uncontroverted law that a person may not take under a will and yet deny its validity." Also in *Hyde v. Baldwin*, 34 Mass. (17 Pick.) 303, Chief Justice Shaw said: "It is now a well-settled rule in equity that if any person shall take any beneficial interest under a will, he shall be held thereby to confirm and ratify every other part of the will, or, in other words, a man shall not take any beneficial interest under a will, and at the same time set up any right or claim of his own, even if otherwise legal and well founded, which shall defeat or in any way prevent the full effect and operation of every part of the will." Similar expressions may be found in other cases too numerous to mention, but in all of those cases where this familiar statement of the doctrine found in the law of wills appears, an examination will show that they are founded upon the doctrine of election by estoppel, and applied the rule as thus broadly stated only in cases where an election was required, and not when the will or certain clauses in it were alleged to be illegal or void. Thus in *Madison v. Larman*, 170 Ill. 65, 62 Am. St. Rep. 356, 48 N. E. 556, where testator's granddaughter and her husband were beneficiaries under the will and had taken their rents, it was held that they could not afterward maintain a bill as heirs at law, attacking the validity of the will.

But in *Schuknecht v. Schultz*, 212 Ill. 43, 72 N. E. 37, a son and devisee sought to have two clauses of his father's will declared void on the ground that they violated the rule against perpetuities. It was insisted by the defendants that as the son had taken a beneficial interest under the will he could not be permitted to set up any right or claim of his own, even if otherwise legal or well founded, which would prevent in any way the full effect and operation of the

will; and many cases were cited in support of the general doctrine which we have stated above. But the court said: "These cases are founded upon the doctrine of election, and have no application to the facts of this case. Where a devisee or legatee takes something under the will to which he would not be otherwise entitled, and at the same time seeks to hold property disposed of by the will to which he would be entitled if there had been no will, the doctrine of election applies. But that is not this case. Here the contention of complainant below is that the third and fourth clauses of the will are illegal and void. Those clauses, being invalid, must be treated as though never made and constituting no part of the will"; hence it was held that the lower court erred in dismissing the bill for want of equity.

But where the devisee of a life estate recognized the paper devising the land as a valid will, took possession thereunder, acquiesced for years in the validity of probate proceedings adjudging the paper to be the will of the person who executed it, and claimed only a life estate thereunder, she cannot deny the validity of the paper as a will: *Branson v. Watkins*, 96 Ga. 54, 23 S. E. 204.

Also, a person by receiving from an executor property bequeathed to her is not necessarily estopped to contest the will, when such property had also been given her by a former will under which she claimed, and it was also claimed by her that she took it for storage at the request of the executor: *Kosteletzky v. Scherhart*, 99 Iowa, 120, 68 N. W. 591. And the fact that in a contest of a will it appears that one of the plaintiffs had accepted a legacy given by the will does not estop his coplaintiffs from maintaining the suit: *Floyd v. Floyd*, 90 Ind. 130.

But a beneficiary under a will who received from the executor the property given her by its provisions, and receipted for the same, without objection, is estopped to contest the will after the executor has made subsequent settlements with other beneficiaries: *Lilly v. Townsend*, 110 Mich. 253, 68 N. W. 136.

A codicil, though never formally executed by the testator, was admitted to probate, and an account rendered under it by the executor, and the heirs applied for and received a considerable sum of money by virtue of its provisions. Quaere, whether the heirs are not estopped from disputing its validity: *Burhaus v. Haswell*, 43 Barb. 424.

But when plaintiff having consented to probate of the will thereafter took the annual income provided by it, with full knowledge of the facts attending its execution, he cannot sue to set aside the probate on the ground that testatrix had not testamentary capacity or was unduly influenced: *Katz v. Schnaier*, 87 Hun, 343, 34 N. Y. Supp. 315.

And in those states where a will may be probated in common form, which is nothing more nor less than an ex parte proceeding, it has been held that neither the receipt of a legacy nor a claim by bill in equity of a trust in the whole estate constitutes acquiescence, barring

the right of the next of kin to have the probate of a will taken in common form recalled and the will proved per testes: *Ralston v. Telfair*, 18 N. C. 482; or from contesting the will in chancery: *Malone's Admr. v. Hobbs*, 1 Rob. (Va.) 346, 39 Am. Dec. 263.

In *Re Cumming's Estate*, 153 Pa. 397, 25 Atl. 1125, testator executed a will in due form under the Pennsylvania law, and attempted thereby to dispose of real estate outside of the state. It was held that though devise was legally void because the will did not have the number of witnesses required by the *lex loci rei sitae*, its validity could not be attacked by residuary legatees and devisees under the will, who accepted the benefit of the residuary clause, though they were the persons who would have taken the entire estate if deceased had died intestate.

The case of *Gusler v. Miller*, 78 Tenn. (10 Lea) 90, illustrates clearly that the rule which estops the beneficiary under a will from contesting the will applies only in cases of election. The testator in this case had by will devised the home tract of land to four of his sons, and another tract to the same sons and also to a fifth son. The fifth son sold his interest under the will, and then brought suit to contest the will. Complainants filed this bill to enjoin the contest on the ground that the fifth son had elected to take under the will by the sale. But it was held not a case of election, and he was not estopped because he would be entitled to an interest in the home tract in the event the will was set aside.

In *Holland v. Coutts*, 100 Tex. 232, 98 S. W. 236, it was held that children of a testatrix are not estopped to bring suit to set aside her will, by acceptance from her husband, to whom she devised all her property, of deeds of property, one-half of which he acquired through the will, and the other half of which he owned in his own right.

So, also, in *Fifield v. Van Wyck's Exr.*, 94 Va. 557, 64 Am. St. Rep. 745, 27 S. E. 446, it was held that an heir at law who accepts a legacy with full knowledge of the facts is not thereby estopped from attacking a residuary clause in the will, where its provisions are not of a character to require an election to be made, and the will does not attempt to dispose of any property right of such legatee.

But an heir, not under disability, taking letters testamentary and making a final settlement, on appearing by attorney at the probate of the will, receiving the share, and executing deeds of confirmation, is estopped from questioning the validity of the probate and of the issuance of the letters: *O'Dell v. Rogers*, 44 Wis. 136.

As election, however, is a question of intention, it necessarily implies knowledge, and therefore to estop a party, as a general rule, from the assertion of his legal rights, it must appear that the party was apprised of his rights, and intentionally by acts, silence or acquiescence influenced the conduct of the person setting up the estoppel to his injury. Hence the general rule that a beneficiary who elects to take under the will is thereby estopped from afterward

contesting its validity does not apply when such beneficiary acted in ignorance of the facts showing invalidity and of his rights in the premises: *Medill v. Snyder*, 61 Kan. 15, 78 Am. St. Rep. 307, 58 Pac. 962.

And the acceptance by a legatee of a bequest will not prevent her from contesting the will for incapacity of the testator and the undue influence of the other beneficiaries, when at the time of acceptance she did not know of such facts, and the others did know them and fraudulently concealed them, to induce her to accept the legacy and not contest the will: *White v. Mayhall* (Ky.), 25 S. W. 881.

Likewise natural children who have been legitimated by their father, and thereby made his forced heirs, are not estopped from bringing action to set aside his will, so far as it affects their legitimacy by reason of having accepted from the executor property specially bequeathed to them, and having granted the executor a discharge from all liability to them on account of that particular property, when they were not parties to the proceedings in the matter of the probate of the will and knew nothing of its other provisions: *Marion-neaux v. Dupuy*, 47 La. Ann. 943, 17 South. 435.

And the fact that a widow received the greater part of her share under her husband's will, not exceeding her distributive share if the will was set aside, and was present at, and acquiesced in, the sale of property under the will, did not estop her from afterward contesting the will when it does not appear that she then knew of the facts on which she is making the contest, or that her conduct was intended to influence, or did influence, the action of the executors, and it does appear that if the will is set aside, she will be entitled to more of the estate in money than she has received, so that the executors cannot be injured by the payments made: *Moore's Exrs. v. Johnson*, 75 Tenn. (7 Lea) 580.

So, also, in *Watson v. Watson*, 128 Mass. 152, the general doctrine that any person taking a beneficial interest under a will thereby confirmed it, and could not set up any right of his own which would defeat or in any way prevent the full operation of any part of the will was recognized and affirmed, yet the court said: "An election made in ignorance of material facts is, of course, not binding, where no other person's rights have been affected thereby. So if a person, though knowing the facts, has acted in misapprehension of his legal rights, and in ignorance of his obligation to make an election, no intention to elect, and consequently no election, is to be presumed."

But it is not under all circumstances that one who has taken under a will in ignorance of his obligation to make an election whether to take under the will or to assert an independent title against it, is not estopped from contesting the will. This clearly appears from the case of *Utermehle v. Norment*, 22 App. D. C. 31, where it was held that the beneficiary of a will who elected to take under a will by consenting to its probate, and has confirmed that election by taking his legacy, and also real estate denied to him, and has disposed of the

latter beyond the possibility of return, and has allowed ten years to elapse, during which time the executor's accounts have been settled and the position of everyone interested in the estate changed, except that some of the devisees still hold some of the real estate devised to them, is estopped to question the validity of the will, although the party contesting in this case alleged that he did not know at the time he accepted the legacy the facts upon which the ground of contest was based. And in affirming the decision in this case it was held by the supreme court of the United States (197 U. S. 40, 25 Sup. Ct. Rep. 291, 49 L. ed. 655) that ignorance of rule of law that a party taking the benefit of a provision in his favor under a will is estopped to contest the will, though coupled with ignorance of any evidence on which a contest could be based, will not prevent the application of such rule in the absence of fraud, imposition or misrepresentation, or when the original situation cannot be restored and there has been extreme negligence in attempting to discover the facts.

c. Restoration of Benefit Received Under Will, as Condition Precedent to Right to Contest.—While we have seen that, as a general rule, one who has received a benefit under a will cannot thereafter contest its validity, we have also seen that this rule is founded on the doctrine of election and is subject to the qualification that if the benefit was received without a knowledge of his right to elect between the benefit so conferred and of his right to the property outside of the will, or he was induced by fraud or deception to accept the benefit conferred, he can revoke the election and contest the validity of the will. This qualification of the general rule, however, is subject to the further qualification that as a condition precedent to his right to contest, he must restore the benefit received: *Woodcock v. McDonald*, 30 Ala. 411; *Vance v. Crawford*, 4 Ga. 445; *Ratliff v. Baldwin*, 29 Ind. 16, 92 Am. Dec. 330; *Medill v. Snyder*, 61 Kan. 15, 78 Am. St. Rep. 307, 58 Pac. 962; *Stone v. Cook*, 179 Mo. 534, 78 S. W. 801, 64 L. R. A. 287; *Hamblett v. Hamblett*, 6 N. H. 333; *Holt v. Rice*, 54 N. H. 398, 20 Am. Rep. 138; *In re Peaslee's Will*, 73 Hun. 113, 25 N. Y. Supp. 940; *In re Miller's Estate*, 166 Pa. 97, 31 Atl. 58; in fact, this doctrine is found running through all the cases, and seems too well established to require further citation of authority in support of it. The only exception to this rule which we have discovered being that one who is induced by fraud to accept a legacy under a will need not offer to restore it as a condition precedent to his right to contest the will: *White v. Mayhall* (Ky.), 25 S. W. 881. True, it was held in *Gaither v. Gaither*, 23 Ga. 521, that an executrix moving to set aside her husband's will, after having qualified and proceeded to execute it, need not first return or surrender her legacy received under the probate of all the property for life. But this decision was in no way intended as opposed to the general rule, but was based upon the peculiar facts of the case as shown by the opinion. "If the will stands, it gives

to Mrs. Gaither an estate for her life, in the whole property, and therefore gives to her the right to the possession of the whole, and it does not appear that there remain any debts; if the will fails, the law gives to her the entire interest in the whole property, and therefore gives to her the right to the possession of the whole. Either way, then, she is the person entitled to possession. Why, then, should she be compelled to surrender the possession?"

But while the rule is universal (except as we have seen, when fraud is involved) that one who contests a will after acceptance of a legacy thereunder must restore the benefit received, there is some diversity of judicial opinion on the question whether the restoration must be made before filing the suit to contest, or whether an offer to bring it into court is sufficient.

The two leading cases of later date which entertain opposing views on this question come from the states of Kansas and Missouri.

In *Medill v. Snyder*, 61 Kan. 15, 78 Am. St. Rep. 307, 58 Pac. 962, where a daughter of the testator who had received a legacy under the will afterward sought to attack its validity, alleging ignorance of her rights and not having knowledge of the facts urged by her as grounds for the attack at the time she accepted the benefits under the will, it was held that an offer of restoration made by her in her pleadings was sufficient, and this ruling was based on the case of *Thayer v. Knote*, 59 Kan. 181, 52 Pac. 433, where it was held that as a general rule, where equity requires the restoration of what has been received under a contract as a condition to its rescission, it is sufficient to make the offer of restoration in the petition and not necessarily before bringing of the suit.

In *Hamblett v. Hamblett*, 6 N. H. 333, and *Holt v. Rice*, 54 N. H. 398, 20 Am. Rep. 138, the ruling in the *Medill* case (61 Kan. 15, 78 Am. St. Rep. 307, 58 Pac. 962) seems to be sustained, though in the latter of these cases the court required that the benefit received be actually brought into court before proceeding with the hearing, saying that the bringing in of the legacy was a test of the sincerity of the opposition to the validity of the will, and would prove it not to be merely vexatious, and at the same time would be security to the executor, in case of the next of kin being condemned in costs.

But the doctrine upheld by the foregoing cases has not received very generous support, for according to the weight of authority, restoration must be made at the time or before the suit to contest is filed. Thus, in *Stone v. Cook*, 179 Mo. 534, 78 S. W. 801, 64 L. R. A. 287, a daughter of the testator received certain legacies under the will, and afterward sought to contest the will, alleging that she accepted the legacies under protest, and averring her readiness and willingness to pay the legacies so received into court, or to have them deducted from her share of the estate if the will was set aside. In holding that bringing the amount of the legacies into court was not sufficient to relieve her of the estoppel, the court said: "The pivotal question here involved is whether the plaintiff, having re-

ceived the legacies bequeathed to her by the will, can be heard to contest the validity of the will, upon bringing into court the sums she has received under the will. The fact that she received the legacies under protest, or under a claim that they constituted only a part of what she was entitled to by law, outside of the will, is wholly immaterial, and avails nothing. . . . Since a person cannot hold under a will and also against, one who accepts a beneficial interest under a will thereby bars himself from setting up a claim which will prevent its full operation at law or in equity; and such person will not, therefore, be allowed to contest a will unless he return the legacy received. . . . The allegation that she is ready and willing to pay the amount received into court, or to have it deducted from her share of the estate if the will is set aside, is not sufficient to bring her within the rule which entitles one to contest an instrument after receiving a benefit under it, for the rule requires that the benefit received shall be actually paid into court at or before the filing of the suit." And this doctrine is supported by *Woodcock v. McDonald*, 30 Ala. 411; *In re Soule* (Sur.), 3 N. Y. Supp. 259, 22 Abb. N. C. 236, affirmed in 57 Hun, 586, 11 N. Y. Supp. 949; *In re Peaslee's Will*, 73 Hun, 113, 25 N. Y. Supp. 940; *In re Miller's Estate*, 166 Pa. 97, 31 Atl. 58.

d. Agreements Affecting Right to Attack or Contest.—It not infrequently happens that one who as a person interested would have the right to contest a will is estopped by some act on his part other than acceptance of a benefit under the will. For example, though a relinquishment to an ancestor by an heir apparent of the latter's expectancy in the former's estate has been strongly opposed as being in contravention of public policy, and therefore inoperative and void, it is generally held that such relinquishment by an heir estops him from afterward contesting the validity of the ancestor's will: *In re Garcelon's Estate*, 104 Cal. 570, 43 Am. St. Rep. 134, 38 Pac. 414, 32 L. R. A. 595; *Eissler v. Hoppel*, 158 Ind. 82, 62 N. E. 692; *Gore v. Howard*, 94 Tenn. (10 Pick.) 577, 30 S. W. 730.

So, also, a contract between heirs that they would not contest a will was binding upon them unless executed upon fraudulent representations as to the facts, and could be set up by the executor, although not a party thereto, in defending a contest brought by such heirs, and moreover the fact that some of the parties to the contract between the heirs were infants would not relieve the adults if they knew of such infancy: *Reichard v. Izer*, 95 Md. 451, 52 Atl. 592. And where a son of testator's daughter agreed with his mother, a devisee, for a valuable consideration, which he received, not to contest his grandfather's will, he could not thereafter attack the will and claim his share of the testator's estate: *Jones v. Jenner*, 14 N. Y. St. Rep. 376.

But the fact that all of testator's heirs consented to a decree probating his will does not bar an action under Code of Civil Procedure, section 2653a, added by Laws of 1892, page 1136, chapter 591, pro-

viding for a determination of the validity of a will admitted to probate, nor proceedings to revoke the probate: *Shea v. Bergen*, 59 Misc. Rep. 294, 110 N. Y. Supp. 572.

When persons interested in an estate have agreed in writing to abide by the testator's will and to hold valid the acts of the executor without his going into court and qualifying, and have acted under such agreement, they are estopped to deny the probate of the will or the authority of the executor: *Darden v. Harrill*, 78 Tenn. (10 Lea) 421.

BLOCK v. CITY OF CHICAGO.

[239 Ill. 251, 87 N. E. 1011.]

MUNICIPAL ORDINANCE—Whether Void Because Unreasonable.—An ordinance passed in pursuance of an express power to enact one of that character cannot be set aside by the courts because they deem it unreasonable. (p. 224.)

MUNICIPAL ORDINANCE—Special or Local Legislation.—The constitutional prohibition against local and special laws does not apply to ordinances adopted by a city within the powers conferred upon it. (p. 224.)

THEATERS—Regulation of Arcades and Moving-picture Shows. Five and ten cent theaters, penny arcades, and moving-picture shows may be singled out for special municipal regulation. An ordinance so doing is not unconstitutional because it does not include other theaters and other forms of public entertainment. (pp. 225, 226.)

THEATERS—Regulation of Arcades and Moving-picture Shows. An ordinance that requires persons who desire to exhibit moving pictures to first exhibit them to the chief of police, who shall determine whether they are immoral or obscene, and if they are refuse to permit their public exhibition, is not invalid because giving him such power of determination and rejection, nor because the pictures are reproductions of scenes enacted in theaters without previous exhibition before the chief of police. (p. 227.)

THEATERS—Regulation of Arcades and Moving-picture Shows. An ordinance requiring persons who desire to exhibit moving pictures to first exhibit them before the chief of police, and giving him authority to reject those that are immoral or obscene, is not invalid because fixing no standard by which their character is to be determined. (p. 227.)

THEATERS—Regulation of Arcades and Moving-picture Shows. An ordinance which requires persons who desire to exhibit moving pictures to first exhibit them before the chief of police, who is authorized to reject such as are immoral or obscene, is not unconstitutional because no sort of hearing is required in court to determine the character of the pictures. (p. 228.)

THEATERS—Moving Pictures, When Immoral.—Moving pictures which represent criminal scenes are immoral, notwithstanding they may illustrate experiences connected with the history of the country, such as the careers of the "James Boys" and the "Night Riders." (p. 228.)

THEATERS—Regulation of Arcades and Moving Pictures.—An ordinance providing that persons engaged in showing moving pictures shall first exhibit them to the chief of police, and that if he determines they are immoral or obscene he shall refuse a permit for their public exhibition, otherwise he shall issue a permit free of charge, and that persons violating the ordinance are subject to a fine for each offense, is constitutional. (p. 228.)

Adler, Lederer & Schoenbrun, for the plaintiffs in error.

Edward J. Brundage, Edwin H. Cassels and Emil C. Wetten, for the defendant in error.

255 **CARTWRIGHT, C. J.** The plaintiffs in error, Jake Block, Nathan Wolf, J. H. Ferris, B. Munstock, S. Van Ronkel and A. Von Ronkel, filed their bill of complaint in the superior court of Cook county against the defendant in error, city of Chicago, alleging that they were engaged in the business of operating five and ten cent theaters in the city of Chicago, where moving pictures were displayed, and praying the court to enjoin the defendant in error from enforcing an ordinance entitled "An ordinance prohibiting the exhibition of obscene and immoral pictures and regulating the exhibition of pictures of the classes and kinds commonly shown in mutoscopes, kinetoscopes, cinemetographs and penny arcades," passed November 4, 1907, and in force November 19, 1907, and to restrain the further prosecution of a suit brought by defendant in error against said Jake Block in the municipal court of Chicago for a violation of said ordinance, and the bringing of any proceedings against any of the complainants for any alleged violation of the provisions of the said ordinance. The court sustained the demurrer of the defendant to the bill, and the complainants having elected to stand by their bill, it was dismissed for want of equity, at their costs. The ground upon which the injunction was asked for was, that the ordinance deprived the complainants of their rights under the constitution, and was therefore void, and for that reason the record has been brought directly to this court for review by writ of error.

The ordinance requires those engaged in the business of exhibiting moving pictures to secure a permit for the exhibition of such pictures, and provides that the chief of **256** police shall not issue a permit for the exhibition of any obscene or immoral picture or series of pictures, but that he shall issue a permit, without fee or charge, for all pictures which are not obscene or immoral. The ordinance declares that it shall be unlawful for any person, firm or corporation

to show or exhibit in a public place, or in a place where the public is admitted, any picture or series of pictures of the classes or kinds commonly shown in mutoscopes, kinetoscopes, cinemetographs, and such pictures or series of pictures as are commonly shown or exhibited in so-called penny arcades, and in all other automatic or moving picture devices, without first having secured a permit therefor from the chief of police. It requires the applicant for a permit to show to the chief of police the plates, films, rolls or other like apparatus by or from which the picture or series of pictures is shown or produced or the picture or series of pictures as shown or exhibited. The chief of police must either grant or deny the permit within three days after such inspection, and if the picture or series of pictures is immoral or obscene, he must refuse the permit, but otherwise it is his duty to grant it without a fee or tax of any kind. If the chief of police refuses to grant a permit, the applicant may appeal to the mayor, whose decision shall be final. When a permit is once granted the picture or series of pictures may be shown by any other exhibiter, provided the written permit is delivered to him and a written notice of the transfer or lease is mailed to the chief of police, and any number of transfers or leases of the same picture or series of pictures may be made under those conditions. The permit must be posted at or near the entrance to the place of exhibition, and anyone violating the terms of the ordinance is subject to a fine, not less than fifty dollars nor more than one hundred dollars, for each offense.

The material facts alleged in the bill and taken to be true for the purposes of the demurrer are as follows: The complainants are engaged in the business of operating five ²⁵⁷ and ten cent theaters, where moving pictures are displayed by means of moving-picture machines known as mutoscopes, kinetoscopes, and cinemetographs, and have paid a license fee for the business. The pictures are displayed upon canvas and are taken from plays and dramas which the bill says are moral and in no way obscene. Among the pictures are pictures taken from the plays known as the "James Boys" and the "Night Riders," displaying experiences connected with the history of this country. There had been, and at the time of the display of the pictures by complainants there were, certain plays and dramas being performed in certain playhouses in the city of Chicago of which the pictures were reproductions of parts. The films which are used in exhibiting pictures are not owned by the exhibitors,

but are rented from concerns which make a business of renting films to complainants and others at a certain rental per week, and if the films must first be exhibited to the chief of police and a permit obtained, it will be necessary to rent the films for a greater length of time and for a larger expense than otherwise. The chief of police refused to grant a permit for the display of the pictures of the "James Boys" and "Night Riders," and others used by the complainants, about two hundred or three hundred in all, without having any hearing in a court of law where the complainants might defend their rights and property interests. The defendant brought an action in the municipal court against the complainant Jake Block for a penalty for exhibiting the pictures known as "James Boys" without a permit, and threatened to bring other proceedings against Jake Block and the other complainants. There are about two hundred persons engaged in the same business in Chicago in addition to the complainants, all of whom are similarly situated, and the chief of police threatens to enforce the ordinance against all of them. At the same time permits to complainants were refused for the pictures named, some of the pictures prohibited were being shown in the ²⁵⁸ city in stereopticon views and stationary pictures. The bill alleges that the ordinance is void because it discriminates against the exhibitors of moving pictures, delegates discretionary and judicial powers to the chief of police, takes the property of complainants without due process of law, and is unreasonable and oppressive.

The purpose of the ordinance is to secure decency and morality in the moving-picture business, and that purpose falls within the police power. It is designed as a precautionary measure to prevent exhibitions criminal in their nature and forbidden by the laws. Even the possession of an indecent picture is a crime under section 223 of the Criminal Code, and the offender may be confined in the county jail not more than six months or be fined not less than one hundred dollars nor more than one thousand dollars for each offense. The ordinance applies to five and ten cent theaters such as the complainants operate, and which, on account of the low price of admission, are frequented and patronized by a large number of children, as well as by those of limited means who do not attend the productions of plays and dramas given in the regular theaters. The audiences include those classes whose age, education and situation in life specially entitle them to protection against the evil influence of obscene

and immoral representations. The welfare of society demands that every effort of municipal authorities to afford such protection shall be sustained, unless it is clear that some constitutional right is interfered with. The defendant by its charter has been invested with very extensive powers to enable it to accomplish the purpose of this ordinance. By clause 41 of article 5 it is authorized to license, tax, regulate, suppress and prohibit exhibitions, shows and amusements. Clause 45 gives power to prohibit the sale or exhibition of obscene or immoral publications, prints, pictures or illustrations, and clause 58 authorizes the defendant to regulate places of amusement. The legislature have thereby given to the defendant power to use every legitimate means for prohibiting ²⁵⁹ and preventing the exhibition of obscene or immoral pictures, but it is argued that in doing so they have interfered with constitutional rights by requiring a permit for moving pictures while none is required for stereopticon or other stationary pictures. No fee, tax or other burden is laid upon the exhibitor of moving pictures, and the permit must be issued if the picture or series of pictures is not immoral or obscene.

Counsel argue the question as though exhibitors of stereopticon or other stationary pictures are authorized by the ordinance to exhibit immoral or obscene pictures while the complainants are prohibited from doing so. That is a false notion, and is of the same character as the argument advanced in *City of Chicago v. Brownell*, 146 Ill. 64, 34 N. E. 595. It was there claimed that the ordinance prohibiting book-making and pool-selling except within the inclosures of fair and race-track associations during the actual time of the meetings of said associations or within twenty-four hours before any such meetings was void, as authorizing book-making or pool-selling in the excepted places at the times mentioned. The court said that the ordinance did nothing of the kind, but simply made no provision for the punishment of those who might do the specified acts within the inclosures at certain times. Attention was called to the radical and fundamental distinction between a failure to provide punishment for an act and the sanction of it, and it is clear that the ordinance in this case does not authorize or sanction the exhibition of obscene or immoral pictures in stereopticon or other stationary pictures, which the statute of the state has made criminal. If this ordinance did not exist, neither the complainants nor other exhibitors of pictures would have any right to exhibit obscene

pictures, either moving or stationary. If the pictures for which the chief of police refused permits were immoral or obscene, it is no ground of objection to the ordinance that other persons ²⁶⁰ were violating the law by other means or that the ordinance does not provide for the punishment of such other persons.

Another supposed discrimination is based on the allegation that some of the same scenes displayed by moving pictures are shown in theaters where the scenes are enacted upon the stage, and there is no requirement that the show shall be given before the chief of police and a permit obtained. Clause 45 of article 5 of the city charter, which empowers the defendant to prohibit the exhibition of obscene or immoral pictures, has no reference to theaters. Their business is not the exhibition of pictures. It cannot, therefore, be said that the exercise of the power conferred by clause 45 is unreasonable because it does not include the theater. Where an ordinance is passed in pursuance of an express power to pass an ordinance of that character, it cannot be set aside by the courts because they may deem it unreasonable: *City of Peoria v. Calhoun*, 29 Ill. 317; *Dillon on Municipal Corporations*, sec. 262. Unless the legislature had no power to confer upon the city the authority contained in clause 45 without including theaters, for the reason that the power delegated would be in conflict with the constitution, the objection now under consideration could not be sustained. The constitution contains a prohibition against local and special laws in certain classes enumerated in section 22 of article 4, but there is no other prohibition which can be enforced by the courts. In all other classes of cases the question whether a general law can be made applicable or whether a special one shall be passed is for the legislature: *Knopf v. People*, 185 Ill. 20, 76 Am. St. Rep. 17, 57 N. E. 22. Under the constitution the legislature cannot pass any special law incorporating a city or amending its charter, but clause 45 is general, and applies to every city incorporated under the act, and the prohibition of the constitution does not apply to ordinances that may be adopted by a city within the powers conferred upon it: *People v. Cooper*, 83 Ill. 585. It is true that an ordinance which deprives a party of a right guaranteed ²⁶¹ by the constitution is null and void, but the complainants were bound to point out such a provision to authorize the court to restrain the city from the enforcement of the ordinance. To say that an ordinance is special and applies only

to a certain business or to persons engaged in a certain line of business does not condemn it.

The ordinance, however, is not special, and contains no discrimination against persons of the same class or engaged in the same business. It applies alike to all persons engaged in the moving-picture business, which the bill itself shows to be a separate and well-established branch of the amusement business. There is good ground for regulations concerning that business, which is different from the business of exhibiting pictures by stereopticons or other similar methods. As to the stereopticon and other similar pictures, there is no allegation in the bill that any business of that kind is carried on, and so far as appears it may be a mere incident of lectures, church entertainments or amateur performances; but if it is a business, the places where it is conducted may be inspected to ascertain whether there is any violation of law, while in the case of moving pictures, rented and passed from one exhibiter to another about the city and constantly changing, it would require the constant attendance of a great force of policemen at the various exhibitions in the two hundred places mentioned in the bill. There is also a radical difference between the burden imposed by the exhibition of films and pictures to be exhibited in the moving-picture show and a requirement that a large number of actors shall go through a dramatic performance before the chief of police. The one is but a trifling inconvenience, while the other would verge upon the ridiculous and entail great and unnecessary expense. To hold that a city, in executing the power conferred upon it to suppress and prohibit things which are hurtful to the morals of the people, must pursue the course insisted upon by counsel would be to practically prevent the execution of the power ²⁶² at all. The ordinance embraces all persons similarly situated and contains no discrimination as between them: *City of Chicago v. Bowman Dairy Co.*, 234 Ill. 294, 84 N. E. 913, 17 L. R. A., N. S., 684; *Hawthorn v. People*, 109 Ill. 302, 50 Am. Rep. 610. In *Gundling v. City of Chicago*, 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230, the fact that young persons of weak and immature minds are more liable to use tobacco in the form of cigarettes than in any other form was considered sufficient to authorize the city to single out, regulate and license the sale of tobacco in that form without including any other form of tobacco. There is at least equal reason for singling out and regulating the five and ten cent theaters, attended in great numbers by

children, without including other theaters and other forms of public entertainment.

It is also argued that the ordinance is void because it delegates legislative and judicial powers to the chief of police by giving him the power to determine whether a picture or series of pictures is immoral or obscene, and not giving to the applicant for a permit a day in court for the determination of the question whether the picture or series of pictures is immoral or obscene. It is true that a legislative body cannot divest itself of its proper function to determine what the law shall be, but it may authorize others to do those things which it might properly, but cannot understandingly or advantageously do. That rule was stated as long ago as the case of *People v. Reynolds*, 5 Gilm. 1, where it was said that without that power legislation would become oppressive and yet imbecile, and that local laws, almost universally, call into action to a greater or less extent the agency and discretion either of the people or individuals to accomplish in detail what is authorized or required in general terms. Government could not be carried on if nothing could be left to the judgment and discretion of administrative officers, and the doctrine of that case has been steadily adhered to ever since. Discretion may be reserved to the officer charged with the duty of issuing dram-shop licenses to determine the number to be ²⁶³ granted and the location (*People v. Cregier*, 138 Ill. 401, 28 N. E. 812); and a reasonable discretion may be exercised by such officer, whether it is reserved to him by the ordinance or not: *Harrison v. People*, 222 Ill. 150, 78 N. E. 52. An act giving discretion to an inspector as to the number, location, material and construction of fire-escapes is not unconstitutional, as delegating legislative or judicial power: *Arms v. Ayer*, 192 Ill. 601, 85 Am. St. Rep. 357, 61 N. E. 851. Neither is an ordinance in violation of the constitution which gives to the commissioner of public works authority to approve a device to prevent the spilling of oil on the streets: *Spiegler v. City of Chicago*, 216 Ill. 114, 74 N. E. 718. It has never been questioned that power may be delegated to officers to determine facts, such as whether animals are diseased so as to exclude them from importation; whether meat or food is found upon an inspection to be unhealthy or diseased; whether an assemblage amounts to a riot to be dispersed. There are numerous facts of that kind which must be left to administrative officers, and the ordinance is not invalid because the chief of police must deter-

mine the question of fact whether a picture or series of pictures is immoral or obscene.

But it is said that, conceding the power of the legislative body to authorize an administrative officer to determine the question, the ordinance fixes no standard by which it is to be determined. Manifestly it would be impossible to specify in an ordinance every picture or particular variety of picture which would be considered immoral or obscene, and no definition could be formulated which would afford a better standard than the words of the ordinance. It is doubtless true, as said by counsel, that there are people who differ upon the subject as to what is immoral or obscene. There are the shameless and unclean, to whom nothing is defilement, and from whose point of view no picture would be considered immoral or obscene. Perhaps others could be found, with no laxity of morals, who pay homage to art, and would not regard anything as indelicate ²⁶⁴ or indecent which had artistic merit, and would look upon any person entertaining different sentiments as of inferior intelligence, without proper training on the subject and blinded with bigotry. Both classes are exceptional, and the average person of healthy and wholesome mind knows well enough what the words "immoral" and "obscene" mean, and can intelligently apply the test to any picture presented to him. There is as great diversity of opinion as to what constitutes good moral character, but it is beyond question that an officer authorized to grant a license to keep a dram-shop may determine whether the applicant has a good moral character, and there has been no ground for complaint that the power has been wrongfully or oppressively exercised against applicants. It is presumed that the chief of police, or the mayor, in case of an appeal to him, will perform his duty with reasonable intelligence and in accordance with the generally accepted meaning of the words. If there should be an abuse of power on the part of either the chief of police or the mayor, the ordinance does not prevent an application to a court to compel either officer to perform his duty and issue a permit for a picture which is not immoral or obscene.

It is further argued that the ordinance deprives complainants of their property without due process of law. Defendant has a right to prohibit the exhibition of immoral or obscene pictures, and the complainants would not be deprived of any right if they are prevented from exhibiting pictures of that class. If the ordinance is enforced according to its terms,

they will not be deprived of any property or right or the use of any property which they have a legal right to use. The only thing alleged in the bill having any relation to the question is the fact that the complainants will have to pay rent for the films or pictures during the time necessary for inspection by the chief of police. There would be no greater delay than is necessary in any case where a permit must be obtained for any purpose,²⁶⁵ and if the defendant may require the permit, there is no lack of due process of law. The ordinance being general in its terms and applying to all persons engaged in the moving-picture business, the complainants are not subject to any unlawful burden.

There is a further argument that some sort of a hearing is required in court to determine the fact whether a picture proposed to be exhibited, or one that has been exhibited, is immoral or obscene. We know of no decision sustaining such a doctrine, and counsel do not appear to have found any. As we have already seen, there is no lawful objection to the determination of the question by the chief of police.

There is a general averment in the bill that the complainants are engaged in exhibiting moving pictures which are not immoral or obscene, but there is no averment that the pictures specifically mentioned, which are the "James Boys" and the "Night Riders," or the others for which permits were refused, were not immoral or obscene. It is true that pictures representing the career of the "James Boys" illustrate experiences connected with the history of the country, but it does not follow that they are not immoral. Pictures which attempt to exhibit that career necessarily portray exhibitions of crime, and pictures of the "Night Riders" can represent nothing but malicious mischief, arson and murder. They are both immoral, and their exhibition would necessarily be attended with evil effects upon youthful spectators. If the other pictures for which permits were refused were of similar character, the chief of police is to be commended for the refusal.

No wrong was done or threatened to the complainants and the bill stated no ground for equitable interference. The court did right in sustaining the demurrer and dismissing the bill.

The decree is affirmed.

The Law Applicable to Theaters is the subject of a note to *Horney v. Nixon*, 110 Am. St. Rep. 525. The legislature has an undoubted right reasonably to regulate theaters as places of public amusement: *People v. Steele*, 231 Ill. 340, 121 Am. St. Rep. 321.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY v. GARRETT.

[239 Ill. 297, 87 N. E. 1009.]

EMINENT DOMAIN—Property Subject to Condemnation.—Rights in real estate, whether cognizable at law or in equity only, may be condemned. (p. 232.)

EMINENT DOMAIN—Claims that may be Adjudicated.—In condemnation proceedings the court has jurisdiction to adjudicate upon all claims of interest in the property sought to be taken or damaged, including an unassigned dower interest. (p. 232.)

APPEAL—Effect of Reversal.—The Rights of a Purchaser in good faith relying upon a decree, before any writ of error is prosecuted or other action taken to avoid it, will be protected, notwithstanding the decree is afterward reversed. (p. 233.)

LIS PENDENS—Writ of Error.—Without a Supersedeas the doctrine of lis pendens has no application to a writ of error. (p. 233.)

DIVORCE—Effect of Reversal on Purchaser of Dower.—A decree of divorce deprives the party at fault of dower in the lands of the other party; and one who purchases in good faith while the decree is in force will be protected against the dower right, although the decree is subsequently reversed on writ of error pending when he purchased without a supersedeas. (p. 233.)

Wheelock, Shattuck & Newey, for the appellants.

Thomas M. Headen, for the appellee.

298 DUNN, J. The Chicago and Northwestern Railway Company filed a petition for the condemnation, for a passenger station, of certain real estate in the city of Chicago, including certain premises at Nos. 32 and 34 West Randolph street. These premises had been the property of Martha S. Chatterton, who died in January, 1905, having devised them to her son, William W. Chatterton, by whom they were conveyed to Stephen B. Jones, who conveyed them to Harvey Strickler. Both Jones and Strickler executed mortgages for part of the purchase money, and all the parties named, together with the mortgagees and William A. Chatterton, were made defendants to the petition. William A. Chatterton was the husband of Martha S. Chatterton, and the order appealed from awarded him damages for his supposed dower interest in the premises. The appellants are the owners of the fee and lienholders.

For several years prior to November, 1903, William A. Chatterton and Martha S. Chatterton were living apart. In that month her father died, and under his will she became **299** the owner of the property involved here. She consulted

her attorney about obtaining a divorce, but before a bill was filed negotiations were begun by her husband, through his attorney, for securing his interest in her property. Besides the property derived from her father Mrs. Chatterton had some property in Wilmette, in which her husband claimed an interest by reason of having contributed several hundred dollars to its purchase and improvement. It was finally agreed that Mrs. Chatterton should pay her husband five hundred and fifty dollars for a release of all his interest in her property. On January 30, 1904, Mrs. Chatterton filed her bill for divorce on the ground of desertion. No service was had, but on February 16th the appearance of her husband was entered. On March 9th he was defaulted. On March 24th a decree of divorce was granted. On March 25th the five hundred and fifty dollars was paid to his solicitor and five hundred dollars was sent to a bank in San Francisco, together with a release, with instructions to pay the money to Chatterton upon his executing the release and paying fifty dollars solicitors' fees. On April 2d he executed the release, which was a release to Mrs. Chatterton of all his interest in her property. It was delivered to her on April 12th and was recorded May 28, 1904. Mrs. Chatterton died in January, 1905, and in June, 1906, a writ of error was sued out of the appellate court, upon which the decree of divorce was reversed in March, 1907, and in December, 1907, the judgment of the appellate court was affirmed by the supreme court: 231 Ill. 449, 121 Am. St. Rep. 339, 83 N. E. 161. William W. Chatterton's conveyance to Jones was made in August, 1906, while the writ of error was pending in the appellate court, and both he and Strickler had been told by appellee's attorney that William A. Chatterton claimed dower in the premises, and that in the opinion of said attorney the release deed of William A. Chatterton was void and the decree of divorce would be reversed.

The petition for condemnation was filed in January, 1907, and on September 10, 1907, William A. Chatterton ³⁰⁰ filed his cross-petition, which, as afterward amended, avers the facts substantially as above stated, and alleges that the negotiations in regard to the payment to him and his release were conducted and the agreement made prior to the entry of the decree of divorce, but the money was not paid until afterward; that it was agreed that his appearance should be entered in the divorce suit but no defense made, though he had a meritorious defense, which was not presented because

of the agreement, and that the contract was in violation of law. The cross-petitioner prayed for a separate award of damages for his dower interest. The court entered an order finding that the parties were not entitled to a separate award and directing that compensation for the premises should be made to the owner or owners thereof, and that the petitioner might pay the award to the county treasurer of Cook county for the benefit of the owner or owners. Thereupon a jury was impaneled and a verdict returned fixing the just compensation to be made to the owner or owners of the premises at fifty-nine thousand dollars and eighty-four cents, which amount was paid by the petitioner to the county treasurer of Cook county for the benefit of the owner or owners. A hearing was then had on the cross-petition, answer and evidence, including a stipulation as to the facts, and a decree was entered finding that the deed of William A. Chatterton to Martha S. Chatterton releasing his interest in her property was made for the purpose of facilitating the entry of the decree of divorce and was contrary to public policy, and that William A. Chatterton was entitled to dower in the real estate and fixing its value at eight thousand three hundred and forty-five dollars and seventy-seven cents.

A motion was made to dismiss the appeal. The appeal is from the order finding William A. Chatterton entitled to dower, fixing the amount and ordering its payment, and the appellants are the owners of the fee and the holders of encumbrances thereon. The grounds of the motion are, that one respondent cannot appeal from a judgment in favor of another, but only the petitioner for condemnation can appeal,³⁰¹ and that if one respondent can appeal, he can do so only by appealing from the entire judgment against all the parties. The motion is based upon a misapprehension. This appeal does not involve the condemnation of the property or the rights of the petitioner, the Chicago and Northwestern Railway Company. The petitioner's connection with the case ceased upon payment of the compensation allowed by the jury. It is not a party to the appeal. The only questions brought up by the appeal are those made upon the cross-petition of William A. Chatterton, and they arise only between him and the other parties interested in the land. The motion to dismiss the appeal will be denied.

It is insisted by appellants that the superior court, in a condemnation proceeding, exercises only statutory powers, and that it therefore had no jurisdiction of the matters in-

volved in appellee's cross-petition, no power to inquire into the validity of the release, no authority to assess damages for an unassigned dower interest. Section 11 of the eminent domain act provides that any person not made a party to the proceeding may become such by filing his cross-petition, setting up that he has an interest in property which will be taken or damaged by the proposed work, and that the rights of such cross-petitioner shall thereupon be fully considered and determined. The fact that his interest is equitable only does not prevent its consideration and determination. The object of the proceeding is to enable the petitioner to acquire the right to take the property as against everyone having an interest therein, and everyone interested may therefore become a party and have his right, whatever may be its character, considered and determined. The jury cannot assess just compensation to each person interested in the property, as the law requires them to do, unless the interest of each person is known, and it is therefore necessary that this question should be determined by the court. This jurisdiction, whether legal or equitable, is conferred by the statute. Rights in real estate, whether cognizable ³⁰² at law or in equity only, may be condemned, and the court has jurisdiction to adjudicate upon all claims of interest in the property sought to be taken or damaged: *Chicago etc. Ry. Co. v. Miller*, 233 Ill. 508, 84 N. E. 683; *Metropolitan West Side Elevated Ry. Co. v. Eschner*, 232 Ill. 210, 83 N. E. 809.

The effect of a decree of divorce is to deprive the party at fault of the right of dower in the lands of the other party: *Hurd's Stats.*, c. 41, sec. 14. Therefore, whether appellee's release is held binding upon him or not, he was not entitled to dower in his wife's land until the decree of divorce was reversed. When appellants bought the property in controversy the decree was in force. Had they bought before the writ of error was sued out they would have acquired a title free from any claim of the appellee for dower, for the law is well settled that when a decree affecting the title to property has been rendered by a court of equity, the rights of a purchaser in good faith relying upon the decree before any writ of error is prosecuted or other action taken to avoid it will be protected, notwithstanding the decree is afterward reversed: *Wadhams v. Gay*, 73 Ill. 415; *Barlow v. Standford*, 82 Ill. 298; *Eldridge v. Walker*, 80 Ill. 270; *Hannas v. Hannas*, 110 Ill. 53; *Lambert v. Livingston*, 131 Ill. 161, 23 N. E. 352; *Hammond v. People*, 178 Ill. 503, 53 N. E. 308.

Assuming, but not deciding, that appellants had notice of the pendency of the writ of error, we are brought to the question whether they took subject to the final disposition of the case. The writ of error was not a supersedeas. The decree was therefore not affected by it, but, until the judgment of reversal was rendered, was valid and effectual, entitled to full faith and credit in all courts and enforceable by all appropriate means. Had it required the payment of alimony, such payment might have been enforced by execution or attachment in spite of the pendency of the writ of error. If it had been a decree of foreclosure, it might have ³⁰³ been executed during the pendency of the writ of error by a sale of the premises involved, and the purchaser, if not a party to the suit, would have acquired a valid title not subject to be divested by the reversal of the decree. At common law the writ of error was itself a supersedeas, and no bail was required. A defendant, by suing out a writ of error, could stop all proceedings in execution of the judgment without giving any security whatever: 1 Tidd's Practice, 530; 2 Tidd's Practice, 1149; Bacon's Abridgment, "Supersedeas," D, 4; Omaha Hotel Co. v. Kountze, 107 U. S. 378, 2 Sup. Ct. Rep. 911, 27 L. ed. 609. To avoid this evil various acts of parliament were passed requiring security in certain cases in order that the writ of error should operate as a supersedeas. Section 106 of the practice act provides that no writ of error shall operate as a supersedeas unless the supreme or appellate court, as the case may be, or some judge thereof in vacation, after inspecting a copy of the record, shall so order, and the plaintiff in error shall file a bond as in case of appeal. Without such supersedeas the doctrine of *lis pendens* has no application to a writ of error. "The writ of error without a supersedeas does not, of itself, stay the proceeding, and to argue otherwise would be to contend that a party might have the same relief upon a writ of error without supersedeas and without bond as he would be entitled to upon an appeal": *Lancaster v. Snow*, 184 Ill. 163, 56 N. E. 416. Everybody was entitled to act upon the decree as a valid decree, and rights acquired in good faith by strangers to the decree, whether with or without notice of the writ of error, cannot be affected by its reversal. The title of the appellants, Jones and Strickler, was not, therefore, subject to appellee's claim of dower.

The order of the superior court will be reversed and the cause remanded, with directions to dismiss appellee's cross-

petition and for further proceedings consistent with this opinion.

The Effect of the Reversal of a Judgment is the subject of a note to *Cowdery v. London etc. Bank*, 96 Am. St. Rep. 124. Innocent third persons have a right to rely upon the judgment or decree of a court having jurisdiction both as to the subject matter and the parties, and interests acquired by them under it will be protected, notwithstanding its subsequent reversal: *Ure v. Ure*, 223 Ill. 454, 114 Am. St. Rep. 336. See, also, *Fidelity Trust etc. Co. v. Louisville Banking Co.*, 119 Ky. 675, 115 Am. St. Rep. 279.

The Law of Lis Pendens is the subject of a note to *Stout v. Philippi Mfg. etc. Co.*, 56 Am. St. Rep. 853. A writ of error is a new action, and one who purchases the subject of litigation between the time of the entry of final judgment and the suing out of the writ is not regarded as a pendente lite purchaser within the rule of *lis pendens*, but is considered a purchaser without notice: *Wingfield v. Neall*, 60 W. Va. 106, 116 Am. St. Rep. 882.

MASSIE v. CESSNA.

[239 Ill. 352, 88 N. E. 152.]

CONSTITUTIONAL LAW.—The Right to Labor for and to Render services to another, and the right to dispose of the compensation to be received for so doing, are property rights within the meaning of the rule that no person shall be deprived of life, liberty or property without due process. (p. 237.)

CONSTITUTIONAL LAW.—General Scope of Police Power.—The laws which the legislature may enact in the exercise of the police power are those that have a tendency to promote the public comfort, health, safety, morals or welfare, or that have a tendency to prevent some recognized evil or wrong. (p. 238.)

WORDS AND PHRASES.—"Wages" and "Salary."—"Wages" has a less extensive meaning than "salary." Wages is usually restricted to sums paid as hire to domestic or menial servants and to sums paid to artisans, mechanics, laborers and others employed in various manual occupations; while "salary" has reference to the compensation of clerks, bookkeepers, and other employes of like class, officers of corporations, and public officers. (p. 238.)

CONSTITUTIONAL LAW.—Regulating Assignment of Wages. A statute providing that no assignment of wages or salaries shall be valid unless in writing, signed and acknowledged by the assignor, and unless a copy of the assignment and acknowledgment is served upon the person, firm or corporation from which the wages or salary is due, and further providing that if the assignor is a married person, the assignment must be executed and acknowledged by the assignor's wife or husband, is an unconstitutional abridgment of property rights, especially as applied to large salaries, the recipients of which cannot be said to be in need of protection against usurers. (p. 239.)

CONSTITUTIONAL LAW.—Regulating Assignment of Wages. A statute which makes an assignment of wages or salary void when given as security for a loan tainted with usury is unconstitutional

when the law of the state makes no such provision with reference to other instruments or conveyances given to secure usurious debts. (p. 240.)

Clark & Clark, for the appellant.

Elmer E. Ledbetter, M. B. Wellington, Edgar A. Bancroft and Victor A. Remy, for the appellee.

355 SCOTT, J. This appeal comes directly from the circuit court of Cook county, and presents the question of the constitutionality of the statute of May 13, 1905, entitled "An act in relation to the assignment of wages, income or salary" (Hurd's Stats. 1908, p. 176), which reads as follows:

"Sec. 1. No assignment of the wages or salary of any person shall be valid, so as to vest in the assignee any beneficial interest, either at law or in equity, unless such assignment shall be in writing, signed by the assignor and acknowledged in person by the assignor before a justice of the peace in and for the township in which the assignor resides, and entered by such justice upon his docket, and unless within three days from the date of the execution and acknowledgment of such assignment, a true and complete **356** copy of said assignment and of the certificate of its acknowledgment shall be served upon the person, firm or corporation from whom such wages or salary is due or is to become due, in the same manner that the summons in chancery is now required by law to be served; provided further, that no assignment of wages or salary by a married person shall be valid unless the same is also executed and acknowledged, as above, by the assignor's wife or husband, as the case may be.

"Sec. 2. The term 'assignment,' as used in this act, shall include every assignment, transfer, sale, pledge, mortgage or hypothecation, however made or attempted, of the wages or salary of any person, or of any interest therein.

"Sec. 3. Whenever any assignment of the wages or salary of any person or persons shall be given as security for a loan tainted with usury, or shall be given to secure the payment or fulfillment of a usurious contract, or the payment of the principal or the interest of a usurious debt, such assignment shall be absolutely void.

"Sec. 4. Every assignment of wages to be earned in whole or in part more than six (6) months from and after the making of such assignment shall be absolutely void.

"Sec. 5. Whenever any person, firm or corporation shall bring or threaten to bring any action or suit to enforce any

assignment of wages or salary which has not been duly executed, acknowledged and served upon the employer in conformity with the provisions of this act or which is declared invalid by the provisions of this act, courts of equity shall have full power, upon the application either of the assignor of such wages or salary, or of the person, firm or corporation from whom such wages or salary is, or is to become due, to perpetually enjoin the threatened or attempted enforcement of any such assignment, and the fact that the complainant has a complete and adequate remedy at law, shall constitute no defense to the maintenance of a suit in equity for the purposes aforesaid.

357 "Sec. 6. The invalidity of any portion of this act shall not affect the validity of any other portion thereof which can be given effect without such invalid part."

The appellee filed his bill for an injunction against the appellant, alleging that he had been for a number of years continuously in the employ of the Inter-Ocean Newspaper Company; that about twelve years ago he commenced a course of dealing with the appellant, who loaned money to wage-earners and salaried people at exorbitant, illegal and usurious rates of interest, which dealings had continued until the present time and all of which had been usurious; that he had upon a number of occasions borrowed from appellant certain sums of money at ten per cent interest per month, and had repaid to appellant, by way of interest and other moneys, many large sums for which he had received no credit upon the principal, which sums greatly exceeded the amount of money borrowed, together with legal interest thereon; that there were executed by appellee, at various times, assignments of his wages as security for the payment of the several usurious loans, all of which assignments appellant now holds and has threatened to file with appellee's employer, thereby intending to compel appellee to comply with appellant's unlawful and usurious demands.

The bill further alleges that in February, 1907, as a transaction wholly separate and apart from the previous dealings with appellant, the appellee borrowed twenty-five dollars, for the use of which he agreed to pay two dollars and fifty cents per month as interest until said sum was repaid, and he executed to appellant an assignment of wages to be earned until August 18, 1908, as security for the payment of said sum and interest; that this assignment was given as security for a loan tainted with usury, and was never acknowledged in person,

nor before a justice of the peace, nor before any person or official whatsoever, so that, by reason of the statute in such case provided, it is not valid; that appellant has filed with the Inter-Ocean Newspaper Company a copy of this assignment ³⁵⁸ and now threatens to bring suit to enforce the same, which would result in great and irreparable injury to the complainant, and the appellant Cessna will bring said suit unless restrained from so doing.

The prayer of the bill was, that all of said assignments of wages now in the hands of the appellant or his agents be canceled and appellant enjoined from proceeding in any manner to enforce any of said assignments. A demurrer to the bill having been overruled, the defendant elected to stand by his demurrer, and a decree was entered in accordance with the prayer of the bill.

The appellant insists that the statute in question violates section 2 of article 2 of the constitution of the state, which provides that "no person shall be deprived of life, liberty or property without due process of law." This is the only question for consideration, as the averments of the bill with reference to transactions prior to that of February, 1907, are too indefinite to show the existence of any equity in favor of appellee.

The right to labor for and to render services to another, and the right to dispose of the compensation to be received for so doing, are property rights within the meaning of the language just quoted from the constitution: *Frorer v. People*, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492; *Braceville Coal Co. v. People*, 147 Ill. 66, 37 Am. St. Rep. 206, 35 N. E. 62, 22 L. R. A. 340; *Mallin v. Wenham*, 209 Ill. 252, 101 Am. St. Rep. 233, 70 N. E. 564, 65 L. R. A. 602. It is at once apparent upon an examination of this statute that it abridges the right of the man who earns a salary and the right of the man who earns wages to contract with reference thereto. Notwithstanding this fact, appellee contends that the act in question is not prohibited by the constitution, for the reason that it is referable to the police power of the state. The laws which the legislature may enact in the exercise of that power are laws which have a tendency to promote the public comfort, health, safety, morals or welfare or which have a tendency to prevent some recognized evil or wrong: *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, 40 N. E. 454, 29 L. R. A. 79; *City of Chicago v. Netcher*, ³⁵⁹ 183 Ill. 104, 75 Am. St. Rep. 93, 55 N. E. 707, 48 L. R.

A. 261; *Noel v. People*, 187 Ill. 587, 79 Am. St. Rep. 238, 58 N. E. 616, 52 L. R. A. 287; *People v. Steele*, 231 Ill. 340, 121 Am. St. Rep. 321, 83 N. E. 236, 14 L. R. A., N. S., 361.

It is urged that wage-earners compose a class of inhabitants of the state who, when they desire to borrow money and secure the same by the assignment of their wages earned or to be earned, become victims of men engaged in the business of loaning money at usurious rates, who are commonly denominated "loan sharks"; that when the wage-earner finds it necessary to borrow money upon such security he is unable to deal with the money lender upon an even footing; that the latter is able to exact usury, and to practice various like wrongs and impositions upon him, by reason of his poverty and sometimes by reason of his improvidence, and that this creates a condition of affairs which the legislature may remedy by the exercise of the police power. While we think this evil exists, it is yet apparent, upon a careful examination of this statute, that it is too broad in its terms to be justified as an exercise of the police power for the purpose of mitigating or remedying the wrong at which it is aimed. It applies not only to wages, but also to salaries. "Wages," in its ordinary acceptance, has a less extensive meaning than "salary." "Wages" is usually restricted to sums paid as hire or reward to domestic or menial servants and to sums paid to artisans, mechanics, laborers and others employed in various manual occupations, while "salary" has reference to the compensation of clerks, bookkeepers, other employes of like class, officers of corporations and public officers: 2 Standard Dictionary, p. 1573; *In re Striker*, 158 N. Y. 526, 70 Am. St. Rep. 489, 53 N. E. 525. In this state salaries in excess of five thousand dollars per annum are not unusual. It cannot be said that an officer of a corporation who is in the enjoyment of a salary of twenty thousand dollars per annum is or may be the victim of the evil at which this statute is aimed, and yet his salary is plainly within the terms of the act. Counsel for appellee intimate that a bank president or the head of a great commercial enterprise requires the same protection in this respect ³⁶⁰ as a wage-earner. We have not been able to regard this suggestion as seriously made. A bank president who desires to borrow money does not need protection from a "loan shark" unless he be mentally deficient or morally delinquent. A very limited exercise of the power of observation is sufficient to demonstrate that as a

borrower he is not in the same class as the laborer who works for two dollars per day.

This statute, in so far as it would tend to make effective the right of the wage-earner to receive the full benefit of the wages earned by him, is like unto the statute which prefers laborers' and servants' claims in certain instances; like unto the statute which provides that no personal property shall be exempt from execution issued for the collection of the wages of any laborer or servant, and like unto the statute which provides that in a suit brought by "a mechanic, artisan, miner, laborer, or servant or employé" for his or her "wages" earned and due, the plaintiff may, under certain conditions, recover, in addition to the wages, an attorney's fee for the prosecution of the suit. It is to be observed that these statutes all pertain to wages, and not salaries.

The statute last above referred to is the act of June 1, 1889: Hurd's Stats. 1908, p. 192. Its validity has been assailed upon the ground that it is special legislation, conferring a right upon persons therein specified to attorneys' fees that was not given to other persons; but this court held that the enumeration, which is broad enough to include all wage-earners and which includes none but wage-earners, is an enumeration of persons composing a class, upon which the right given by the statute might be conferred without violation of the constitution: *Vogel v. Pekoc*, 157 Ill. 339, 42 N. E. 386, 30 L. R. A. 491. We have recently referred to that case with approval: *Manowsky v. Stephan*, 233 Ill. 409, 84 N. E. 365. The reasoning of the *Vogel* case would seem to lead to the conclusion that wage-earners are the proper objects of legislation which ³⁶¹ would tend to protect them from the evil which this statute is designed to obviate. Such an act would not be rendered invalid by the fact that it placed reasonable regulations upon the right to assign wages to secure an indebtedness and prescribed a reasonable method to be pursued in making the assignment effective. It has been recently so held by the supreme court of Massachusetts in reference to the sections of a statute regulating the assignment of "wages": *Mutual Loan Co. v. Martell*, 200 Mass. 482, 128 Am. St. Rep. 446, 86 N. E. 916. It is true that many persons who are salaried receive compensation not greater in amount, by the month or year, than the compensation received by many wage-earners. Whether a statute protecting a salary not greater in amount than a

certain sum per week or month, or protecting a portion of a salary, which portion is not greater than a certain sum per month or week, would be valid, is a question not here presented.

The statute now under consideration is invalid, because it violates the provision of our constitution which has been invoked by limiting the right of persons earning the higher salaries to assign or transfer their salaries in such manner as they see fit, there being nothing in the public policy of the state requiring or warranting such abridgment of their right, and nothing requiring or warranting a statute giving to such persons the benefit that might with entire propriety be given to wage-earners by an act in reference to the assignment of wages.

The third section of this statute is unconstitutional for the further reason that it makes the assignment given as security for a loan tainted with usury void, while the law of the state makes no such provision with reference to other instruments or other conveyances given to secure usurious debts. We also point out the fact that it is extremely doubtful whether the act in its entirety could in any event be made effective in the city of Chicago, for the reason that it requires the assignment to be acknowledged before a justice of the peace in and for the township in ³⁶² which the assignor resides and entered by such justice upon his docket, there being now no justices of the peace in that city and no law requiring the keeping of such a docket as that which the justice of the peace formerly kept.

The decree of the circuit court of Cook county will be reversed and the cause will be remanded, with directions to sustain the demurrer to the bill.

VICKERS and DUNN, JJ., Specially Concurring. We concur in holding the statute unconstitutional, but not in the implication that it would be constitutional if restricted to wage-earners, if the opinion contains such implication.

Statutes Restricting the Right to Assign Wages have been upheld in *International Text-book Co. v. Weissinger*, 160 Ind. 349, 98 Am. St. Rep. 334; *Mutual Loan Co. v. Martell*, 200 Mass. 482, 128 Am. St. Rep. 446. The general question of the constitutionality of statutes regulating the time and method of paying wages is the subject of a note to *Shortall v. Puget Sound etc. Co.*, 122 Am. St. Rep. 903.

HENSHAW v. STATE BANK OF WEST PULLMAN.

[239 Ill. 515, 88 N. E. 214.]

BILLS AND NOTES—Indorsement by "Trustee."—Where a water certificate is offered to a bank as collateral security, bearing the indorsement of the person to whom it was issued, followed by the indorsement of another person as "Trustee of . . . Land Trust," and the bank accepts it without any inquiry, except from the borrower, as to the actual ownership of the paper, it is not entitled to protection against the real owners. (p. 244.)

LACHES—Time to Raise as a Defense.—Laches, to be available as a defense, should be set up in the trial court. (p. 245.)

William E. O'Neill, for the appellant.

Kerr & Kerr, for the appellees.

515 CARTER, J. This is a suit over the fund represented by two certificates issued by the department of public works of the city of Chicago. The first one was numbered 79, dated November 11, 1890, and certified that D. S. Place had advanced \$7,164.35 for laying water-pipes, and that the amount would be refunded to him, without interest, from any money belonging to the water tax fund in the city treasury not otherwise appropriated, when the permanent revenue from the said pipes should equal five cents per foot annually. This certificate was indorsed, when delivered to the appellant bank, as follows: "D. S. Place, H. W. Christian, Trustee of Chicago Auburn Park Land Trust." The second certificate was numbered 182, issued by said department of public works, and certified that D. S. Place & Co. had advanced the sum of \$3,795.12 for laying water-pipes, to **516** be refunded under the same terms and conditions as stated in the other certificate. Certificate 182, when delivered to the bank, was indorsed, "D. S. Place & Co., H. W. Christian, Trustee of Chicago Auburn Park Land Trust." The fund represented by these two certificates was deposited by Place and Place & Co. with the city of Chicago for putting in water-pipes in a subdivision known as West Auburn. The moneys were originally furnished by a syndicate composed of about twenty persons, each share representing \$5,000. On May 7, 1892, the name of the syndicate was changed to "The Chicago Auburn Park Land Trust," and five trustees were elected and executed a declaration of trust introduced in evidence, which was filed for record in the recorder's office of Cook county, May 11, 1892. The trust took over the as-

sets of the syndicate, including the water-service certificates. In 1898 Place, one of the trustees, died, and by the action taken in pursuance of the declaration of trust H. W. Christian was made a trustee. He was not, however, a member of the syndicate, and never owned any interest in the land of the Chicago Auburn Park Land Trust but received a small salary as trustee. The certificates were placed in the hands of H. W. Christian on December 31, 1902, apparently on his representations that he could effect an arrangement with the city whereby the latter would make a present payment on them. Subsequently Christian's brother, James H. Christian, applied to the appellant bank, and on January 13, 1903, obtained a loan of \$2,500, for which H. W. Christian gave his note. He also obtained \$2,500 upon a note executed by Mary J. Christian, giving as collateral security for these two notes said certificate No. 79. In the year 1902, the appellant bank loaned one A. B. Rockwell \$2,500 on his personal note, without other security. When this note came due, February 4, 1903, at Rockwell's request the bank renewed the loan upon receiving as collateral security said certificate No. 182.

⁵¹⁷ The original bill of complaint in this case was filed by the other trustees of the Chicago Auburn Park Land Trust, except Christian, and prayed that Christian should be directed to deliver the certificates to the bank as trustee, and on February 4, 1905, the court so decreed. Failing to obtain the certificates, and being unable to find H. W. Christian when they sought to serve him with a writ of attachment, the appellees filed a supplemental bill March 31, 1905, making the unknown owners and holders of the certificates parties defendant. The appellant bank answered, setting up its title to the certificates. The superior court of Cook county entered a decree upon this supplemental bill, reversing the former decree and adjudging the bank to be the lawful, absolute and rightful owner of said certificates, having become the purchaser for value, and without notice, of any kind or character, of any interest of the appellees. The appellate court reversed the decree and remanded the cause, holding that the appellant bank purchased with notice and that said certificates were the property of appellees. From the judgment of the appellate court this appeal was taken.

⁵¹⁹ The main question argued in this case is whether the appellant bank took the certificates in good faith, without notice of appellee's title. The evidence in this record shows

that when James H. Christian took the first certificate to the appellant bank he told the president of the bank that the certificate was given to his brother, H. W. Christian, when a division was made by the trustees of the land association, as his part of the profits of the land trust. The president thereupon told Christian that he would have to obtain the indorsement of H. W. Christian. The certificate was already indorsed by D. S. Place. James H. Christian thereupon took the certificate away and brought it back with the indorsement on the back, "H. W. Christian, Trustee of Chicago Auburn Park Land Trust." The bank officials made no further inquiry as to why the certificate was indorsed "trustee." The president of the bank testified that ⁵²⁰ when the second certificate was presented he supposed it was owned in the same way and was satisfied with the same indorsement, "H. W. Christian, Trustee of the Chicago Auburn Park Land Trust." This court, in *Chicago Title etc. Co. v. Bruger*, 196 Ill. 96, 63 N. E. 637, held that where a trustee having no title to a trust deed and note fraudulently transferred them to a trust company, it devolved upon the trust company to show that it took the paper in good faith, without notice, for value and before maturity, in the usual course of business, and that where the note and trust deed bore indorsement showing that another person than the trustee was the legal holder of the note, a purchaser from the trustee who relied upon his explanation of the indorsement instead of making inquiry as to the ownership of the note was not entitled to protection as against the legal holder of the note, whom the trustee had defrauded in making the sale. In *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115, it was held that when a certificate of stock in the name of A B, trustee, was pledged by him to secure his own debt, the pledgee was by the terms of the certificate put on inquiry as to the character and limitations of the trust, and if he accepted the pledge without inquiry, did so at his peril. In *Geyser-Marion Gold Min. Co. v. Stark*, 106 Fed. 558, 45 C. C. A. 467, 53 L. R. A. 684, the title of stock was in the name of C D, trustee, and that court said that the word "trustee" meant something. "It is a warning and a declaration to everyone who reads it that the person so named is not the owner of the property to which it relates; that he holds it for the use and benefit of another, and that he has no right or power to sell or dispose of it without the assent of his cestui que trust." The record in this case is

clear that these certificates were not the property of H. W. Christian, and that if the bank officials had made reasonable inquiry they could readily have ascertained that fact.

Our attention has been called by appellant to *Barbour v. White*, 37 Ill. 164, *Silverman v. Bullock*, 98 Ill. 11, and ⁵²¹ *Olds v. Cummings*, 31 Ill. 188, where the rule is laid down that although the assignee of a mortgage takes it subject to equities in favor of the maker, he does not take it subject to latent equities in favor of third persons of which he had no notice. We do not think that line of authorities has any particular bearing on the question here under discussion. The bank had notice by the indorsement of H. W. Christian as trustee. If it chose to rely on the false statement of the one that presented the certificates that they belonged to H. W. Christian, instead of making an inquiry as to the real ownership, it was not entitled to protection against such owners. The appellate court rightly decided that the bank took these certificates with notice of appellees' title.

We think the contention of the appellant that appellees are estopped from disputing the bank's title or Christian's power to dispose of the certificates because said Christian had been clothed with all the usual indicia of ownership of the certificates is without force, in view of what we have said with reference to the appellant bank being notified, by indorsement and otherwise, that Christian held these notes only as trustee.

The further contention of appellant that appellees were without authority to bring this suit as trustees under the declaration in question cannot be sustained. The trust agreement gave the trustees power to represent the shareholders in all suits or legal proceedings, and the agreement further provided: "Whether the trust be determined by lapse of time or otherwise, their powers shall continue for the purpose to prosecute and defend all suits and legal proceedings pending at the time of such termination of the trust," and "to do all other acts necessarily or properly incidental" to winding up the trust. The recovery of these certificates, the property of the trust, is clearly for the benefit of the stockholders and properly incidental to winding up the trust. This agreement authorized this action to be ⁵²² taken and begun after the ten years provided for during which it was to remain in force.

The further contention of appellant that these proceedings cannot be upheld because appellees are guilty of laches is without force, even though that point could be raised for the first time in the appellate court, as seems to have been the case in this proceeding. Laches, to be availed of as a defense, should be set up in the trial court: *Zeigler v. Hughes*, 55 Ill. 288; *Spalding v. Macomb etc. Ry. Co.*, 225 Ill. 585, 80 N. E. 327; *Schnell v. City of Rock Island*, 232 Ill. 89, 83 N. E. 462, 14 L. R. A., N. S., 874.

Other points are raised in the briefs, but what we have already said disposes of all the material questions involved.

The judgment of the appellate court will therefore be affirmed.

The Addition of the Word "Trustee" to the name of a person is said to be notice of a trust, and calls for inquiry and examination: *Marbury v. Ehlen*, 72 Md. 206, 20 Am. St. Rep. 467. A person who takes an assignment of a note made payable to the order of a third person as trustee is put upon inquiry as to all of the terms and conditions under which the note was executed, and is presumed to have had full knowledge thereof: *McLeod v. Despain*, 49 Or. 526, 124 Am. St. Rep. 1066.

MILLER v. KELLY COAL COMPANY.

[239 Ill. 626, 88 N. E. 196.]

PROXIMATE CAUSE—Intervening or Concurring Negligence.

It is no defense to an action for injuries occurring by reason of the negligent act of the defendant that the negligence of a third person or any inevitable accident or any inanimate thing contributed to cause the injury, if the negligence of the defendant was an efficient cause without which the injury would not have occurred. (p. 247.)

PROXIMATE CAUSE—Kick of Mule—Concurring Negligence.

Where the driver of a coal-car is kicked by a vicious mule and thrown down in front of the car and crushed by it, the kick is the proximate cause of the injury, although he could have escaped after receiving it if there had not been a gob next to the track which prevented his getting away. (p. 248.)

EMPLOYER'S LIABILITY—Kick by Mule—Assumption of Risk.—Where an employé is kicked by a vicious mule the first trip the second day he has driven it, when he had no knowledge of the vicious propensities of the animal, nor any occasion previously to observe it while being driven by others, the instructions to the jury, in an action by the injured employé, are not required to negative the question of assumed risk. (p. 248.)

EMPLOYER'S LIABILITY—Knowledge of Viciousness of Mule.—In an action against an employer for personal injuries received by a driver from the kick of a mule, an instruction that if the defendant knew, or by the exercise of reasonable diligence would have

known, the dangerous disposition of the animal, but that the plaintiff did not know it, and by reason of such disposition was injured while performing his usual duties in the exercise of due care, then the defendant is liable, is not erroneous because it submits to the jury the liability of the defendant if he had constructive knowledge, while the charge in the declaration is that he knew the mule was dangerous and unsafe. (p. 249.)

EMPLOYER'S LIABILITY—Recovery for Medical Attendance.—An instruction that an injured employé is entitled to recover the necessary expenses of nursing and medical care, "so far as these are shown by the evidence," is not reversible error because there is no evidence of any amount paid or indebtedness incurred on that account, where the defendant's instruction emphasizes that no damages can be recovered except such as can be measured in dollars and cents from the evidence in the case. (p. 249.)

George T. Buckingham, Charles Troup and Mastin & Sherlock, for the appellant.

S. F. Schecter and Acton & Acton, for the appellee.

627 FARMER, J. This is an appeal from a judgment of the appellate court for the third district affirming a judgment for three thousand dollars rendered by the circuit court of Vermilion county in favor of appellee, and against appellant, for personal injuries sustained by the appellee while working as a mule driver in the coal mine of appellant.

The declaration contained two counts. The first count charged that plaintiff was employed in defendant's mine, at the time of his injury, as a mule driver, in hauling coal along the sixth northwest entry; that the defendant, disregarding its duty in that behalf, negligently and carelessly furnished plaintiff a mule that was vicious and disposed to kick, which the defendant knew and which the plaintiff did not know; that on the morning of the second day plaintiff had driven the mule in the usual course of his employment, and while, in the exercise of ordinary care for his own safety, he was hauling coal along the entry about opposite room 30 of said entry, said mule, without provocation, began kicking and kicked plaintiff down in front of the car; that because of a gob of rock, dirt and other debris which defendant had permitted to accumulate on either side of the track to a height of, to wit, three feet, plaintiff was unable to escape and get away from the mule and the car, and was thereby caught beneath the car, loaded with about four tons of coal; that said car was pulled up against, upon and over **628** plaintiff, thereby crushing the bones of his chest and injuring him in the hips, arms, head and divers other parts of his body. The second count of the declaration charged the defendant with

failing to use reasonable care to provide the plaintiff with a reasonably safe place in which to work. The second count was taken from the jury by the court and the cause submitted upon the first count only.

The principal contention of appellant is that the kicking by the mule was not the proximate cause of the injury, and that the trial court erred in not directing a verdict in its favor upon that ground.

Appellee testified that when the mule kicked him the first time he was standing on the bumper of the car; that he then attempted to get out of the way, but by reason of a gob next to the track extending up so high, he was unable to do so and the mule kicked him down on the ground under the car; that if it had not been for the gob he would have gotten out of the way. Appellee's injury occurred on the 31st of May and he had been driving in the sixth northwest entry since the 4th of March previous. He testified the gob had been in the same condition and he had seen it several times a day during the period he had been driving in that entry. Appellant contends that the injury would not have occurred but for the gob; that this was an independent cause of the injury, and therefore the kicking by the mule was not the proximate cause of said injury. We think the trial court was warranted in refusing to direct a verdict for appellant upon that theory. The law was correctly ⁶²⁹ stated by the appellate court in the following language: "The proximate cause of an injury is that act or omission which immediately causes and without which the injury would not have happened, notwithstanding other conditions or omissions concurred therewith. It is obvious that in the case at bar the immediate cause of appellee's injuries was the kicks he received from the mule; that had not the mule kicked, appellee would not have been harmed by the presence of the gob. Even though the gob be held to have been a concurring or intervening cause of the injury, appellant would be nevertheless liable for the reason stated." This is abundantly sustained by the following authorities: Pullman Palace Car Co. v. Laack, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; Springfield Consolidated Ry. Co. v. Puntenney, 200 Ill. 9, 65 N. E. 442; Chicago Terminal R. Co. v. Schmelling, 197 Ill. 619, 64 N. E. 714; City of Joliet v. Shufeldt, 144 Ill. 403, 36 Am. St. Rep. 453, 32 N. E. 969, 18 L. R. A. 750; Missouri Malleable Iron Co. v. Dillon, 206 Ill. 145, 69 N. E. 12. In Armour v. Golkowska, 202 Ill. 144, 66 N. E. 1037, this court said: "In City of Joliet v. Shufeldt, 144 Ill. 403, 36 Am. St. Rep. 453, 32 N. E. 969,

18 L. R. A. 750, we deduced from the authorities the general doctrine that it was not a defense to an action for injuries occurring by reason of the negligent act of the defendant that the negligence of a third person or an inevitable accident or an inanimate thing contributed to cause the injury to the plaintiff, if the negligence of the defendant was an efficient cause and without which the injury would not have occurred." In *Commonwealth Electric Co. v. Rose*, 214 Ill. 545, 73 N. E. 780, the court said: "Where an injury is the result of the negligence of the defendant and an inevitable accident, or an inanimate thing has contributed with the negligence of the defendant to cause the injury, the plaintiff may recover if the negligence of the defendant was an efficient cause of the injury and the injured or deceased party was in the exercise of ordinary care for his own safety."

It is also contended by appellant that the court erred in instructing the jury, for appellee, that if he proved his case ⁶³⁰ as set forth in the first count of the declaration, it was the duty of the jury to find a verdict in his favor. The objection made to the instruction is, that it does not negative the assumption of risk. We do not think this a case where that question was involved. The proof tended to show that appellee was injured while making his first trip the second day he had driven the mule. There was evidence tending to show that the mule had frequently exhibited its vicious disposition to kick, for a considerable period of time previous to appellee's injury, when being driven by others; that it would kick without cause or provocation, and one witness testified that he refused to drive the mule on that account; that he notified appellant of its dangerous disposition and quit appellant's employment because it would not furnish him a safer animal. There was no evidence that appellee had ever had occasion to observe the mule while being driven by others, and there is no proof that he had any knowledge of the disposition of the mule to kick, or that during the time he had driven it it had manifested any such disposition before the injury. The appellee testified he was not informed and had no knowledge of the disposition of the mule to kick, and in this he is not contradicted. It was not a case where observation would disclose the danger before it had occurred. In such case instructions are not required to negative the question of assumed risk: *Illinois Terra Cotta Lumber Co. v. Hanley*, 214 Ill. 243, 73 N. E. 373; *Hagen v. Schleuter*, 236 Ill. 467, 86 N. E. 112.

By another instruction given for appellee the court told the jury that if defendant knew of the dangerous disposition of the mule, or by the exercise of reasonable diligence would have known it, and that plaintiff did not know it, and by reason of such dangerous and vicious disposition he was injured while performing his usual duties and exercising due care for his safety, then defendant would be liable. It is insisted this instruction was erroneous because it submits ⁶³¹ to the jury the liability of appellant if it had constructive knowledge, while the charge in the declaration is that the defendant knew the mule was dangerous and unsafe. A similar objection was held to be invalid in *City of La Salle v. Porterfield*, 138 Ill. 114, 27 N. E. 937, and cases there cited. Other objections to the same instruction are without merit.

The declaration alleged damages sustained by appellee in and about being healed of his injuries. No proof was offered of any amount paid or indebtedness incurred by him on that account. In the instruction given on his behalf as to the measure of damages the court told the jury it was proper for them to consider, in determining the amount of damages he had sustained, if they found appellant liable, among other things, "the necessary expenses of nursing, medical care and attendance and loss of time, so far as these are shown by the evidence." It is contended that as there was no proof that appellee had paid or obligated himself to pay anything for medicine, nursing or medical care this instruction was prejudicial error, in that it authorized a recovery on a theory not supported by the evidence and augmented the damages to an excessive amount. We do not think appellant was prejudiced by the instruction. It only authorized a recovery for the elements therein mentioned "so far as these are shown by the evidence." At appellant's request the court instructed the jury "that the measure of damages adopted by the law is simply compensation—that is, such damages as will make good the loss sustained in dollars and cents, . . . and no other damages whatever, except such as can be measured in dollars and cents from the evidence in the case." The instruction given for appellee only authorized a recovery for medical care and attention so far as the same were shown by the evidence, and appellant's instruction emphasized that no damages could be recovered except such as could be measured in dollars and cents from the evidence in the case. Under similar circumstances a similar instruction to that complained

of was held not to be ⁶³² reversible error in North Chicago Street R. R. Co. v. Cook, 145 Ill. 551, 33 N. E. 958.

Whether the damages awarded are excessive is not open to review in this court. The proof tended to show appellee's injuries were serious and permanent in character, and the verdict is not so large as to lead to the conclusion that the jury must have considered any elements in determining the amount except such as were warranted by the proof.

We have examined the complaint as to the ruling of the court in permitting Dr. Sims to answer, over appellant's objection, a question asked him by appellee's counsel, and also as to the ruling of the court in permitting appellee to exhibit his back and breast to the jury, and find no error in any of the rulings upon these questions.

Finding no reversible error in this record, the judgment of the appellate court is affirmed.

The Proximate Cause of an Event is that which in a natural and continuous sequence, unbroken by a new cause, produces that event, and without which that event would not have occurred: Pilmer v. Boise Traction Co., 14 Idaho, 327, 125 Am. St. Rep. 161; Bell v. Rocheford, 78 Neb. 304, 126 Am. St. Rep. 595; Western Union Tel. Co. v. Milton, 53 Fla. 484, 125 Am. St. Rep. 1077. If there is an intervening cause and the prior cause does nothing more than to give rise to the circumstances under which the injury occurs, then the prior cause cannot be said to be the proximate cause. There may, however, be a succession of causes and the first be the proximate cause: Martin v. Southern Ry., 77 S. C. 370, 122 Am. St. Rep. 574. Where several proximate causes contribute to an accident and each is an efficient cause without the operation of which the accident would not have happened, it may be attributed to all or any of the causes: Burk v. Creamery Package Mfg. Co., 126 Iowa, 730, 106 Am. St. Rep. 377; Clark v. Patapasco Guano Co., 144 N. C. 64, 119 Am. St. Rep. 931; Skinn v. Reuter, 135 Mich. 57, 106 Am. St. Rep. 384; Christy v. Elliott, 216 Ill. 31, 108 Am. St. Rep. 196; Siegel-Cooper & Co. v. Treka, 218 Ill. 559, 109 Am. St. Rep. 302. The doctrine of proximate cause is discussed at length on the note to Gilson v. Delaware etc. Canal Co., 36 Am. St. Rep. 807.

CONRAD v. SPRINGFIELD RAILWAY COMPANY.

[240 Ill. 12, 88 N. E. 180.]

ELECTRIC RAILWAY—Negligence in Maintaining Wires.—

Although an ordinance granting the right to an electric railway company to construct its line, and imposing certain conditions as to the manner of erecting and maintaining its wires is for some purposes a contract between the city and the railway company, this does not prevent a person, not a party thereto, from suing the company for personal injuries sustained through its violation of such conditions. (pp. 253, 254.)

ELECTRIC COMPANY—Failure to Guard Wires as Required by Ordinance.—An ordinance requiring a street railway company to place guards above its electric wires at points where they cross other wires is a valid exercise of the police power, and the violation thereof is *prima facie* negligence. (p. 254.)

ELECTRIC COMPANY—Failure to Provide Guard Wires as Required by Ordinance.—In an action by a telephone lineman against a railway company for injuries received from a wire coming in contact with unguarded wires of the company at a point where an ordinance requires guard wires to be maintained, the defendant may show as a defense that a compliance with the ordinance would not have prevented that particular injury, but it cannot make the general defense that the use of guard wires is a menace rather than a protection and has generally been discontinued in recent years. (p. 254.)

NEGLIGENCE.—The Doctrine of Assumption of Risk is applicable only to cases arising between master and servant. (pp. 254, 255.)

Wilson, Warren & Child, for the appellant.

T. J. Condon and Albert Salzenstein, for the appellee.

13 VICKERS, J. On August 21, 1906, James T. Conrad was employed as a lineman by the Central Union Telephone Company. On that day he was engaged in taking down and putting up telephone wires on a telephone pole at the corner of Sixth and Monroe streets, in the city of Springfield, and while so engaged an old telephone wire which he was handling broke and fell upon a trolley wire belonging to the Springfield Consolidated Railway Company, carrying a high voltage of electricity, which was thereby communicated to his person, causing severe personal injuries. In an action on the case against the street railway company Conrad recovered a judgment for three thousand dollars, which has been affirmed by the appellate court for the third district. The street railway company has prosecuted a further appeal to this court.

The declaration consists of three counts. The first and second counts charge that appellant acquired its right to operate the street-car line in the city of Springfield by virtue

¹⁴ of a certain ordinance passed by the city council of said city, the terms and conditions of which were accepted by the appellant and its predecessor companies; that the said ordinance provided that such companies should stretch and maintain suitable guard wires over and above the electric cables and overhead wires at all points where the said railway ran, where other wires belonging to other companies were suspended over and above such electric cables. These counts charged that the Central Union Telephone Company maintained wires above the electric cables at the place where the accident occurred, and that thereby it became the duty of appellant to maintain suitable guard wires over its said cables at that point; that appellant neglected and failed to maintain such guard wires, by means whereof appellee, in the course of his duty as an employé of the telephone company and while in the exercise of due care for his own safety, was injured by the broken telephone wire coming in contact with the unguarded electric cable of appellant. The third count was for common-law negligence, and charged a failure to properly guard and protect its cables so as to avoid the injury to the appellee by coming in contact with currents of electricity that were liable to be communicated from such cables through wires of other companies coming in contact therewith.

The appellee introduced in evidence an ordinance duly passed by the city council of Springfield, approved January 20, 1890, granting to the Citizens' Street Railway Company the right to operate its lines of railway in the city of Springfield by electric power. The ordinance prescribed the manner in which such railway company should erect its poles and put up its wires and other overhead construction. Section 7 of the ordinance is as follows: "That it is the duty of said company to stretch and maintain a suitable guard wire along and above its electric cables and over wires at all points within the city where other wires belonging to other companies are suspended over or above said ¹⁵ electric cables. The same may be extended along the whole line of said railway when required by the council. And in case of willful violation of this section said company shall be subject to a fine of not exceeding two hundred dollars for every day." The written acceptance of the Citizens' Street Railway Company of the foregoing ordinance, dated February 20, 1890, was introduced in evidence. It was admitted that appellant was the successor to the Citizens' Street Railway

Company, and was exercising the rights and privileges of such company under the ordinance aforesaid.

At the request of appellee the court gave to the jury the following instruction: "The court instructs the jury that under the ordinance of the city of Springfield offered and admitted in evidence in this case it became and was the duty of the defendant to have guard wires over its trolley wire at all places where such trolley wire was crossed by the wires of other companies, and if you believe, from the evidence in this case, that at Sixth and Monroe streets, where plaintiff was injured, other companies, long previous to the day the plaintiff was injured, had wires over defendant's trolley wire, then it was and became the duty of the defendant to have and maintain guard wires at such place; and if you further believe, from the evidence, that the defendant failed so to do, and plaintiff was injured in the manner charged in the first two counts of his declaration, or in either of them, by a wire of the Central Union Telephone Company, which he was then and there attempting to remove, breaking and falling on defendant's unguarded trolley wire at said place, whereby the current from said trolley wire was transmitted against the person of plaintiff, and plaintiff at and before such injury was using ordinary care and caution for his own safety, then you will find a verdict for the plaintiff."

The rulings of the court upon objections made to certain testimony offered by the appellant were in accordance with the rule embodied in the foregoing instruction. The ¹⁶ giving of this instruction, and the ruling upon the evidence in accordance therewith, are the subjects of appellant's most serious contention in this court. Appellant's position in respect to these rulings is, that the ordinance granting the use of the streets upon certain conditions, and the acceptance thereof, constitute a contract between the city and appellant, and as such it should be construed like any other written contract, and that such contract was subject to suspension or alteration by the consent, expressed or implied, of the contracting parties, and, regarding the ordinance as a contract between the city and appellant, that no one not a party to such contract can maintain an action for a violation of its terms. We do not deem it necessary, in the view that we take of this question, to follow the elaborate line of argument presented by appellant's brief. Undoubtedly the ordinance in question for some purposes is regarded as a contract between the city and the railway company, but in

so far as it lays duties upon appellant in the interest of the public, it is essentially the legislative exercise of the police power of the city and designed to afford protection to the public against injuries such as appellee received. If appellant's contention were sustained, then appellee would have no remedy either against appellant or the city, neither could the city recover against appellant for the injury to appellee. Therefore, appellant would not be liable to anyone in any form of action, although its admitted violation of the condition of the provisions was the proximate cause of an injury to an unoffending member of the class for whose protection the condition was imposed. In *Commonwealth Electric Co. v. Rose*, 214 Ill. 545, 73 N. E. 780, this court had before it a state of facts not materially different from those presented in the case at bar. In that case the electric company was granted the use of the streets of the city of Chicago by an ordinance on the condition that the company would maintain guard wires. The circumstances of the injury ¹⁷ in that case were very similar to those in the case at bar. It was there held that the ordinance was a valid exercise of the police power of the city and that the violation of the ordinance was *prima facie* evidence of negligence. We think this question is properly disposed of under the authorities cited by the appellate court.

Appellant sought to prove that the use of guard wires was a menace rather than a protection, and that their use had been generally discontinued in recent years. This evidence was not offered for the purpose of proving that the accident in question was not the proximate result of the omission charged, but rather to show the reason why the appellant had been permitted for a number of years to disregard the condition. While one charged with a tort resulting from the violation of an ordinance or a statute may show in defense that a compliance would not have prevented the injury complained of, yet such evidence must be confined to the particular injury involved and not directed to the general adaptability of the legislation as a means of preventing injury. This is a legislative question. The evidence excluded by the court of which complaint is made relates to this general question, with which the court was not concerned. There was no error in its exclusion.

Appellant's contention that appellee must be held, as a matter of law, to have assumed the risk cannot be sustained, since the doctrine of the assumption of risk is only appli-

cable to cases arising between master and servant: Shoninger Co. v. Mann, 219 Ill. 242, 76 N. E. 354.

Other reasons urged for the reversal of this judgment are without merit.

The judgment of the appellate court is affirmed.

The Duties and Liabilities of Electric Corporations are considered in the note to *Hebert v. Lake Charles Ice etc. Co.*, 100 Am. St. Rep. 516. Electricity being an exceedingly dangerous agency, it is the duty of those making use of it to exercise a high degree of care commensurate with the danger involved: *Wilbert v. Sheboygan Light etc. Ry. Co.*, 129 Wis. 1, 116 Am. St. Rep. 931; *Fisher v. New Bern*, 140 N. C. 506, 111 Am. St. Rep. 857; *Gilbert v. Duluth General Electric Co.*, 93 Minn. 99, 106 Am. St. Rep. 430; *Barto v. Iowa Tel. Co.*, 126 Iowa, 241, 106 Am. St. Rep. 347. As to the duty to provide guards at points where wires intersect or cross each other, see *Guinn v. Delaware etc. Tel. Co.*, 72 N. J. L. 276, 111 Am. St. Rep. 668; *Mize v. Rocky Mt. Bell Tel. Co.*, 38 Mont. 521, 129 Am. St. Rep. 659.

PEOPLE v. STRAUCH.

[240 Ill. 60, 88 N. E. 155.]

APPEAL—Assignment of Errors.—When a case is removed from the trial to the appellate court, it is the duty of the complaining party to point out in his brief all errors relied upon for the reversal; and where he fails in this regard and the cause is by him brought to the supreme court for review, no errors will be considered other than those presented by his brief to the appellate court. (p. 261.)

CONSPIRACY to Stifle Competition Among Bidders for Public Work.—One who introduces third persons to each other with the intention of bringing them together to form a conspiracy to prevent competition in letting bids for a public contract is guilty of conspiracy upon their entering into the unlawful transaction contemplated. (p. 262.)

CONSPIRACY to Stifle Competition Among Bidders for Public Work.—One who assists or encourages others to conspire and agree together to prevent competition in the letting of a contract to do public work is equally guilty with those who actively participate in the unlawful agreement. (pp. 262, 263.)

CONSPIRACY to Stifle Competition Among Bidders for Public Work.—The offense of preventing competition in the letting of a contract for public work may be by bids, the amounts of such having been previously agreed upon between parties to the conspiracy, or by an agreement not to bid. (p. 263.)

CONSPIRACY to Stifle Competition Among Bidders for Public Work.—The offense of preventing competition in the letting of a public contract to construct a bridge may be complete, although the price at which the bridge is in fact constructed is not excessive. If the unlawful combination is entered into, it is not a circumstance of mitigation that the contract is in fact let at a reasonable price. (p. 264.)

CONSPIRACY.—All Who Take Part in a Conspiracy after it has formed and while it is in execution, and all who with knowledge of the facts concur in the plans originally formed and aid in executing them, are fellow-conspirators. Their concurrence, without proof of an agreement to concur, is conclusive against them; they commit the offense when they become partners to the transaction or further the original plan. (p. 265.)

CONSPIRACY—Absence of Agreement.—If One Concurs in a Conspiracy, no proof of agreement to concur is necessary in order to make him guilty. (p. 265.)

CONSPIRACY to Stifle Competition Among Bidders for Public Work.—In a prosecution for conspiracy in preventing competition in the letting of contracts for public work, the state is not required to prove the existence of competition on the day the contracts were let. (p. 265.)

CRIMINAL TRIAL—Previously Expressed Opinions of Jurors. A verdict will not be set aside because of previously expressed opinions indicating bias or prejudice in the jurors unless the proof of bias or prejudice is clear and satisfactory. (p. 267.)

CRIMINAL TRIAL—Remarks of Prosecutor.—What is proved by direct testimony or is fairly inferable from facts and circumstances proved, which has a bearing upon the issues, may be a fair subject for comment by counsel; and if such deductions or inferences tend to fix upon a defendant the wickedness of the crime charged against him, it is within the scope of proper and fair argument to denounce him accordingly. (p. 268.)

O. M. Grove, W. H. A. Renner and E. E. Wingert, for the plaintiffs in error.

W. H. Stead, attorney general, and F. J. Stransky, state's attorney, for the people.

⁶⁴ VICKERS, J. Andrew A. Strauch, Oswald Strauch and Hubert E. Hughes were jointly indicted in the circuit court of Carroll county for unlawfully conspiring for the purpose of preventing competition in a public letting of contracts for the construction of certain bridges which were to be constructed ⁶⁵ partly at the expense of the county and partly at the expense of Fair Haven township. Hughes entered a plea of guilty and a fine of five hundred dollars was assessed against him, which was paid. The other two defendants entered their plea of not guilty, and they were at the November term, 1907, of the circuit court of said county tried, found guilty by the verdict of the jury and a fine of five hundred dollars was assessed against Andrew A. Strauch and a fine of three hundred dollars against Oswald Strauch. After overruling a motion for a new trial, judgment was entered upon the verdict. To reverse this judgment defendants removed the cause to the appellate court for the second district by a writ of error, where the judgment below was in all particulars adjudged to be free from error and affirmed.

A writ of error having issued for that purpose, this judgment is now brought into review in this court.

The facts, so far as the same are necessary to a decision of the questions involved, may be summarized as follows: Plaintiff in error Andrew A. Strauch and plaintiff in error Oswald Strauch are, respectively, father and son. Andrew A. Strauch, at the time of the occurrence of the circumstances out of which this prosecution grows, and for a number of years prior thereto, had been a member of the board of supervisors of Carroll county, elected in the town of Fair Haven. Oswald Strauch, the son, and two of his brothers, had been attending school at the State University at Urbana, from which Oswald had about the middle of June, 1906, graduated as a mechanical engineer. Four bridges were to be constructed at public expense in the town of Fair Haven, two of which were to be steel bridges and the other two were to be made of concrete. It appears that the three sons of Andrew A. Strauch, in order to profitably occupy their time during the summer vacation, had under consideration the matter of bidding for the contracts to construct the bridges referred to. It also appears that their father was very anxious that his sons have employment during ⁶⁶ their vacation, and to this end he aided them in securing the data upon which a bid for the bridge work might be predicated. On June 13, 1906, plaintiff in error, Andrew A. Strauch, presented to the chairman of the board of supervisors of said county a petition, signed by the commissioners of highways of Fair Haven township, asking for county aid in the building of the two steel bridges above referred to. At the time the petition was presented, Andrew A. Strauch requested the chairman of the county board to appoint three supervisors, whose names were suggested by Strauch, as a committee to represent the county in connection with the commissioners of highways of Fair Haven township, with which joint board rested the decision of the question whether county aid would be granted for the construction of said bridges in accordance with the prayer of the petition. Two of the supervisors suggested by Strauch were appointed on said committee, and the other member, appointed at the suggestion of the chairman of the board, was unobjectionable to Strauch. This committee of supervisors met with the commissioners of highways of Fair Haven township and decided to grant the prayer of the petition. The evidence shows that Andrew A. Strauch visited a number of bridge building concerns for the purpose

of procuring estimates upon the steel work, and that this information was sought with the view of enabling his sons to bid intelligently upon the contracts. On June 30, 1906, after legal notice, the commissioners of highways met with the committee of supervisors for the purpose of letting contracts for the construction of the bridges above referred to. The evidence shows that Andrew A. Strauch and his sons had numerous conferences regarding the matter of securing the work relating to the construction of these bridges. On the morning of the day the contracts were to be let, Andrew A. Strauch ascertained that Hubert E. Hughes, the president of the Continental Bridge Company, was the only bidder present representing a bridge construction company. Andrew A. ⁶⁷ Strauch informed Joseph Warner, one of the members of the joint committee, that there was only one bridge man present to bid on the bridges, and Mr. Warner informed him that the contract would not be let unless there was more than one bid. Andrew A. Strauch was frequently seen in consultation with Hughes before the hour arrived for letting the contracts, in one of which Hughes testified that Strauch told him that his boys were intending to bid on the contract for the two steel bridges and advised Hughes to "talk it over with the boys." Afterward Andrew A. Strauch brought his son Oswald to Hughes and introduced them, saying at the time to Hughes, "Here is one of my boys—here is one of my boys that has been figuring on the bridge work"; and said to his son Oswald, "Hughes is one of the men that came here on bridge matters." After this introduction the three men, Andrew A. Strauch, his son Oswald Strauch and Hughes, went to the private office of Andrew A. Strauch, in the village of Chadwick, and all three sat down at a table. Immediately upon going into the office Hughes and Oswald Strauch produced blue-prints, specifications and figures relating to the contracts for the two steel bridges in question. Andrew A. Strauch then withdrew to another room adjoining the office, saying to Oswald Strauch and Hughes as he departed: "Whatever you do, do not get me mixed up in any of your deals; you and Hughes figure it over, but do not mix my name in any of your deals." The evidence is practically uncontradicted that Oswald Strauch and Hughes entered into an agreement at that time by the terms of which Oswald Strauch was to put in a sham bid over and above the amount of the bid to be submitted by Hughes, and that Hughes was to pay Oswald Strauch fifty dollars in cash and

refrain from bidding on the concrete bridges, and also the Strauch boys to do the hauling of the material for the steel bridges. The evidence shows that after this agreement was made Hughes revised his figures and increased the bid from nineteen hundred and eighty-five dollars to two thousand and thirty-five dollars, being fifty dollars more ⁶⁸ than he had originally intended to make, and that the bid put in by Oswald Strauch was thirty-three dollars more than the revised figures of Hughes. The result was that the commissioners, having no knowledge of this unlawful agreement, awarded the contract for the construction of the steel bridges to the Continental Bridge Company upon the bid of Hughes, its president, and the concrete bridge contract was awarded to the Strauchs. Two days later Oswald Strauch appeared at the Chicago office of the Continental Bridge Company and there signed a receipt which reads as follows:

“\$50.00

Chicago, Ill., July 2, 1906.

“Received of Continental Bridge Co. fifty and no/100 hundredths (50.00) on account of services at Chadwick, June 30th, '06.
O. F. STRAUCH.”

At the time this receipt was signed a check for fifty dollars, signed by H. E. Hughes and drawn on A. W. Jefferis & Co., bankers, payable to the order of O. F. Strauch, was delivered and on the same day indorsed by O. F. Strauch and paid. It also appears from the evidence that during the time Hughes and Oswald Strauch were negotiating in regard to the terms upon which Strauch would put in this sham bid, Oswald Strauch left the room and consulted frequently with his father in regard to the negotiations between himself and Hughes; that the amount of Hughes' bid was communicated to Andrew A. Strauch before the bid was put in, and he offered no opposition to the awarding of the contract to Hughes at the figures agreed upon by Hughes and Oswald Strauch. It was also agreed that the material for the steel bridges should be shipped to the order of Andrew A. Strauch, and in pursuance of this part of the agreement Hughes afterward wrote a letter giving Andrew A. Strauch authority to receive the material from the railroad company, and Strauch acted as the agent of Hughes in procuring a drayman in the village of Chadwick to receive this material.

The foregoing statement contains a general outline of most important facts out of which this prosecution grows. ⁶⁹ The indictment contains seven counts, all of which charge the de-

defendants with the crime of conspiracy. The charging part of the fourth count avers that Hubert E. Hughes, Oswald Strauch and Andrew A. Strauch "did unlawfully conspire and agree together with a fraudulent and malicious intent then and there wrongfully, wickedly and unlawfully to prevent competition in the letting and awarding of a certain contract (a more particular description of said contract being to the grand jurors unknown) to be thereafter, on the 30th day of June, in the year of our Lord one thousand nine hundred and six (A. D. 1906), let and awarded by the then and there authorities of the said county of Carroll and the then and there authorities of the said town of Fair Haven, in the said county of Carroll, aforesaid, said authorities of the said county of Carroll and said authorities of the said town of Fair Haven then and there being legally organized and then and there acting together as a joint organization in and at the letting and awarding of said contract, said authorities of the said county of Carroll and said authorities of the said town of Fair Haven acting as such joint organization aforesaid, being then and there, at the time of and at said letting of said contract, the persons and authorities authorized by law to let and award said contract, the manner and means of said unlawful conspiracy and agreement so entered into as aforesaid, by the defendants aforesaid, to prevent competition aforesaid, in the letting aforesaid, of the contract aforesaid, being to these grand jurors unknown; contrary to the form of the statute in such case made and provided and against the peace and dignity of the same people of the state of Illinois." The first, second and third counts of the indictment are similar to the fourth count, except that the facts constituting the alleged unlawful agreement are set out more specifically. The fifth count charges a conspiracy to do an illegal act injurious to the public trade, and sets out with some particularity the nature of the illegal act and the manner ⁷⁰ in which it is alleged such act was injurious to the public trade. The sixth and seventh counts charge a conspiracy to prevent competition in the letting of a public contract, and are similar to the fourth, which we have above set out.

Plaintiffs in error contend that this judgment should be reversed for the following reasons: (1) Because of the alleged error in giving instructions 4, 6, 7, 8, 9, 10, 11, 14, 15 and 16 on behalf of the people; (2) because the court erred, it is alleged, in refusing to give instructions 1, 2, 3

and 4 at the request of the plaintiffs in error; (3) because the court refused to grant a new trial on account of the prejudice of the juror John Iler, which alleged prejudice was brought to the attention of the court after the trial, by affidavits; (4) because of alleged improper and prejudicial remarks made by counsel in argument to the jury; (5) because it is claimed that the evidence is insufficient to support the verdict.

1. By the first assignment of error, in the order in which we have stated them above, plaintiffs in error complain of the giving of instructions 4, 6, 7, 8 and 9. These instructions are separated from 10, 11, 14, 15 and 16 for reasons which will soon appear. The ruling on the instructions first above mentioned is not properly preserved for review in this court. In accordance with leave granted, on the motion of the attorney general a certified copy of the appellate court brief of plaintiffs in error has been filed in this court. From an examination of that brief it appears on pages 28 and 29 thereof that the only instructions complained of by plaintiffs in error in the appellate court were instructions 10, 11, 14, 15 and 16. No complaint was made by plaintiffs in error in the appellate court of the instructions 4, 6, 7, 8 and 9. Plaintiffs in error have waived their right to insist in this court that these instructions are erroneous, by their failure to point out the alleged errors and insist upon them in their brief in the appellate court. When a case is removed from the trial court to the appellate ⁷¹ court it is the duty of the complaining party to point out to that court in his brief all the errors relied upon for a reversal, and where the appellant fails in this regard and the cause is by him brought to this court for review, no errors will be considered other than those which were presented by his brief to the appellate court: *Abend v. Endowment Fund Com.*, 174 Ill. 96, 50 N. E. 1052; *Reynolds v. Mandel*, 175 Ill. 615, 51 N. E. 649.

Instructions 10, 11, 14, 15 and 16 were by plaintiffs in error complained of in their brief in the appellate court and their complaint is renewed in this court. The assignments of error upon the giving of these instructions are properly before us for review. Instruction No. 10 is applicable especially to the case of Andrew A. Strauch. By it the jury are instructed that if Andrew A. Strauch introduced his son Oswald Strauch to Hubert E. Hughes with the intention of bringing said Hughes and said Oswald Strauch into an agreement or understanding which would, in effect, prevent com-

petition in the letting of the contract mentioned in the indictment, and that the said Hughes and Oswald Strauch did thereafter enter into such unlawful agreement with each other to prevent competition in the letting of the contract in question, then the jury may be justified in finding the said Andrew A. Strauch guilty of conspiracy. The complaint made of this instruction is that it singles out the fact that Andrew A. Strauch introduced his son to Hughes and predicates the guilt of Andrew A. Strauch upon such isolated fact. The act of introducing the two principal actors in this unlawful confederation would, of course, amount to nothing if done with a proper motive; but if, as the instruction recites, the parties were introduced by Andrew A. Strauch "with the intention of bringing the said Hubert E. Hughes and the said Oswald Strauch into an agreement or understanding which, in effect, would prevent competition in the letting of the contract mentioned in the indictment," and such introduction resulted ⁷² in the formation of the unlawful agreement set out in the indictment, then we are unable to conceive of any reason why Andrew A. Strauch would not thereby become a party to such unlawful conspiracy. The gist of the offense is the combination or confederacy for the illegal purpose of preventing competition in the letting of the contract in question. If Andrew A. Strauch innocently introduced his son to Hughes, the mere fact that these parties, as a result of such acquaintance, might ultimately enter into a conspiracy would not make Andrew A. Strauch a party thereto, even though his act in introducing the parties might be the means of bringing about the ultimate conspiracy. The criminality of his act in such case would necessarily depend upon the guilty intention or purpose he had in view in thus bringing the parties into communication with each other. If this plaintiff in error did the act mentioned in the instruction with the unlawful purpose therein stated, the conclusion of the instruction that he would be guilty as a party to such conspiracy appears to be the necessary legal result from the premises stated in the instruction.

The criticism made on instruction No. 11 is not well taken. By that instruction the jury are told that it is sufficient to sustain a conviction if the people have shown by the evidence, beyond a reasonable doubt, that the defendants, or any two of them, did unlawfully conspire and agree together to prevent competition in the letting of said contract in the manner and form as charged in the indictment. It is objected

by plaintiffs in error that the jury were liable to be misled by this instruction into the conclusion that if the evidence showed that some two of the parties charged were guilty of conspiracy, the jury might convict any number of other persons charged. We do not see how it would be possible to put such construction upon the language here employed. The instruction does not purport to state facts which will warrant a verdict of guilty nor does it conclude by directing such a verdict. It certainly cannot be contended ⁷³ that in order to constitute the offense of conspiracy it is necessary to prove that more than two of the persons charged entered into the unlawful confederation or agreement. If any two of the defendants charged entered into such conspiracy and the third aided, assisted and encouraged the making of such unlawful agreement, such third party would be equally guilty with those who actively participated in the unlawful agreement. Nor do we find any fault with the latter clause of instruction No. 11, which informs the jury that the offense of preventing competition in the letting of a contract may be by bids, the amounts of such having been previously agreed upon between parties to the conspiracy or by an agreement not to bid.

Instruction No. 14 is assailed by the plaintiffs in error. That instruction informs the jury that if they believe, from the evidence in this case, that Oswald Strauch signed the receipt introduced in evidence in this case, then it is presumed that he knew the contents thereof at the time of signing the same. The objection to this instruction is, that the jury are not informed by it whether the presumption is conclusive or rebuttable. By the twenty-sixth instruction given on behalf of plaintiff in error, Oswald Strauch, the jury were told that if they believed, from the evidence, that at the time of signing and delivering said receipt Oswald Strauch did not know the contents and purport of the same, then the jury should not consider such receipt as evidence against him. Taking the two instructions together, the jury should not have been misled as to the character of presumption which the law raises as to the knowledge Oswald Strauch had in regard to the contents of the receipt which he voluntarily signed.

On behalf of Andrew A. Strauch it was contended on the trial that he made objections to the amount which Hughes first proposed to bid for the steel bridges, and that through his objections Hughes reduced the amount of his bid some-

what and finally placed it at the lower figure. From ⁷⁴ this circumstance it was contended that Andrew A. Strauch had been the means of reducing the cost of the bridges and thereby effected a saving to the municipalities. Instruction No. 15 was given on behalf of the people in view of this evidence. By it the jury were told that if the conspiracy had been entered into as charged in the indictment and sustained by the proof, the fact that Andrew A. Strauch was instrumental in lessening the cost of the said bridges to the authorities was immaterial. The principal complaint lodged against this instruction is, that it deprived Andrew A. Strauch of the benefit of this evidence in determining the degree of culpability, and, consequently, the amount of fine that should be imposed upon him. It is contended that it was a material circumstance to be considered by the jury in determining the amount of fine they would assess against Andrew A. Strauch in case they found him guilty. It must be borne in mind that the offense here may be complete even though the price at which the bridges were, in fact, constructed was not excessive. The plaintiffs in error are not charged with having fraudulently obtained an excessive price for the building of these bridges. The charge is that they entered into an unlawful conspiracy for the purpose of preventing competition in the letting of these contracts. If such unlawful combination was entered into, it is not a circumstance of mitigation that the contracts were, in fact, let at a reasonable price. The statute is leveled against the making of such unlawful combinations for the purpose of stifling competition among bidders for public work, and it is the making of such agreements that the statute makes criminal, and the offense does not depend on the amount of loss to the public in any given case. The evil tendency of such combinations is the essence of the offense. We do not think that the intervention of Andrew A. Strauch, which resulted in a slight reduction in the amount of Hughes' bid, could be said, as a matter of law, to be a mitigating circumstance proper to be considered in fixing the amount of his fine. ⁷⁵ The instruction which told the jury that this circumstance was immaterial is not open to the exception taken to it.

Instruction No. 16 is subject to exception by plaintiffs in error. That instruction tells the jury, as a matter of law, that all who take part in a conspiracy after it is formed and while it is in execution, and all who, with knowledge of the facts, concur in the plans originally formed and aid in

executing them, are fellow-conspirators; that their concurrence, without proof of an agreement to concur, is conclusive against them; that they commit the offense when they become partners to the transaction or further the original plan. It is not complained that this instruction is not good law, but it is said that it has never been approved by this court. Whether this statement is true or not, the principle of the instruction has often been approved. In *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898, it was held that if one concur in a conspiracy no proof of agreement to concur is necessary. Such we understand to be the settled rule of law.

There was no error in giving any of the foregoing instructions on behalf of the people.

2. Plaintiffs in error contend that the court erred in refusing instructions 1, 2, 3 and 4. These instructions may be considered together, since all contain the same proposition, in substance. By these instructions the jury were directed to acquit if they believed, from the evidence, that Andrew A. Strauch or Oswald Strauch were not actually intending to bid for the construction of these steel bridges on June 30th, prior to their meeting with Hughes. The argument in support of this contention is, that if the Strauchs had no real intention of bidding upon the bridges prior to their meeting with Hughes, then, no matter what agreement they may have entered into with Hughes, said agreement could not amount to a conspiracy to prevent competition which, in fact, had no existence. This argument rests upon the assumption that the plaintiffs in error could only be guilty, under the indictment, upon proof, beyond a reasonable ⁷⁶ doubt, that but for such confederation between Hughes and the Strauchs there would have been competition in the letting of said contracts and that such agreement had the effect of preventing such competition. The evidence shows that the contracts would not have been let on a single bid. If Oswald Strauch had not put in a sham bid, so as to lead the commissioners to believe that there was competition, when, in fact, there was none, Hughes would not have obtained the contract for the want of competition, and the letting would, presumably, have been postponed until a time when there would have been competition. We cannot assent to plaintiffs in error's contention that the state was required to prove the existence of competition on the day that the contracts were let. Commissioner Warner had notified Andrew A. Strauch during the

forenoon that the contracts would not be let upon a single bid. If, in view of this resolution of the officials, the plaintiffs in error entered into a conspiracy, by the terms of which Oswald Strauch was to put in a fictitious bid for the purpose of enabling Hughes to obtain the contract and to prevent an adjournment of the letting to obtain other bidders, then the jury were justified in finding that the plaintiffs in error were guilty. The court properly refused the instructions now under consideration, which erroneously embodied the converse of the above proposition.

3. Plaintiffs in error next insist that a new trial should have been granted on account of the prejudice of juror, John Iler. In support of this contention plaintiffs in error introduced W. J. Lamoreux and Frank Roberts, both of whom testified to statements made by Iler previous to his being called as a juror, which statements indicated that Iler had a bitter personal feeling against Andrew A. Strauch. The juror denied that he made the statements attributed to him, and other evidence was heard tending to corroborate the juror in respect to the statement attributed to him by the witness Lamoreux. It was shown that Lamoreux was a ⁷⁷ very close personal friend of Andrew A. Strauch; that he was active in aiding Strauch in his defense and held frequent consultations with the Strauchs' attorneys during the trial. He admits that he did not say anything to the Strauchs or their attorneys about his having heard Iler express ill-feeling toward Andrew A. Strauch. It also appears that during the trial Lamoreux had a conversation with the trial judge in which he told the judge that Strauch was having a fair trial. It is strange that Lamoreux did not give Strauch or his attorneys or the court the information which he claimed, after the trial, to have in respect to the prejudice of the juror, Iler. His explanation for withholding this information is, that there were a number of other persons present when the statement was made and that he was afraid the others did not hear it. This explanation does not explain. There would have been no occasion for calling such other persons if he had privately given this information to his friend Strauch before the juror was accepted. In respect to the statement sworn to by the witness Frank Roberts, the trial court was warranted, in view of the impeachment of Roberts by proof that he had a bad reputation for truth and veracity, in disregarding his statement and believing the statement of the juror, Iler. Neither of these witnesses testified that Iler expressed

any opinion as to the guilt or innocence of Strauch in regard to the offense for which he was tried. The rule is well established that a verdict will not be set aside because of previously expressed opinions indicating bias or prejudice in the juror unless the proof of bias or prejudice be shown by clear and satisfactory evidence: *Collins v. People*, 194 Ill. 506, 62 N. E. 902. The evidence here is not of that clear and satisfactory character which required the trial court to set aside the verdict and grant a new trial.

4. It is next urged by plaintiffs in error that the judgment should be reversed because of improper remarks of an attorney who was aiding in the prosecution, in his ⁷⁸ address to the jury. One of the statements to which exceptions were preserved is as follows: "The jury will remember that when Oswald was having the conversation with Hughes in the office, he was running out to see his father every few minutes." This remark was objected to on the ground that the statement was not warranted by the evidence. In ruling upon the objection the court said that the jury were the judges of the evidence, and they knew the evidence, and knew whether or not the statement was borne out by the evidence, and if the statement was not sustained by the evidence the jury would disregard it. Plaintiffs in error insist that the ruling of the court was improper. To this we cannot agree. There was evidence tending to show that Oswald Strauch did leave the room where he and Hughes were talking and went out to see his father more than once. The statement that he ran out "to see his father every few minutes" was simply the construction that the attorney, in his argument, put upon the evidence. The trial court very discreetly refrained from telling the jury what had and what had not been testified to. It would have been highly improper for the trial judge to express his recollection or opinion as to the facts that had been sworn to. Further on in his address the attorney said: "Now, I say this, gentlemen of the jury, because they did steal." This language was objected to on the ground that the indictment did not charge stealing. The court said: "No, sir; that is not in the indictment, and I charge the jury, as I did before, that if anything is stated that is not borne out by the evidence they are to pay no attention to it." Again the attorney said: "In this case, gentlemen, I must compliment Andrew A. Strauch as being one of the most cunning rascals I ever knew." Upon objection being made the court said: "That remark is not proper and the jury will pay no

attention to it." We think that the record shows that the trial court ruled properly upon the objections now under ⁷⁹ consideration. What is proven by direct testimony or is fairly inferable from facts and circumstances proved and which has a bearing upon the issues may be a fair subject for comment by counsel, and if such deductions or inferences tend to fix upon a defendant the wickedness of the crime charged against him, it is within the scope of proper and fair argument to denounce him accordingly: *Crocker v. People*, 213 Ill. 287, 72 N. E. 743; *People v. Hagenow*, 236 Ill. 514, 86 N. E. 370.

5. It is finally contended by plaintiffs in error that the evidence is insufficient to support the verdict. The principal contention under this assignment of error is, that the proof failed to show the existence of competition in the letting of the contracts on the day the contracts were, in fact, let. This assignment of error has had our consideration in connection with division 2 of this opinion, in connection with the refusal of instructions there considered. We need not repeat the views already expressed upon that question. In addition to the point already suggested, the plaintiffs in error insist that the proof is insufficient to connect Andrew A. Strauch with the conspiracy. To this we cannot agree. We have considered the evidence with such care as the importance of the case enjoins, and our conclusion is that the jury were entirely justified, not only in finding Andrew A. Strauch guilty, but also fixing his fine larger than the fine assessed against his son. The substance of the evidence upon which we base this conclusion is set out in the fore part of this opinion, and it would serve no useful purpose to recapitulate it.

There are no other reasons urged for a reversal of this judgment. The judgment of the appellate court is affirmed.

A Conspiracy is a Combination of two or more persons by some concerted action to accomplish a criminal or unlawful purpose, or to accomplish a purpose not in itself criminal or unlawful by criminal or unlawful means: Lindsay & Co., Ltd., v. Montana Fed. of Labor, 37 Mont. 264, 127 Am. St. Rep. 722; *Standard Oil Co. v. Doyle*, 118 Ky. 662, 111 Am. St. Rep. 331.

Everyone Who Enters into a Conspiracy is deemed a party to every act connected therewith done by the others before that time, and a party to every act afterward done by any of the others in furtherance of such common design: Driggers v. United States, 1 Okl. Cr. 60, 129 Am. St. Rep. 823, and cases cited in the cross-reference note thereto.

It is No Answer to the Illegality of a Monopoly that it has lowered prices: Hunt v. Riverside Co-operative Club, 140 Mich. 538, 112 Am. St. Rep. 420.

WILKINSON v. AETNA LIFE INSURANCE COMPANY.

[240 Ill. 205, 88 N. E. 550.]

ACCIDENT INSURANCE—Self-inflicted or Accidental Death.

In an action upon an accident insurance policy the burden of proof is upon the plaintiff to show that the injuries which caused death were accidental and not self-inflicted; but the fact of accident may be established by circumstantial evidence. (p. 271.)

ACCIDENT INSURANCE—Accidental or Self-inflicted Death.

In an action upon an accident insurance policy the plaintiff may invoke the presumption that all men are sane and do not ordinarily take their own lives; and this presumption, taken with evidence that the injuries which caused the death were violent and external, is sufficient to require the court to submit to the jury the question whether the injuries causing the death of the insured were accidental or self-inflicted. (p. 272.)

ACCIDENT INSURANCE—Burning of Building or Contents.

An accident policy which provides for double indemnity in case of injuries "in consequence of the burning of a building in which the insured shall be at the commencement of the fire," covers accidental injuries from fire while he is in a building, perhaps from the burning of its contents, and not alone from the burning of the building itself. (p. 273.)

ACCIDENT INSURANCE—Self-inflicted or Accidental Death.

Where the evidence in an action on an accident policy shows that the insured has suffered an injury which has caused death, and there is no proof in the record from which it can be determined whether the injury was accidental or self-inflicted, the presumption is that the injury was accidental and not self-inflicted. (p. 273.)

ACCIDENT INSURANCE.—Evidence of the Habits and Temperament of the insured is admissible, in an action on a policy for death caused by burning in a building, as bearing upon his mental condition at the time of the accident; and if the insurance company has filed a plea that the insured suicided, the introduction of such evidence in chief is proper in anticipation of such defense. (p. 274.)

Flannery & McKinley, for the appellant.

Samuel Adams and Carl R. Latham, for the appellee.

209 HAND, J. This was an action of assumpsit commenced in the superior court of Cook county by the appellee. Laura S. Wilkinson, executrix of the will of John Wilkinson, deceased, against the appellant, the Aetna Life Insurance Company, upon two policies of accident insurance taken out in said insurance company by said John Wilkinson, one called a "Regular form accident policy" for five thousand dollars and the other called a "Twentieth century combination accident policy" for ten thousand dollars, which last policy contained a provision that in case injuries to the insured were sustained "in consequence of the burning of a building in which the insured shall be at the commencement of the

fire, the amount to be paid shall be double the sum specified in the clause under which claim is made, subject to all the conditions of this policy." The declaration contained ten special counts and the consolidated common counts in indebitatus assumpsit, to which were filed the general issue and four special pleas. A trial resulted in a verdict for twenty-seven thousand nine hundred and eighty-two dollars and sixty-four cents, upon which the court rendered judgment, which judgment has been affirmed by the appellate court for the first district, and a further appeal has been prosecuted to this court.

The evidence of the plaintiff fairly tended to prove that John Wilkinson died on the ninth day of September, 1904; that prior to the accident which caused his death he lived with his family at 482 and 484 La Salle avenue, in the city of Chicago; that he had a cottage at Fox Lake, where he and his family spent a part of each summer; that on the seventh day of September, 1904, his wife was at Fox Lake, from which place he had just returned to the city of Chicago; ²¹⁰ that he was fond of archery, and he made the archery targets which he used, in the loft of a brick barn which stood in the rear of the house in which he lived; that he was in good health and of a cheerful and hopeful disposition, and was an inveterate smoker of cigars, especially when at work; that a housekeeper was employed at the La Salle avenue house, who prepared the meals for Mr. Wilkinson and one of his sons in the absence of his wife; that there were some wooden boxes and some boards in the barn loft used as a bench or table upon which to manufacture archery targets and a small amount of straw used in making said targets; that on the afternoon of September 7, 1904, after Wilkinson had eaten his mid-day meal, he went to the barn; that he subsequently returned to the house and talked with a boy who called to see him; that he then went back to the barn; that he then had in his mouth a cigar; that at 3:40 o'clock in the afternoon there was an alarm of fire; that the fire department responded and on arriving at the barn found the loft on fire; that the loft was reached by an inclosed stairway from the first story and by two doors from the alley in the rear of the barn, which opened in, and the barn loft was lighted by two windows on the east side of the barn, which fronted toward the house; that the firemen, on breaking into the barn loft through the doors and from the alley, found the straw, boxes, boards and the interior of the loft

on fire and Wilkinson lying on the loft floor, unconscious; that they removed Wilkinson from the loft, who soon regained consciousness, and the fire was extinguished; that Wilkinson was badly burned upon his hands, arms, legs and body and had inhaled flame and smoke, from the effect of which he died within two days.

On the trial it was admitted that the policies were in force at the time Wilkinson was injured, that his injuries were effected by violent and external means, and that proper proof of his death had been made.

211 At the close of all the evidence the defendant made a motion for a directed verdict, which motion was denied, and the action of the court in that regard is the first error relied upon as a ground of reversal.

It was admitted on the trial that John Wilkinson lost his life by injuries effected by violent and external means. The only question of fact, therefore, left open for proof was whether the injuries which caused his death were accidental or self-inflicted. The burden of proof was upon plaintiff to show they were accidental and not self-inflicted: *Fidelity and Casualty Co. v. Weise*, 182 Ill. 496, 55 N. E. 540. It was not necessary, however, that the plaintiff prove by an eye-witness that the injuries which caused the death of Wilkinson were accidental, but that fact might be established by circumstantial evidence, and we think it clear from the facts in proof that it cannot be said, as a matter of law, that the injuries which caused the death of Wilkinson were self-inflicted, but that the court properly submitted that question to the jury.

The defendant introduced no proof, and the evidence of the plaintiff tended to establish that the deceased was in good health prior to the time he was injured; that he was of a cheerful and hopeful disposition; that he was seen to go to the barn with a cigar in his mouth; that he was an inveterate smoker, especially when at work; that in a short time after he went to the barn the loft where he did his work was in flames; that on it being broken into by the firemen he was lying upon the floor in an unconscious condition, and that his body, when he was removed from the burning loft, was found to be badly burned. In addition to those facts the plaintiff, in support of the theory that Wilkinson's injuries were accidental and not self-inflicted, had the right to invoke the presumption that men in the condition in which the evidence showed Wilkinson to be just prior to his injury

do not ordinarily take their own lives. In the Weise case, supra, on page 498, this court said: ²¹² "The presumption of the law is that all men are sane and possessed of the love of life; are animated by the instincts of self-preservation and the natural desire to avoid personal injuries and death. This presumption, in the absence of countervailing proof, may be sufficient, within itself, to establish prima facie that death occurred otherwise than by self-destruction and to cast upon the defendant company the burden of producing evidence on the point." While this presumption is a rebuttable presumption and may be overcome by proof, when not rebutted by proof or the circumstances in evidence surrounding the death, such presumption, when taken with the admission that the injuries which caused death were violent and external, is sufficient to require the court to submit to the jury the question whether the injuries which caused the death of Wilkinson were accidental or self-inflicted.

It is next contended that the court should have directed the jury that the plaintiff could not recover the double liability upon the "Twentieth century combination accident policy," as it is said the proof did not show that the injuries from which Wilkinson died were sustained in consequence of the burning of the building in which Wilkinson was at the time the fire commenced. This contention involved two facts: 1. Does the evidence tend to show that Wilkinson was in the barn loft when the fire commenced? and 2. Was it the burning of the building which caused the injuries which resulted in his death? The evidence fairly tended to show that Wilkinson went to the barn; that his work required him to be in the loft; that he had a cigar in his mouth when he went to the barn; that he was an inveterate smoker, especially when at work; that shortly after he went to the barn the loft was discovered to be on fire, and that he was then found in the loft, badly burned and in an unconscious condition. From those facts the jury were justified in drawing the inference that he was in the building at the commencement of the fire. It ²¹³ also appeared from the evidence that the floor and roof of the loft were more or less burned at the time the firemen broke into the loft, and that when they reached the loft Wilkinson was lying upon the floor in an unconscious condition, with severe burns upon his hands, arms, legs and different parts of his body and had inhaled flame and smoke. The inference from this evidence, we think, might fairly be

drawn that the injuries which resulted in Wilkinson's death resulted, in part, from the burning of the building.

This court, in passing upon the question as to whether the court erred in declining to direct a verdict cannot weigh the evidence. The only question this court can determine upon that motion is, Was there evidence introduced which, together with all inferences which may legitimately be drawn therefrom, fairly tended to show that Wilkinson was in the building when the fire commenced, and that the injuries which caused his death were inflicted upon him as a result of the burning of the building? If, however, it did not appear that the building, as contradistinguished from its contents, was on fire, still, as the contents of the loft were on fire, we think the appellant should be held liable, under the terms of said policy, for the double liability. The word "building," as used in this form of policy, should be held, we think, to include the contents of said loft. It has been repeatedly held that a contract of insurance like the one upon which this suit is based, if there is any ambiguity in the language used in the policy, as the language found in the policy is that of the insurance company and not of the insured, should be favorably construed on behalf of the insured and so as not to defeat a recovery in favor of the insured. The insured in this case was contracting for indemnity against an accident from fire while he was in a building, and not alone from the burning of a building.

We do not think the court erred in declining to take the case from the jury at the close of all the evidence.

²¹⁴ It is also contended that the court erred in giving to the jury the first instruction offered upon behalf of the appellee, which reads as follows: "The court instructs you that where a man suffers injuries which might have been caused by accident or might have been intentionally inflicted upon himself, and there is no preponderating evidence as to the cause of such injuries, the presumption is that they occurred by accident."

The law is well settled where the evidence shows that the insured has suffered an injury which has caused death and there is no proof in the record from which it can be determined whether the injury was accidental or self-inflicted, that the presumption is that the injury was accidental and not self-inflicted: *Preferred Accident Ins. Co. v. Fielding*, 35 Colo. 19, 83 Pac. 1013; *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. Rep. 1360, 32 L. ed. 308; *Mallory v.*

Travelers' Ins. Co., 47 N. Y. 52; Cronkhite v. Travelers' Ins. Co., 75 Wis. 116, 17 Am. St. Rep. 184, 43 N. W. 731; Warner v. United States Mut. Accident Assn., 8 Utah, 431, 32 Pac. 696; Jones v. United States Mutual Acc. Assn., 92 Iowa, 652, 61 N. W. 485; Couadeau v. American Accident Co., 95 Ky. 280, 25 S. W. 6; Fidelity and Casualty Co. v. Freeman, 109 Fed. 847, 48 C. C. A. 692, 54 L. R. A. 680; Travelers' Ins. Co. v. Sheppard, 85 Ga. 751, 12 S. E. 18; Accident Ins. Co. v. Bennett, 90 Tenn. 256, 25 Am. St. Rep. 685, 16 S. W. 723. We think the instruction correctly stated the law.

It is also contended that the trial court erred in declining to give to the jury certain instructions offered on behalf of the appellant. These instructions bore upon the questions whether deceased was in the building at the time the fire commenced or was injured in consequence of the burning of the building, and are in conflict with what has been heretofore said upon those subjects in this opinion and were therefore properly refused, or were upon propositions of law which were fully covered by other instructions which were given to the jury on behalf of the appellant. We think the jury were properly instructed as to the law.

It is also insisted that the court erred in admitting proof of the habits and temperament of Wilkinson as bearing ²¹⁵ upon his mental condition at the time of the accident. This kind of testimony is competent in this class of cases (Laessig v. Travelers' Protective Assn., 169 Mo. 272, 69 S. W. 469; Fidelity and Casualty Co. v. Freeman, 109 Fed. 847, 48 C. C. A. 692, 54 L. R. A. 680), and the appellant having filed a plea that Wilkinson suicided, it was not error to permit the introduction of such evidence in chief in anticipation of such defense: Dimick v. Downs, 82 Ill. 570; Mayer v. Brensinger, 180 Ill. 110, 72 Am. St. Rep. 196, 54 N. E. 159.

We have examined this record with care, and finding no reversible error therein, the judgment of the appellate court will be affirmed.

In Case of the Death of an Insured Person the presumption of law is against suicide, and if the insurer relies on self-destruction as a defense he has the burden of proof: Masonic Life Assn. v. Pollard, 121 Ky. 349, 123 Am. St. Rep. 198; Equitable Life Ins. Co. v. Hebert, 37 Ind. App. 373, 117 Am. St. Rep. 324; Lindahl v. Supreme Court I. O. F., 100 Minn. 87, 117 Am. St. Rep. 666. The jury should be instructed that the evidence to warrant a verdict for the insurer on the ground that the insured came to his death by suicide should

exclude every reasonable hypothesis of accidental death: *Life Ins. Co. of Virginia v. Hairston*, 108 Va. 832, 128 Am. St. Rep. 989. Suicide as a defense to an action to recover life insurance is the subject of a note to *Supreme Conclave etc. v. Miles*, 84 Am. St. Rep. 539.

VAN CLEEF v. CITY OF CHICAGO.

[240 Ill. 318, 88 N. E. 815.]

MUNICIPALITY—Granting Use of Streets for Fair or Carnival.—A city has no power to authorize the use of its streets for a carnival and street fair; and the occupancy of a street for that purpose by permission of the municipal authorities is unlawful and the tents and platforms are a nuisance per se. (p. 277.)

MUNICIPALITY—Liability for Nuisance Created by Street Fair.—A city that authorizes the occupation of its streets with the tents and platforms of a street fair becomes a participant in creating and maintaining a public nuisance, of whose existence or character it is not entitled to notice as a condition precedent to its liability to persons who receive personal injuries therefrom, although it does not itself put up the structures. (p. 277.)

MUNICIPALITY—Street Fair—Liability for Dangerous Platform.—Where a city permits the use of its streets for a fair or carnival, the negligence of one who constructs a platform does not exempt the city from liability to a person thereby injured if the permission of the city was a proximate cause. (p. 278.)

MUNICIPALITY—Liability for Structures Maintained by Street Fair.—Where a city permits the use of its streets for a fair or carnival, it assumes the obligation to use reasonable care to see that the structures erected for that purpose are reasonably safe. If it fails to do so, and a person attending the fair is injured in consequence of the negligent construction of a platform over which he must pass in reaching a tent show, he may recover from the city. (p. 280.)

APPEAL—Questions Reviewable.—When a plaintiff in error assigns for error in the supreme court that the appellate court erred in affirming the judgment, every question reviewable in the supreme court under the errors assigned in the appellate court is properly raised. (p. 280.)

INSTRUCTIONS—When Cured by Others.—An Omission to Instruct on one phase of a personal injury case may be cured by other instructions, when the instructions, read as a series, cannot be misunderstood by the jury. (p. 281.)

John R. Caverly and Sigmund Zeisler, for the plaintiff in error.

Darrow, Masters & Wilson, for the defendant in error.

322 **CARTWRIGHT, J.** On June 15, 1903, the city council of the city of Chicago, on the application of the business men of the eighth ward, passed a resolution giving permis-

sion to use certain streets for a merchants' carnival and street fair to be held from July 20 to July 26, 1903, with the necessary shows, stands and attractions. Under that authority the streets named in the resolution were occupied with tents, booths and other structures, and at the corner of Ninety-second street and Exchange avenue there were three shows in tents erected in the street intersection. One was an animal show, ³²³ another a lilliputian, and the third was a show named "Enoch, the Water Man." The streets were festooned and illuminated by electric lights and the crowds at night were estimated from forty thousand to fifty thousand people. The sidewalks and roadways were full of visitors to the street carnival and teams and street-cars went around through other streets. The tent in which the show of "Enoch" was conducted would hold three hundred people. In front of it was a platform six feet wide, fifteen or more feet long and four or five feet above the street. A "barker" stood on the platform attracting the attention of the crowd to the show, and there was a place there for selling tickets. A stairway five or six feet wide went up to the platform from the street and a like stairway led down on the other side into the tent. The show lasted about ten or fifteen minutes, and consisted of "Enoch" in a water-tank smoking a pipe. The defendant in error, Anna Van Cleef, went into the show with her husband about 9 o'clock in the evening of July 24, 1903. The performance was attended by one hundred and fifty to two hundred people, and at its conclusion the crowd started to go out on the street. In descending the steps from the platform to the street Mrs. Van Cleef was pushed by the crowd, and there being no railing or guard along the edge of the stairway she fell to the street and suffered serious injuries. She brought her suit in the superior court of Cook county against the plaintiff in error, the city of Chicago, to recover damages for her injuries, and obtained a verdict of fifteen thousand dollars. The court denied motions for a new trial and in arrest of judgment and entered judgment on the verdict. The branch appellate court for the first district affirmed the judgment, and the city sued out a writ of error from this court to bring the judgment of the appellate court in review.

The brief and argument of counsel for the city is almost wholly devoted to the general proposition that under the facts of the case the plaintiff was not entitled to recover ³²⁴ and the city was not liable for her injury, and is not

directed to any ruling of the trial court or any error assigned, and an argument of that kind might very properly be disregarded. On the oral argument, however, the counsel stated that the argument then made and the printed brief and argument were designed to demonstrate that the court erred in refusing to direct a verdict of not guilty and refusing to arrest the judgment after verdict, and we are disposed to consider them as applying to the errors assigned on such rulings.

The controverted questions of fact have been settled against the city by the judgment of the appellate court, and there is and can be no dispute of the propositions that the city had no power to authorize the use of the street for the carnival and street fair; that the occupancy of the street for that purpose was unlawful and the tent and platform a nuisance per se; that the city having by an affirmative act authorized the creation of the public nuisance, became a participant in creating and maintaining it and was not entitled to any notice of its existence or character, and that although it did not itself put up the structure, it became liable for all injurious consequences to anyone who might be in a position to complain of the breach of duty by the creation of the nuisance. It is admitted that the structure in the street was a public nuisance, and the city would be liable for any resulting injuries to persons using the street for street purposes, but it is contended that to those using the structure it was a private nuisance on account of its improper construction, and that the city was not a participant in creating and maintaining the private nuisance in its aspect as a structure unsafe to those using it. Counsel, repeating the argument in different form, say that the invitation to enter the show was extended by parties in control of it, and while the city would be liable for an injury to anyone using the street for the legitimate purposes of a street, the plaintiff was hurt solely by reason of ³²⁵ entering upon the insufficient stairway, and the fact that the street had been made unsafe for use as a street had no connection with her injury. Counsel therefore conclude that the wrong by the city was not the proximate cause of the injury to the plaintiff.

It is, of course, true that the injury must be the legitimate consequence of the wrong, and, considering the question of proximate cause in the relation of cause and effect, it is clear that the injury was a natural result of the wrongful act of the city. When the city authorized showmen to

fill its streets with tents and structures of the temporary character usual in carnivals and street fairs, it was reasonably to be apprehended that unless considerable care was exercised injury might result. It was not necessary that the city should have contemplated or been able to anticipate the injurious consequences to the plaintiff or the precise form of her injury, but it is sufficient that the city might have foreseen that some injury might result from its wrongful act, and when the injury did result, it could be seen that it was the natural consequence of the occupation of the street by structures of the nature of this platform under the permission given by the city. The negligence of the one who constructed the platform would not exempt the city if the permission was also a proximate cause. The city was guilty of a serious wrong and violation of duty by permitting the occupation of the streets for show purposes and creating a nuisance in them, and the expectation was that large numbers of people would go into the shows by whatever means might be provided. The city negligently permitted the structure authorized by it to be erected in an unsafe manner, and the wrong and resulting damage were connected according to the ordinary course of events. This proposition is practically conceded on the part of the city in the admission expressly made that if the plaintiff had gone on the platform voluntarily for the purpose of passing over it to reach some other place, and precisely the ³²⁶ same injury had resulted from the same cause, the city would be liable. The relation of cause and effect would not exist in that case any more than in this.

The principal ground upon which counsel insist that the wrong was not the proximate cause of the injury is, that the city owed no duty to the plaintiff when she went over the platform to see the show and while she was returning from it, and as to her the street was not unsafe, as a street, while she was in that situation. It is admitted that the plaintiff did not lose her character as a legitimate user of the street until the moment she stepped upon the stairway to enter the show, and up to that moment, even though she had merely loitered around the street or mingled with the throng that filled the sidewalks and roadway, the duty of the city existed and also a liability for any injury resulting from the wrongful use of the street, but it is insisted that when she started up the stairway the duty ceased and would not come into being again until she was again on the street. The

liability of the city is, of course, not confined to travelers, but extends to a person stopping on the street to converse with another, or stopping to see a procession pass, or using the street for convenience or pleasure, and there are liabilities to abutting owners and to children playing upon the street: *City of Chicago v. Keefe*, 114 Ill. 222, 55 Am. Rep. 860, 2 N. E. 267. The position of counsel for the city is illustrated by the case of *Cohen v. New York*, 113 N. Y. 532, 10 Am. St. Rep. 506, 21 N. E. 700, 4 L. R. A. 406. In that case the city granted permission to a grocer to keep his wagon on the street in front of his store and he negligently tied up the thills, which fell and struck Cohen, who was passing. It is said that if Cohen had climbed on the wagon the city would not have been liable, which is doubtless true. It is also true that in the case of *Little v. Madison*, 42 Wis. 643, 24 Am. Rep. 435, if the plaintiff had mounted one of the bears in the bear show licensed in the street and had been injured, the city would not have been liable. But the argument overlooks the clear and broad distinction between those cases and this ³²⁷ in the fact that when the nuisance was authorized it was expected that the public would attend the shows and go upon the structures placed in the street. Undoubtedly, under ordinary circumstances, it is the duty of a city to see that its streets are reasonably safe for the use for which streets are intended, but when a city changes the character of a street and devotes it to the purposes of a street fair, we do not think it can escape liability on the ground that the street was intended for different uses. If this carnival and street fair had been licensed upon common public ground or in a park under the control of the city, we do not think there could be any question as to liability, and we are unable to state any valid ground of distinction when the city perverted its streets to like uses for a show ground. In *Forget v. Corporation of Montreal*, 4 Montreal L. R. 77, the city was held liable for injuries arising from the use of a public place for an exhibition without taking the necessary measures to protect the public against dangers that might result. Manifestly, public policy would not dictate or approve refined distinctions for the purpose of relieving the city from the natural and probable consequences of its wrongful act. Justice would rather require such distinctions to be made in favor of a party injured, and if that were done, we might say that when the plaintiff left the tent she was using the street, as such, to reach some other place. We do not

regard that as necessary, but as the city had changed the ordinary conditions governing the highway and had actively participated in creating a carnival and street fair in public streets, we think it assumed the obligation to use reasonable care to see that the structures were reasonably safe.

It is insisted that because a private individual owning premises and leasing them for the purpose of a show, or permitting shows on them, would not be liable for the negligent construction of a platform, the city should not be held liable. But the cases are not alike, since the individual ³²⁸ owner has no duty to the public and is not guilty of any wrong in leasing his premises or permitting the shows, while a city is guilty of violation of duty and a serious wrong in doing the same thing.

In our opinion the court did not err in refusing to direct a verdict or in denying the motion in arrest of judgment.

Complaint is made of the action of the court in giving, refusing and modifying instructions, and the reply is made that the assignment of errors is not sufficient to raise any question concerning the instructions. In the appellate court the assignment of errors included all the matters complained of, and the errors assigned in this court are, that the appellate court erred in not reversing the judgment, erred in affirming the judgment and erred in rendering judgment for costs against the city. The judgment under review in this court is the judgment of the appellate court, and the only error the appellate court could commit would be in affirming the judgment. The appellate court did not give, refuse or modify instructions or make any other ruling which was excepted to, and it was not necessary in this court to reassign errors of the trial court. When a plaintiff in error assigns for error in this court that the appellate court erred in affirming the judgment, every question reviewable in this court under the errors assigned in the appellate court is properly raised.

Instruction No. 7 which was given at the request of the plaintiff directed the jury that if the plaintiff was suffering from an affection or disease of the bones, the jury had a right to consider whether her existing condition was due to the affection or to the fall, and if they found it was due to the fall, even though the condition may have been aggravated by the condition of the bones at the time of the fall, they might proceed to assess the plaintiff's damages, if they found she had sustained any damages under the evidence in the

case. The instruction, standing alone, was wrong in lacking the qualification that the jury must first ³²⁹ find that the plaintiff was entitled to recover. The omission, however, was cured by other instructions. In fact, if the number "7" was stricken out and the instruction should be read with No. 6 which preceded it, it would be free from any objection. Instruction No. 6 told the jury that if they found, from the evidence and under the instructions, that the plaintiff was entitled to recover as alleged in her declaration, then, in estimating the damages, they might take into consideration different elements mentioned in the instruction, and that instruction was followed by this one, which was faulty in omitting the condition mentioned. The instructions are to be read as a series, and the jury could not have misunderstood them when so read, or have supposed that damages might be assessed regardless of the merits of the case.

The sixteenth instruction as tendered by the defendant required the plaintiff to use due care and caution for her safety, commensurate with the knowledge which she had or which by the exercise of reasonable care she would have had, and the court modified it by confining her obligation in respect to care to defective conditions of which she had knowledge. She had a right to assume that the place was reasonably safe in the absence of knowledge to the contrary. But if the instruction was too limited in that respect, the defect was supplied by the fifteenth instruction, in which the court told the jury that the plaintiff was required to use such degree of care and caution for her safety as reasonably prudent persons would use under all the circumstances shown by the evidence.

The modification of instruction 17 did not change its substantial meaning.

Instruction 22, which was refused, represented the theory of the city that it was not liable, and that its duty was limited to the necessities of ordinary modes of travel or passing along the street. What has already been said shows that we do not regard that to be the law. And instruction ³³⁰ 24 was not applicable to the case and was not the law. It directed the jury to regard the authority as a license to provide, maintain and conduct the exhibition in a proper and reasonably safe manner, and the resolution contained no qualification of that kind.

The judgment is affirmed.

The Liability of Municipal Corporations when people suffer personal injuries while fairs, races and exhibitions are being conducted in the streets by permission of the city is considered in the note to *Commonwealth v. Morrison*, 125 Am. St. Rep. 354.

MANTERNACH v. STUDT.

[240 Ill. 464, 88 N. E. 1000.]

PROBATE SALE—Minor not Estopped to Avoid.—Where an administrator's sale is void as to a minor heir for want of due service of process, he is not estopped to disregard the sale and enforce partition by the fact that his mother, who purchased the property as the principal creditor of the estate, has furnished him care, maintenance and education. (p. 284.)

PROBATE SALE—Avoidance by Minor—Parties.—An administrator who made a sale of real property, void as to a minor heir, is not a necessary party to an action of partition brought by the minor fifteen years after the settlement of the estate and the discharge of the administrator, when no relief is sought against him and his interest is not affected by the decree. (p. 284.)

EQUITY—Maxim "He Who Seeks Equity must Do Equity."—A court of equity will not give equitable relief unless the complainant concedes corresponding equitable rights to the defendant, but a court cannot deny to a complainant his rights unless he will do something to which the defendant is not justly entitled by the principles of equity. (p. 285.)

PROBATE SALE—The Rule of Caveat Emptor applies to administrators' sales of real estate. (p. 286.)

PROBATE SALE—Doctrine of Subrogation.—Where the title of a purchaser at an administrator's sale to pay debts which are not liens on the land fails for want of jurisdiction, he is not entitled in equity to be subrogated to the claims of creditors paid by the purchase money. (p. 286.)

PROBATE SALE—Avoidance by Minor Without Restitution.—Where an administrator's sale is void on its face for want of due service on a minor heir, he is entitled to disregard the sale and have partition of the land, without reimbursing grantees of his mother (she having purchased at the sale as principal creditor of the estate) for his share of the purchase money received by her, but not by him unless in the way of care and maintenance. (p. 285.)

PARTITION—Allowance for Improvements by One Cotenant.—In partition proceedings the court will, if possible, allow the portion improved by one cotenant to be set apart to him, without taking into account the value of the improvements; but if such a division cannot be made, the court will allow the one making the improvements the increased value of the premises caused thereby, and not the cost of the improvements. (p. 287.)

Bulkley, Gray & More, for the appellants.

Mason & Wyman. for the appellee.

⁴⁶⁵ CARTWRIGHT, J. Most of the questions presented and argued by counsel for appellants were before the court on a former appeal and were then finally settled: *Manternach v. Studt*, 230 Ill. 356, 120 Am. St. Rep. 310, 82 N. E. 829. The court decided that the proceeding in the probate court of Cook county to divest the appellee, John Manternach, of the undivided one-fourth of the lot described in his bill for partition, inherited from his father, Peter Manternach, was null and void for want of jurisdiction over appellee; that he was not bound by the warranties contained in a deed of said lot executed by his mother, ⁴⁶⁶ for the reason that he did not claim any title through her, and that his suit was not barred by any statute of limitations. When the cause was reinstated in the superior court a cross-bill was filed by the appellants, August T. Studt, Sofie Studt, John Nagl and Mary Nagl, the principal defendants to the original bill, by which they made Alexander S. Maltman, administrator de bonis non, an additional party, and set up proceedings in the probate court in the guardianship of appellee; the payment of forty-two dollars and twenty cents, balance of the proceeds of the sale, to appellee's mother, as guardian; the fact that she supported and cared for him as a minor up to her death, and the payment of taxes on the premises and the improvement of the same by the erection of a flat-building thereon in the year 1897. Appellee filed exceptions to portions of the cross-bill, and the exceptions were sustained. The same evidence taken before the former appeal was heard by the court and some additional evidence, and the court entered a decree dismissing the cross-bill as to the appellee for want of equity, and finding that he was the owner of an undivided one-fourth of the lot and the appellants John Nagl and Mary Nagl each owned three-eighths thereof. By the decree commissioners were appointed to make partition of the lot if susceptible of division without manifest prejudice to the parties, and if not susceptible of such division, to appraise its value, and it was ordered that the cause be referred to a master in chancery to take an account of rents and profits and to report the same to the court; that in case of sale the proceeds should not be disbursed until the settlement of the account, and that the question of solicitors' fees be reserved for further consideration by the court. From that decree said August T. Studt, Sofie Studt, John Nagl and Mary Nagl took this appeal.

The superior court could not err in adopting the opinion of this court on the former appeal as a guide to a correct conclusion in the further proceedings in the case, ⁴⁶⁷ and no attention will be given to arguments that the court erred in so doing.

The first question proper to be considered is whether the court erred in sustaining exceptions to the portions of the cross-bill setting out that appellee's mother supported him in his minority, up to her death; that he admitted the correctness of the guardian's account, and was bound to take notice of what estate his father left and from what estate he got his support, and that he had notice of the proceedings in the probate court or was bound to take notice of them. The care, maintenance and education of appellee by his mother, alleged in the cross-bill, could not operate to estop him from denying the validity of the sale, which was void and had no effect to transfer his property. None of the accounts showed that he received or retained, when he became of age, any part of the proceeds of the sale, or that he ratified or confirmed the proceeding in any manner, and the court did not err in sustaining the exceptions.

Alexander S. Maltman, the administrator de bonis non who made the sale, was a defendant to the cross-bill and answered it, and it is now insisted that the decree ought to be reversed because he was not made a defendant to the original bill. If there was anything in the point, it was in the case when it was considered before and the point was not made then. But he was not a necessary party. The estate had been settled and the administrator discharged for more than fifteen years before the original bill was filed. It was simply a bill for partition, and there was not only no administrator, but the bill sought no relief against Maltman. His interest was in no way affected by the decree.

On the former appeal it was held that the suit was not barred by any statute of limitations, but it was stated that there was some controversy as to the age of appellee, and the fact was not decided. Some further evidence was taken under the claim that the suit was barred; but whether the filing of the cross-bill and the taking of such evidence was ⁴⁶⁸ proper or not, the legal conclusion was unaffected. The evidence was that appellee was twenty-four years old on July 27, 1906, and he was therefore within the exception to sections 6 and 7 of the statute of limitations. Section 4 of the statute does not apply, for the reason that appellants did

not show a connected title in law or equity, which is required by that section.

The principal argument is, that the court erred in entering a decree for partition without requiring appellee to reimburse the appellant, August T. Studt, with the amount of money received by appellee's mother for his share of the purchase money, and one-fourth of all taxes and special assessments, and a like share of the value of the improvements on the lot. At the same time appellants deny that appellee is entitled to any interest in the improvements, and propose, as an alternative to the foregoing, that the court ought to have ordered the real estate sold separate from the improvements, and if it should not sell for more than nineteen hundred and seventy-five dollars, that the appellee would not be entitled to anything. Counsel say that both these propositions are based on the maxim that "he who seeks equity must do equity," and that the appellee must not be permitted to eat up the proceeds of the sale while he is an infant, and within three years after becoming of age claim the property without recompensing the purchaser for the nourishment received. As a matter of fact, the court found that the forty-two dollars and twenty cents, balance of the proceeds of the sale, was never received by the appellee from his guardian, and that subsequent to attaining his majority he never had any part of said sum, and this was in accordance with the evidence. We have already expressed an opinion that the maintenance of appellee by his mother had no effect to validate the void proceeding and sale.

If a complainant asks a court to grant to him equitable relief, the maxim that "he who seeks equity must do equity" requires the complainant to recognize and admit the equitable rights and claims of his adversary growing out of ⁴⁶⁹ the same subject matter. A court of equity will not give equitable relief unless the complainant concedes corresponding equitable rights of the defendant, but a court cannot deny to a complainant his rights unless he will do something to which the defendant is not justly entitled by the principles of equity. In this case the appellee takes title to the undivided one-fourth of the lot by descent from his father, and is entitled to disregard the proceeding and sale, which were void for want of jurisdiction. So far as his title is concerned, a court of law would recognize and enforce his right as fully and freely as a court of equity, the infirmity of title being apparent on the face of the record, which

showed service for the minors on the principal creditor. An heir might be prevented from questioning a sale without restoring what he had received under it, but in this case the appellee did not receive anything. The doctrines applicable to the facts of this case are, that the rule caveat emptor applies to the sale; that the debts of the estate of Peter Manternach were not liens on the lot and the doctrine of subrogation has no application; and that where the title of a purchaser at an administrator's sale fails for want of jurisdiction, he is not entitled, in equity, to be subrogated to the claims of creditors paid by the purchase money: *Burr v. Bloemer*, 174 Ill. 638, 51 N. E. 821; *Bishop v. O'Conner*, 69 Ill. 431; *Borders v. Hodges*, 154 Ill. 498, 39 N. E. 597; *Heppe v. Szczepanski*, 209 Ill. 88, 101 Am. St. Rep. 221, 70 N. E. 737. The decisions relied upon by appellants were made in cases where the sale was voidable, merely, at the election of an interested party, and where the court was asked to administer equitable relief. In the case of *Kinney v. Knoebel*, 51 Ill. 112, a judgment against a testator was employed as a means of selling real estate which was susceptible of division, for the purpose of raising money, beyond the amount of the judgment, to pay other debts of the estate. On a bill filed to redeem from the sale it was held to be fraudulent for the purpose of accomplishing under the forms of the law what the law did ⁴⁷⁰ not authorize; but as the purchaser had acted fairly and without fraud, and the purchase money relieved the estate from all indebtedness and gave a surplus to the executor for the benefit of the heirs, it was made a condition of the redemption that appellants should pay the purchase money, with interest, and taxes, and also for lasting improvements. In *Ebelmessenger v. Ebelmessenger*, 99 Ill. 541, the administrator was indirectly a purchaser at his own sale, and it was held that the purchase was not void but only voidable, and the administrator would be treated as a trustee and entitled to an account. Manifestly, in such a case the heirs or devisees might prefer to affirm the sale on account of the amount of the purchase price or for other reasons, or they might elect to have the sale set aside and the administrator treated as a trustee for them. *Lagger v. Mutual Union Loan Assn.*, 146 Ill. 283, 33 N. E. 946, was a similar case, where an administratrix was a purchaser at her own sale. The doctrine that an administrator buying at his own sale becomes a trustee was again applied, and it was held that a bill could be maintained to have the sale set

aside, on application, within a reasonable time, when the trustee would be entitled to an account. In *Bruschke v. Wright*, 166 Ill. 183, 57 Am. St. Rep. 125, 46 N. E. 813, the court had jurisdiction of the parties but set aside the foreclosure sale on account of the failure of the purchaser to fulfill his agreement to buy the equity of redemption. The sale was voidable only, and on ordering a resale the court protected the assignee of the certificate of purchase acting in good faith, which was in accordance with settled principles of equity. All the cases cited by appellants are of like character and were decided on the same principles.

It was proved that the tenants in common, together owning the undivided three-fourths of the lot, improved it in 1897 with a three-story flat-building. In case one tenant in common improves the property, if a bill is filed for partition the court will, if possible, allot the portion improved to the one making the improvement, without taking into account ⁴⁷¹ the value of the improvement: *Louvalle v. Menard*, 1 Gilm. 39, 41 Am. Dec. 161; *Dean v. O'Meara*, 47 Ill. 120; *Noble v. Tipton*, 219 Ill. 182, 76 N. E. 151, 3 L. R. A., N. S., 645. If such a division cannot be made, the court will allow to the one making the improvement the increased value of the premises caused thereby, and not the cost of the improvement: *Mahoney v. Mahoney*, 65 Ill. 406; *Cooter v. Dearborn*, 115 Ill. 509, 4 N. E. 388. But in this case appellants offered no evidence of the value of the land separate from the improvements or the extent to which the improvement enhanced the value of the lot, and the record is in the same condition as in the case of *Heppe v. Szczepanski*, 209 Ill. 88, 101 Am. St. Rep. 221, 70 N. E. 737, where the court was unable to determine what ought to be done concerning the improvements. Apparently the flat-building covers the whole frontage of the lot, and partition could not be made so as to give John Nagl and Mary Nagl a part covered by the improvements, and there is nothing in the record from which the court could charge appellee with his proportion of the amount which the improvements added to the value of the lot. There was no error in the decree as entered.

The court referred the cause to a master to state an account of rents and profits, and also provided that in case of sale the proceeds should not be disbursed until the adjustment of the account. In stating the account the amount which the improvements add to the value of the premises may be taken into consideration. The provision that the proceeds

of a sale shall not be disbursed until the adjustment of the account will enable the court to protect the equitable interests of the parties in case a sale shall be necessary.

Complaint is made that the court reserved the question of solicitors' fees for further consideration, but any action which the court may take in the future cannot be passed upon now and the propriety of it determined. The mere reservation does not present any question for decision.

The decree is affirmed.

The Law of Subrogation as Applied to Purchasers at Judicial Sales is discussed in the note to *American Bonding Co. v. National etc. Bank*, 99 Am. St. Rep. 528.

Jurisdiction of Minor Defendants in a proceeding by an administrator to sell land to pay debts of the estate is not acquired by leaving a copy of the summons with their mother and informing her of its contents, when she is a creditor of the estate, and the real party in interest, having resigned her office as administratrix in order to purchase at the sale: *Manternach v. Studt*, 230 Ill. 356, 120 Am. St. Rep. 310, and see cases cited in the cross-reference note thereto.

UNITED STATES v. HRASKY.

[240 Ill. 560, 88 N. E. 1031.]

APPEAL—Case Involving Elective Franchise.—An appeal from a decision in naturalization proceedings lies directly to the supreme court, since a "franchise" is involved. (p. 290.)

NATURALIZATION.—The Court has a Discretion to Determine Whether an Alien is Fit for Naturalization. This discretion is not arbitrary, but judicial and subject to review if abused. It is a legal, not a personal, discretion. (p. 290.)

WORDS AND PHRASES—"Character" and "Reputation."—Character consists of the qualities which constitute the individual; reputation the sum of opinions entertained concerning him. The former is interior; the latter external. The one is the substance; the other the shadow. (p. 291.)

NATURALIZATION—Good Character of Alien.—An alien who has habitually and knowingly violated the Sunday closing law by keeping the back door of his saloon open, and who intends to continue such practice after naturalization, should be denied naturalization as wanting in good moral character, notwithstanding many citizens violate the law in like manner. (p. 293.)

Milton M. Dearing, for the appellant.

561 Per CURIAM. October 29, 1908, appellee filed in the city court of East St. Louis a petition for naturalization under section 4 of the naturalization act of June 29, 1906: 34

Stat. Law, 596. That section provides, among other things, that it shall be made to appear to the satisfaction of the court that the person desiring citizenship has resided in the United States at least five years preceding his application and one year in the state, "and that during that time he has behaved as a man of good moral character, attached to the principles of the constitution of the United States and well disposed to the good order and happiness of the same." The statute further provides that two witnesses shall testify as to the applicant's residence, moral character and attachment to the principles of the constitution. When the petition came on for hearing in that court, February 13, 1909, appellee testified that he was a native of Austria and came to East St. Louis to live May 8, 1903; that he had been in the saloon business for more than three years; that he was familiar with the state law requiring the closing of the saloons on Sunday in Illinois and had known of its requirements for over two years; that in spite of that fact he had kept the back door of his saloon open on Sunday regularly, and, although he should take an oath to support the United States constitution and laws, he would continue to keep the back door of his saloon open on Sundays. The representative of the federal government objected to appellee being admitted to citizenship, on the ground that he ⁵⁶² had not shown himself to be a man of good moral character and well disposed to the good order and happiness of the United States, and that he manifested a disposition to continue to violate the laws of the state of Illinois, at the same time, however, conceding that, as a matter of general practice, saloon-keepers in East St. Louis and many other large cities of the state, in spite of the law upon the subject, regularly keep the back doors of their saloons open on Sundays, regardless of the nationality of the saloon-keeper, and further conceding "that this practice is permitted by the mayor and police authorities of the cities referred to." The court, while stating that the legal question was not free from doubt, overruled the government's objection, "for the reason that it conceded that people in the same business (saloon-keeping) in this city and Chicago and other cities in the state of Illinois, irrespective of nationality, keep the back doors of their saloons open on Sunday, and it seems to me to be unreasonable to require a man seeking citizenship in this country to observe the laws more strictly than native-born citizens are required to observe them, espec-

ially when the authorities of the cities referred to permit persons in that business to keep the back doors open on Sunday."

The first question necessary to decide is whether this case involves a franchise, as that term is used in section 118 of the practice act (Hurd's Stats. 1908, p. 1637), so that it was rightly appealed from the city court to this court. In *People v. Holtz*, 92 Ill. 426, in discussing the meaning of the word "franchise" as applied to appeals from trial courts to this court, we said: "If the constitutional convention and the General Assembly used the term according with its strict legal import—and we must presume they did—then in this country it can only embrace corporations, ferries, bridges, wharfs and the like where tolls are authorized to be taken, and we may add the elective franchise, as it is granted by the constitution to a ⁵⁶³ portion of the people to elect their officers." This decision has never been overruled on this point, and the reasoning of this court in *Board of Trade v. People*, 91 Ill. 80, *Chicago etc. R. R. Co. v. Dunbar*, 95 Ill. 571, and *People v. Cannon*, 236 Ill. 179, 86 N. E. 215, tends to support the same holding. The naturalization of the petitioner would permit him to exercise the elective franchise and a refusal would deprive him of that right. We think, therefore, it must be held that the elective franchise was involved, and that under the authorities just cited the appeal was properly taken to this court.

The city court of East St. Louis has conferred upon it jurisdiction to naturalize aliens as citizens: *Van Dyne on Naturalization*, pp. 11-19, inclusive; *Mills v. McCabe*, 44 Ill. 194; *Levin v. United States*, 128 Fed. 826, 63 C. C. A. 476. The United States statutes provide that the facts to justify the naturalization of the applicant shall appear to the satisfaction of the court. There is vested, therefore, in that tribunal the discretion to determine whether an alien is fit for admission. But this discretion is not arbitrary. It must be a sound judicial discretion, and if abused is subject to review: *Anderson Transfer Co. v. Fuller*, 174 Ill. 221, 51 N. E. 251; 9 Am. & Eng. Ency. of Law, 2d ed., p. 473. It must be regulated according to known rules of law, and is a legal and not a personal discretion: 14 Cyc. 384, and cases there cited.

The Sunday closing law, so called, is in force in all parts of this state: *People v. Busse*, 238 Ill. 593, 87 N. E. 840; *Koop v. People*, 47 Ill. 327; *Kroer v. People*, 78 Ill. 294. Has a person who has knowingly and habitually violated this

law behaved as "a man of good moral character" and one who is "well disposed to the good order" of this people?

While the word "character" is frequently used as synonymous with reputation, strictly speaking character is what a person is, while reputation is what he is supposed to be: 5 Am. & Eng. Ency. of Law, 2d ed., p. 852; 6 Cyc. ⁵⁶⁴ 892, and cases cited. In discussing a former United States statute which had the identical provisions as to good character, the United States circuit court, in *Re Spenser*, 5 Saw. 195, Fed. Cas. No. 12,234, said: "The applicant must not simply have sustained a good reputation, but his conduct must have been such as comports with a good character. In other words, he must have behaved—conducted himself—as a man of good moral character ordinarily would, should or does. Character consists of the qualities which constitute the individual; reputation the sum of opinions entertained concerning him. The former is interior; the latter external. The one is the substance; the other the shadow": See, also, *Words and Phrases*, 1061, 1063.

We concur in the view that the word "character," as used in this statute, is not synonymous with "reputation"; that what it is here intended to mean is what the person really is. Good behavior is defined to be conduct authorized by law; bad behavior such as the law punishes: *Bouvier's Law Dictionary*; 2 *Blackstone's Commentaries*, book 4, *251, *256. The phrase "during good behavior" is defined by the *Standard Dictionary* as "while conducting oneself conformably to law." *Anderson's Law Dictionary* defines behavior as "the bearing with respect to propriety, morals and the requirements of law." "Good moral character," within the meaning of this statute, may not be easy to determine in all cases and under all circumstances. The standard doubtless will vary from one generation to another. In discussing this question in *Re Spenser*, 5 Saw. 195, Fed. Cas. No. 12,234, the court said: "It may be said that an alien who has otherwise behaved as a man of good moral character during a residence in the country of at least five years ought not to be denied admission to citizenship on account of the commission, in that time, of a single illegal or immoral act. This suggestion is based upon the idea that it is sufficient if the behavior of the applicant was generally good—that the good preponderated over the evil. In some sense this ⁵⁶⁵ may be correct. For instance, the law of the state prohibits gaming and the unlicensed sale of spirituous liquors. These acts thereby be-

come immoral. But their criminality consists in their being prohibited and not because they are deemed to be intrinsically wrong—*mala in se*. Now, if an applicant for naturalization whose behavior during a period of five or more years was otherwise good was shown to have committed during that time either of those or similar crimes, I am not prepared to say that his application ought to be denied on account of his behavior; and yet it is clear that anything like habitual gaming or vending of liquors under such circumstances would constitute bad behavior—immoral behavior—and be a bar, under the statute, to admission to citizenship.”

Whether an applicant should be naturalized who has committed only a single offense of the nature of the one here charged is not in this case and need not be decided. Neither is the question as to whether an applicant should be naturalized who has formerly been a habitual violator of the law but admits his wrongdoing and for years has been observing the law. Both these hypothetical cases are very different from the one now before us. Can a man be said to be “well disposed to the good order” of this country when he has knowingly, willfully and habitually violated the laws of the state in which he resides and intends to continue doing the same if he is naturalized? The question answers itself. While it is true that this is a “government of the people, by the people, for the people,” it is just as true that it is a “government of laws and not of men.” It is essential to the safety and perpetuity of government that laws should be observed and enforced until repealed. The decision as to the wisdom of the Sunday closing statute rests with the legislature and not with the courts. As long as it is the law it should be observed. The courts should not be, and as a rule are not, charged with executive or legislative functions, but they are charged with the responsibility ⁵⁶⁶ of deciding, when the question is properly presented, that a law is in force even if it is not observed by all citizens or enforced by all public authorities.

In discussing the subject of naturalization in *Re Clark*, 18 Barb. 444, the supreme court of New York said: “The intention was to permit those who came here from abroad seeking a permanent home, who by five years of continuous residence manifested that intention, and by good behavior during all that time and an attachment to republican principles—a good behavior and an attachment to republican principles which

could be proved to the satisfaction of a court—had shown themselves worthy recipients of the benefits to be derived from citizenship and safe depositories of the powers it confers, to be admitted to these rights and the exercise of these powers by an order entered in open court after an examination into the facts of each case and a judicial decision upon the application—an examination which should be conducted with the same care and a decision which should be made with the same deliberation and solemnity as that which should accompany every other judicial act.”

Applying these principles of law, it is our duty to hold that a person has not behaved as a man of good moral character and one well disposed to the good order of this country if he has habitually, knowingly and willfully violated the Sunday closing law. The petitioner in this case had not only done this for the three years immediately preceding his application, but he stated that he intended, if he were naturalized, to continue to violate that law. His application to be naturalized should have been denied.

The judgment of the city court of East St. Louis admitting appellee to be a citizen of the United States of America will be reversed and set aside and the case remanded to that court, with directions to refuse appellee a certificate of naturalization.

An Alien cannot be Denied the Right to Become a Citizen by Naturalization, according to *Ex parte Johnson*, 79 Miss. 637, 89 Am. St. Rep. 665, simply because he shows great ignorance of the laws and constitution of the United States.

CASES

IN THE

SUPREME COURT

OF

IOWA.

CORRELL v. NATIONAL ACCIDENT SOCIETY.

[139 Iowa, 36, 116 N. W. 1046.]

ACCIDENT INSURANCE.—The Preliminary Notice of Death contemplated by an accident insurance policy is no part of the proofs of death. It is intended to advise the insurer that an accident has happened on account of which a claim will be made, and to the end that the insurer may for himself make inquiry into the facts and circumstances thereof; "full particulars," as required by the contract, means sufficient of the particulars to enable the insurer intelligibly to prosecute such inquiry, and not all the details of the accident. (p. 297.)

ACCIDENT INSURANCE—Notice of Death, Waiver of Insufficiency.—If an accident association raises no objections to the sufficiency of the notice of a death, but merely calls for the names of witnesses to the accident, which the beneficiary is not bound to furnish, the association is thereafter in no situation to complain of the sufficiency of the notice. (p. 298.)

ACCIDENT INSURANCE—Proof of Death—Absence of Blanks. An accident insurance association that has agreed to furnish blanks on which to make proof is in no position to complain, if it does not furnish them, that proof is not made on time. (p. 298.)

ACCIDENT INSURANCE—Proof of Death—Absence of Blanks.—Where the beneficiary under an accident policy gives notice to the insurer of the death of the insured in a letter sufficient to present the idea that she wants to be put in position to prove her claim, she has the right to wait for the coming of the blanks which the insurer has agreed to furnish, and, if they are not received within the time limit, to thereafter proceed in her own way and within a reasonable time to make up the proofs. What is a reasonable time is a proper question for the jury. (p. 298.)

WORDS AND PHRASES.—An "Apparent Danger" is one capable of being seen or otherwise comprehended through the medium of the senses. (pp. 299, 300.)

ACCIDENT INSURANCE—Exposure to Danger.—To Constitute Voluntary or Unnecessary Exposure, the danger must either have been known to the insured in fact, or one which in the exercise of his faculties as an ordinarily prudent person should in reason have been known to him. (p. 300.)

ACCIDENT INSURANCE—Exposure to Danger—Burden of Proof.—The burden of proof that the danger was apparent and the

exposure thereto voluntary or unnecessary, in an action on an accident insurance policy, rests upon the insurer. (p. 300.)

ACCIDENT INSURANCE—Death While on a Railroad Track. In an action on an accident insurance policy which exempts the insurer from liability for an injury sustained by the insured while on a railway roadbed, the insurer may rest his case when he proves that the insured met his death while on the track of a railroad by being struck by a moving train. (p. 300.)

ACCIDENT INSURANCE—Exposure to Danger.—Provisions in an accident insurance policy exempting the insurer from liability for an accident resulting from voluntary and unnecessary exposure, or while the insured is on a railway roadbed, present separate exemptions; and an instruction which recognizes them as constituting only one and as therefore presenting but a single defense, and which applies rules of proof thereto which are not applicable to both, is erroneous. (p. 300.)

Whipple & Brown and McBurney & McBurney, for the appellant.

Nichols & Nichols, for the appellee.

³⁷ BISHOP, J. The policies in suit were issued to the husband of plaintiff, John D. Correll. Each bears date July 20, 1905, and contains the same promises and provisions. For the purposes of the case, they may therefore be considered as one policy. Among other things, it is promised that if the insured meet death by reason of personal bodily injury, through external, violent, and accidental means, and resulting solely and independently of all other causes, the full sum stipulated shall be paid. Among other provisions are these: "The insurance under this contract does not cover suicide; willful or unnecessary exposure to apparent danger; intentional injuries ³⁸ inflicted by the insured or any other person; walking or being on the roadbed of any railway." Written notice of the happening of an accident is required to be given the society at once upon the happening thereof, and a failure to do so within ten days shall invalidate the policy. "Unless affirmative and final proofs, containing answers under oath to questions in the blank furnished by the society upon request for that purpose, are filed with the society within one month from date of death all claims for benefits based thereon shall be waived and forfeited to the society. . . . No legal proceedings for a recovery under this policy shall be brought within three months after the receipt by the society of proofs as above stated, and the society shall not be liable in any legal proceedings unless the same is commenced within six months from date of receipt of such proofs." The said John D. Correll met his death on

October 16, 1905. He was found at about 9:30 o'clock P. M. on the tracks of the Illinois Central Railroad at Waterloo, his body being cut in two. Defendant admits the death of Correll, but denies that the same was the result of personal bodily injury, through external, violent and accidental means, and independent of all other causes. Further, it resists payment on the ground of the violation and failure to comply with each of the policy provisions to which we have made reference above.

1. At the close of all the evidence, defendant moved for an instructed verdict on the grounds: (a) Written notice of the accident was not given, as required; (b) final proofs were not filed within the time and on blanks, as required; and (c) no final proofs having been filed, the action is not maintainable. The fact situation, shown without dispute, necessary to an understanding of the questions presented, is as follows: On October 18th, plaintiff wrote defendant, in substance, that her husband had been killed in Waterloo, "apparently crossing or waiting to cross the tracks of the Illinois Central Railroad to his boarding-house." After³⁹ making reference to her circumstances, the letter continues: "I wish you would please be so kind as to hasten settlement as I am very needy." And the letter closes by asking that the society "attend to this as promptly as possible." On October 24th, the secretary of the society responded, saying: "We have your letter notifying us that your husband was killed at Waterloo . . . and stating that it was apparent that he was crossing or waiting to cross railroad tracks. There seems to be some doubt about this, and I wish you would give us the names of the witnesses to the accident, or who were with him just prior to the accident, and the names of those who first arrived after the accident. We will give the claim our immediate attention, and if the proofs show that the claim is a valid one, you will be paid." Plaintiff in testimony neither affirms nor denies receipt of this letter, but she says that "the company never mailed me any blanks on which to make proof of death." And counsel for defendant do not pretend in argument that the evidence in the record makes showing to the contrary. Plaintiff says she waited for the society to act until in November, when, hearing nothing, she placed the matter in the hands of Mr. Nichols, her attorney. Nichols, as a witness, testified that he prepared proofs of death in the form of affidavits setting forth the circumstances of the accident and forwarded the

same to defendant in January, 1906. In the letter of transmittal, request was made that the society, after arriving at a conclusion, advise him of the action taken. On January 24th, the society responded, acknowledging receipts of the affidavits. In the letter, the statements in the affidavits respecting the circumstances surrounding the death of Correll are criticised as unreasonable, and it is said: "We have made a thorough investigation, and, while there were no witnesses, it is quite evident that he was on a railway roadbed, and on this account we supposed the claim abandoned." It is also said in the letter that no request had ever been made for blanks for proofs as required by the policy, and that "if it is your⁴⁰ intention to encourage . . . a claim, we will upon request furnish a blank, although it will be understood that in so doing we waive none of our rights." In a further letter, written on February 24, 1906, in answer to a request by Nichols for a copy of plaintiff's letter of October 18, 1904, the secretary of the society discussed the circumstances of the death of Correll as understood by the society, and closed by insisting that death came while the insured was on a railroad track in violation of the terms of the policy. This action was commenced on July 16, 1906.

Having the fact situation before us, we may now give attention to the several grounds of the motion, taking them up in their order. That the letter of plaintiff, considered as a notice of the accident, was not fatally deficient is very clear to our minds. By the letter the society was advised that Correll had been found dead at Waterloo, in the night-time, on a railroad track, and apparently death had been caused by his being run over by the cars. Until an investigation had been made, no more could be authoritatively stated. The requirement of a notice in such cases is that the fact of death be stated, and, as far as known at the time, the cause thereof: *Simons v. Iowa S. T. U. Assn.*, 102 Iowa, 267, 71 N. W. 254. The notice is no part of the proof, but is intended to advise the insurer that an accident has happened because of which a claim will be made under the policy, and to the end that such insurer may for itself prosecute inquiry into the fact of the accident, and the circumstances thereof. And "full particulars" must be taken to mean sufficient of the particulars to enable the insurer to intelligently prosecute such inquiry. It does not mean that all the details of the accident must be incorporated in the notice: 1 Cyc. 277, citing *Acci-*

dent Co. v. Card, 13 Ohio C. C. 154; Brown v. Fraternal Acc. Assn., 18 Utah, 265, 55 Pac. 63.

Moreover, in this case it is quite apparent that the defendant society did not come to regard the notice as wanting ⁴¹ in any respect until the matter of a defense to the action was being arranged. The secretary, in replying to the notice, did not intimate that it was deficient, but volunteered the information that payment would be forthcoming if the proof to be furnished warranted the making thereof. True, he asked the names of witnesses to the accident, but that was not a call for particulars. On the contrary, he was seeking an avenue of independent investigation, and as plaintiff was not bound on any theory to furnish the secretary with a list of witnesses, defendant is in no position to complain that she did not do so.

So, also, while the letter of plaintiff does not in form of words request the sending on of blanks, yet such was the clear purport thereof. The society had agreed to furnish blanks on which to make proofs, and the language used in the letter was sufficient to present to the mind of the average man the idea that she wanted to be put in position to prove up her claim. In all fairness, that was enough. If the policy of the society was to insist for nonliability unless requests for blanks were couched in a particular form of words, to be effective it should have not only incorporated the feature in its contract, but given warning that failure of observance would be fatal to the policy claim. As defendant had agreed to furnish blanks on which to make proofs, and as it did not do so, it is in no position to complain that proof was not made on time. Plaintiff had the right to wait for the coming of the blanks, and, if not received within the time limited, to thereafter proceed in her own way, and within a reasonable time, to make up the proofs: Gellatly v. Odd Fellows M. B. Assn., 27 Minn. 215, 6 N. W. 627. And what would be a reasonable time, as far as that was a matter at issue, was a question proper for the jury to decide.

The evidence makes it appear, as we have seen, that the proofs of death furnished were not objected to because lacking in form or sufficiency of statement within the requirements ⁴² of the policy. The criticism went only to the merits of the claim, and the offer made to the attorney, Nichols, to furnish blanks, did not amount to an objection to the form of the proof, or a demand for further proof. In this situation, we may forego further consideration of the proofs as fur-

nished. It remains only to be noticed that this action was commenced within six months from the time the proofs of death were filed with the society. These considerations lead to the conclusion that the motion to direct a verdict was properly overruled.

2. Without serious controversy, the evidence made it appear that John D. Correll came to his death by being run over by a train of cars. No one saw the accident, but the body was found on the track, severed in twain, the head and shoulders between the rails, and the remaining portion outside the south rail, and the place was some three hundred yards distant from any highway or other public crossing. In the thirteenth instruction, the court told the jury that the defendant had interposed these, among other, defenses: (a) Voluntary and unnecessary exposure; (b) that the said Correll met death while walking or being on the roadbed of a railway, and that "it is incumbent on the defendant to establish said several defenses by a preponderance of the evidence." The fourteenth instruction was as follows: "The defendant claims that the said Correll came to his death from voluntary or unnecessary exposure to danger, walking or being on the roadbed of a railway, and by reason of such exposure to danger the defendant is not liable in this action. Under this issue it is incumbent on the defendant to show that the said Correll consciously and intentionally exposed himself to danger by being or walking upon said railway roadbed. You are instructed that voluntarily being or walking upon said roadbed does not show of itself that he voluntarily or unnecessarily exposed himself to danger."

The instruction thus quoted is assailed as error, and ⁴³ we think with reason. Involved therein, without doubt, is a misconception of the state of the issues, and the proofs addressed thereto. Looking to the provisions of the policy, it will be observed that it excludes from liability accidents which happen as the result of "voluntary or unnecessary exposure to apparent danger." So, also, it excludes those that happen while "walking or being on the roadbed of any railway." These exceptions, as embodied in the policy, are separate and distinct, and it was clearly intended that proof of either one should be sufficient—as it would be—to avoid the policy. And the defendant, in answer, sought to advantage itself by pleading both the unwarranted exposure to an apparent danger, and that the death of Correll came while he was on a railway track. Now, an "apparent danger" is

one which is capable of being seen or otherwise comprehended through the medium of the senses: Webster's Dictionary; Century Dictionary. And to constitute a voluntary or unnecessary exposure, the danger must either have been known to the insured in fact, or one which in the exercise of his faculties as an ordinarily prudent person should in reason have been known to him: *Follis v. United States M. Acc. Assn.*, 94 Iowa, 435, 58 Am. St. Rep. 408, 62 N. W. 807, 28 L. R. A. 78. See, also, Cyc. 261, and cases cited in the notes. As proof that the danger was apparent, and that the exposure thereto was voluntary or unnecessary, are prime requisites of the defense, it follows quite logically that the insurer must assume the burden of making such proof: *Follis v. United States M. Acc. Assn.*, 94 Iowa, 435, 58 Am. St. Rep. 408, 62 N. W. 807, 28 L. R. A. 78.

But when we come to the defense of walking or being on a railroad track, the situation is in some respects materially different. It is the act of walking or being on a railroad track that is inhibited by the policy, and, conceding the burden to be on the insurer, no more is necessary in making out the defense than to bring forward proof of the naked fact, coupled, of course, with proof that the injury of death complained of occurred from a cause inhering in the hazards peculiar to such place: *McClure v. Great Western Acc. Assn.*, 133 Iowa, 44 224, 119 Am. St. Rep. 598, 110 N. W. 466; 4 Cooley on Insurance Briefs, 3187. In such cases the insurer may of right rely upon the general presumption that all men are sane and in the full possession of their faculties, and that the insured in going upon a railroad track went there knowingly and voluntarily. Accordingly, when the insurer has made proof of the fact that the insured met his death while on the track of a railroad, and by being struck by a train moving over such track, he may rest. The burden has then become shifted and it is for the party claiming under the policy to show that the presence of the insured on the track was for some sufficient reason excusable. The vice of the instruction, then, is that it recognizes the several exceptions found in the policy as constituting but one, and therefore presenting but a single defense, and it applies to that one the rules respecting proof which are separately applicable to each, and, as we have seen, not in all respects applicable to both.

As the case must be sent back for a new trial, we need not notice other errors assigned. None thereof are likely to again arise.

For the error in the fourteenth instruction, the judgment must be reversed and a new trial awarded.

The Words "Voluntary Exposure to Unnecessary Danger," when employed in an insurance contract, relate to dangers of a substantial character which the insured recognizes and to which he nevertheless consciously and purposely exposes himself, intending at the time to assume the risk of the danger: *Travelers' Ins. Co. v. Clark*, 109 Ky. 350, 95 Am. St. Rep. 374, and see the cases cited in the cross-reference note thereto. A policy of accident insurance, exempting from liability for injuries resulting from "voluntary or unnecessary exposure to danger," contemplates cases in which there is a realization that an accident will in all probability result, and an injury follow, from the action about to be taken, and the danger of injury must be obvious: *Hunt v. United States Acc. Assn.*, 146 Mich. 521, 117 Am. St. Rep. 655.

A Provision in an Insurance Policy Requiring the Insured to Furnish "Full Particulars" of an accident does not call for unnecessary details, but only such as will enable the insurer to determine whether a claim is likely to be made. Such a provision does not call upon the insurer to make and report an exhaustive examination of the circumstances attending the accident, or to decide the facts upon conflicting evidence: *Ward v. Maryland Casualty Co.*, 71 N. H. 262, 93 Am. St. Rep. 514.

WISE v. OUTTRIM.

[139 Iowa, 192, 117 N. W. 264.]

ESTATE OF DECEDENT—Amendment of Claim—Limitations.

Where a claim against an estate is stated informally and so as to be apparently barred by the statute of limitations, a subsequent statement referring to the first, which sets forth the claim with more formality, shows that it is founded on an express contract, and alleges additional matter preventing the bar of the statute of limitations, will be regarded as an amendment of the original statement, rather than a new one, and hence seasonably filed, although since the filing of the original claim the time for presenting claims has expired. (p. 305.)

ESTATE OF DECEDENT—Amendment of Claim—Limitations.

Where a claim against an estate is so stated that it apparently is barred by the statute of limitations, an amendment alleging additional matter which prevents the application of the statute does not destroy the identity of the claim within the meaning of the rules of amendment. (p. 305.)

ESTATE OF DECEDENT—Amendment of Claim—Notice.—

When the notice of the filing of a claim has been given, and the administrator appears to resist or defend, a further notice of an amendment to the claim is not necessary. (p. 306.)

ESTATE OF DECEDENT—Statement of Claim—Appearance.

The question whether the administrator appeared in resistance to a

claim filed against the estate is so peculiarly within the knowledge of the trial court that the supreme court is not disposed to interfere with its finding. (p. 306.)

ESTATE OF DECEDENT—Sufficiency of Statement.—The statutory provisions requiring a claim to be entitled in the name of the plaintiff and defendant and to be verified are directory only, and a failure to observe these formalities affects neither the jurisdiction of the court nor the plaintiff's right of action. (p. 306.)

ESTATE OF DECEDENT—Amendment Avoiding Statute of Limitations.—The allowance of an amendment to the statement of a claim, the effect of which is to avoid the bar of the statute of limitations, but which leaves the essential grounds of recovery substantially unchanged, is favored by the courts. (p. 306.)

ESTATE OF DECEDENT—Enforcement of Claim—Security for Costs.—The statute providing that a nonresident plaintiff may be required to give security for costs has no application to a proceeding to establish a claim against the estate of a decedent. (p. 307.)

ESTATE OF DECEDENT—Claim for Personal Services.—Services rendered by a girl in a man's family wherein she has gone to live will, upon his death, support a claim against his estate. (pp. 308, 310.)

WITNESS—Communications with Persons Since Deceased.—A statute forbidding testimony of communications with persons since deceased does not forbid the testimony of an interested party to communications and transactions between the deceased and a third person in which the witness took no part. (p. 309.)

PERSONAL SERVICES—Implied Contract for Compensation. Where a girl goes to live with a family and renders services therein during her minority and up to the time of her marriage at twenty-four years of age, her services are presumed to be rendered gratuitously. (p. 310.)

INSTRUCTIONS—Failure to Give, Whether Waived.—The court is required to state to the jury all issues joined by the pleadings upon which any evidence has been offered, and to state the law applicable thereto. A failure to do so is not waived by failure of counsel to ask or formulate an instruction. (p. 310.)

G. S. Toliver, J. A. Henderson and Wilson & Albert, for the appellant.

Owen Lovejoy and Howard & Howard, for the appellee.

194 WEAVER, J. James Outtrim died testate May 29, 1904, and his widow was appointed executrix of his will August 24, 1904. Notice of her appointment was published September 1 and September 8, 1904. On May 10, 1905, the plaintiff filed her duly verified claim against the estate in the following words, omitting caption and verification:

“The said Kittie D. Wise claims of the said Mrs. Dovey Outtrim, as executrix of said estate, the sum of \$2,500.65 as per the following statement:

195 "November 17, 1878. Commenced doing work and labor in housekeeping and nursing for James Outtrim, deceased.

Worked until February 17, 1884, being 275	
weeks, at \$4 per week.....	\$1,100 00
Interest at 6 per cent.....	1,400 65

Total.....\$2,500 65"

On July 22, 1905, plaintiff filed a written statement asking the allowance of her claim previously filed and alleging that said James Outtrim in his lifetime promised and agreed to make provision for payment of plaintiff's services out of his estate after his decease. To this claim defendant demurred, on the ground that plaintiff's right of action, if any she ever had, appears to be barred by the statute of limitations; that the alleged services are not shown to have been rendered in consideration of or reliance upon the promise pleaded in the petition for allowance; that the claim was not filed within six months after publication of the notice of defendant's appointment as executrix, and no notice of such filing was ever served on said executrix within twelve months as provided by statute; and that the petition for allowance is not entitled in the manner provided by the statute. The demurrer was overruled and thereupon defendant filed a motion showing that plaintiff was a nonresident of Iowa, and asking that she be required to give a cost bond. This motion was also overruled and, defendant answered the petition, pleading the statute of limitations and denying the claim made by the plaintiff. It is further pleaded that during the time when the alleged services were rendered by the plaintiff she was a member of the family of the testator, and that the service rendered by her was performed in that capacity, without promise or expectation of payment or compensation other than her support and maintenance, ¹⁹⁶ which she in fact did receive. Other matters are pleaded, but they are in substance the statements of grounds of demurrer to the plaintiff's claim, and will be considered in their proper place.

While making very numerous objections to the rulings of the trial court, counsel for appellant say in argument that "the principal controversy in the case is whether the provisions and requirements of law, with respect to the statement of claims against estates of deceased persons, the filing of the same, and giving notice thereof, are not to be observed, and may be disregarded as in the case at bar." To this phase of the case we therefore give first attention.

1. It will be seen from the statement of facts that the plaintiff filed her claim May 10, 1905, about eight months after the publication of notice of the executrix's appointment, and it therefore ranks as a claim of the fourth class. It is conceded that this paper was entitled in due form, and that notice thereof was duly given, shortly after the filing of the claim. On July 22, 1905, before the expiration of one year from the appointment of the executrix, the plaintiff filed the written petition already spoken of. That petition is in the following form:

"In the district court of the State of Iowa, in and for Greene county. August Term, 1905. In Probate. In the Matter of the Estate of James Outtrim, Deceased, Petition for Allowance of Claim. Your petitioner Kittie D. Wise states: That on and between the 17th day of November, 1878, and the 7th day of February, 1884, at the request of James Outtrim, she performed work and labor for him, as stated in her verified claim, filed in this court on the 10th day of May, 1905. That there is justly due and owing your petitioner, from the estate of said James Outtrim, the sum of \$2,500.65, as shown by said verified claim, which is made part hereof, no part of which has been paid or in any manner satisfied. That the said James Outtrim during his lifetime frequently promised and agreed to and ¹⁹⁷ with your petitioner that he would make provision for payment in full for her services, from his estate after his decease. That said deceased made no provision for said payment, and your petitioner asks that her claim be allowed against said estate of James Outtrim, in the sum of \$2,500.65, including interest, and the executrix of said estate be ordered to pay the same."

This writing was not verified, and no notice was given of its filing, except such notice as is imparted by the filing of a pleading or amendment in proceedings pending in court. It is the position of appellant that said petition is not a mere amendment to the original claim, or another statement of the same claim in more extended and formal terms, but that it should be regarded and treated as an independent claim, which must stand or fall without reference to the matter previously filed. Starting with this assumption, defendant states that this petition is defective in form, because not properly entitled in the name of the claimant as plaintiff, against the executrix as defendant, and because it is not verified. It is also urged that, even if objection to the form of pleading be waived, notice of its filing was not served within

the first year of administration as required by Code, section 3338. We are of the opinion, however, that the assumption that the claim filed May 10, 1905, and the written petition for allowance filed July 22, 1905, are distinct claims and not two statements of the same claim, cannot be upheld. While the petition does not in express words style itself an amendment or substitute for the claim originally filed, it does so state in substance. It expressly alleges the petitioner's claim to be for the services performed by her "as stated in her claim filed on the 10th day of May, 1905." The pleading is clearly an attempt to state plaintiff's original claim in a more formal manner, and not to state another and distinct claim, and the district court did not err in so treating it. In their argument upon this point counsel for appellant say that the claim as originally ¹⁹⁸ filed is based upon an implied contract, while in its amended form it is based upon an express contract. Even if this were a true interpretation of the record, it would not follow that the amendment sets up such new claim or cause of action as would permit the intervention of the statute of limitations where the period has expired since the filing of the original claim: See *Kuhn v. Brownfield*, 34 W. Va. 252, 12 S. E. 519, 11 L. R. A. 700.

But it is hardly correct to say that the claim as originally filed is founded upon an implied contract. The statement is a mere skeleton account, stating no facts from which the court or jury could determine whether the services for which payment is demanded were rendered without any agreement as to the time of payment thereof, or under an express agreement providing for the payment at some future date.

Doubtless, in this form, the statement was subject to a motion for a more specific showing, but before any such motion was made the amendment was filed, alleging a promise by which the testator bound himself to provide for the payment out of his estate at his decease. There is no necessary inconsistency between the claim as originally filed and as stated in the written petition. It is true that as originally filed the claim may have been demurrable, as being apparently barred by the statute of limitations, while the amendment states additional matter, which, if true, prevents the application of the bar. But this additional allegation does not destroy the identity of the claim. Due notice of the claim was given at or about the time of the original filing, and appellant appeared thereto by counsel.

There is some dispute as to the time when counsel appeared, and whether their appearance was to the claim as amended or simply to the matter originally filed. The controversy in this respect is of an immaterial character. The defendant was in court to defend ¹⁹⁹ against a claim of which she had been duly notified, and was bound to take notice of amendments made thereto. When the defendant has been duly served with the notice of filing of a petition or claim, and appears to resist or defend, there is no rule or statute which requires a new original notice to be given every time an amendment to the petition is filed.

Moreover, in the case at bar the question whether counsel for defendant expressly appeared to the amended claim within the first year of administration was raised in the trial court, and, after due hearing and consideration, it was decided in favor of plaintiff's contention that such appearance had been made, and the fact was by nunc pro tunc order entered of record. The matter was one so peculiarly within the knowledge of the trial court that we are not disposed to interfere with its finding. As the appearance, thus made of record, was within the year in which notice, if required, could have been served, the necessity of the notice was thereby obviated.

The objection to the amended petition because it was not properly entitled with the name of plaintiff and defendant and was not verified, is not fatal to the plaintiff's right to have her claim adjudicated in the usual manner. The statutory provisions in this respect, upon which appellant relies, are directory only, and failure to observe them affects neither the jurisdiction of the court nor the plaintiff's right of action: See *Smith v. Watson*, 28 Iowa, 218; *First Nat. Bank v. Stone*, 122 Iowa, 558, 98 N. W. 362; *Goodrich v. Conrad*, 24 Iowa, 254; *Wile v. Wright*, 32 Iowa, 451; *McCrary v. Deming*, 38 Iowa, 527.

The finding that there was such an appearance by defendant, to resist the allowance of plaintiff's claim, as to render the question of service of original notice immaterial makes it unnecessary to further discuss appellant's repeated contention that ²⁰⁰ the amended claim is upon a new and different cause of action; but we think it proper, in this connection, to say that the allowance of an amendment, the purpose of which is to avoid the effect of the statute of limitations, but leaves the essential grounds of recovery substantially unchanged, is favored by the courts and frequently upheld: *Myers v. Kirt*, 68 Iowa, 124, 26 N. W. 22; *Lottman v. Barnett*,

62 Mo. 159; Beard v. Simmons, 9 Ga. 4; Schieffelin v. Whipple, 10 Wis. 81; Chicago City R. R. Co. v. McMeen, 102 Ill. App. 318; Burns v. Schreiber, 48 Minn. 366, 51 N. W. 120; Sanger v. Newton, 134 Mass. 308; Davenport v. Holland, 56 Mass. 1; Wood v. Lenawee Circuit Judge, 84 Mich. 521, 47 N. W. 1103.

Other objections made to the sufficiency of the petition are not well founded. The pleading is somewhat obscure and indefinite in its statement, but we think it reasonably clear that plaintiff seeks an allowance of a claim for services alleged to have been rendered by her under a promise of the testator to pay the reasonable value thereof, and to make provision for such payment out of his estate at his death. Conceding the truth of this statement, as we must, for the purposes of the demurrer, they show a good cause of action. We are therefore of the opinion that the trial court correctly held the allegations of the petition a sufficient statement of a cause of action.

2. Nor was there any error in denying the motion to require plaintiff to give security for costs. The statute (Code, sec. 3847), which provides that a nonresident plaintiff may be required to give security for costs, has no application to proceedings of this nature. The main action or proceeding pending in the district court was the settlement of the testator's estate; and the presentation and proof of claims by creditors are mere incidents or details in the accomplishment of that end. The law opens the door of the court to all creditors, and invites them to come forward and present and prove their demands against ²⁰¹ the estate, and this right is not made dependent upon their ability to give a cost bond: See Meyer v. Evans, 66 Iowa, 179, 23 N. W. 386.

3. At the close of the plaintiff's testimony the appellant moved for a directed verdict in her favor, on the ground that plaintiff had failed to produce any evidence upon which the allowance of her claim could be upheld. The overruling of this motion is also assigned for error. We are quite clear that the evidence was sufficient to take the case to the jury for a verdict upon its merits. It was shown, without substantial dispute, that plaintiff, while still a young girl, went to live in the testator's family, remaining there for several years after she reached her majority. During these years she performed the duties of a domestic, and assisted in a material degree in caring for and nursing the testator's wife, who was most of the time in ill-health. That the services

thus rendered were of a valuable nature is beyond question, though the extent of their value is a matter of much controversy in the testimony. The fundamental question, and the one upon which the right of the plaintiff to recover necessarily turns, is whether these services, rendered after she arrived at her majority, were performed under an express promise of payment. On this subject George Outtrim, a son of the testator, testifies that he heard a conversation in which the testator told the plaintiff, after she arrived at the age of eighteen, that he and his wife could not get along without her, and could hire no one to take her place, and that if she would stay they would make it all right with her—that is, they would pay her for it—and that this conversation, in substance, occurred at different times during this period. He also says that at the time plaintiff was married testator told her that he would pay her when he was through with his property, would make provision so she could have it. This and other assurances and promises he says were made to plaintiff on various occasions, and at other ²⁰² times the testator expressed his purpose to plaintiff, and repeated his promise that he would provide for her for what she had done for him and his wife when he was through with his property. The credibility of this testimony was for the jury alone. It was also corroborated, to some extent, by other witnesses having no direct interest in the controversy. Assuming the truthfulness of this testimony, it is not within the province of the court to say that there is nothing upon which a verdict in the plaintiff's favor can be sustained.

4. The plaintiff testified as a witness in her own behalf; the defendant making timely objections that she was disqualified to testify to any personal transaction or communication between herself and the testator, with reference to matters involving her claim. Overruling the objection, the court permitted plaintiff to testify to one or more conversations which she claims to have taken place between the testator and his wife in her presence, in which the testator expressed his purpose to pay the plaintiff for her services. She also testified to similar conversations in her presence between the testator and his son, George Outtrim. The competency of plaintiff to testify to these conversations depends, of course, upon the fact whether she herself took part therein, or, in other words, whether the matter related by her constituted a personal transaction or communication between herself and the deceased. She repeatedly asserts that, while

hearing these statements, she took no part in the conversation, though upon her cross-examination she seems to say, under the interrogation of counsel, that at about the same time of the conversation between the testator and his wife they asked her if she would stay with them, and she replied in the affirmative. In the same connection, however, she says: "No, sir; I was not mixed in the conversation. They came to me afterward. No, sir; only as they asked me questions as I was about the work. Mr. Outtrim did not come to me until after the conversation was ²⁰³ over with him and his wife." Other statements made in her cross-examination, taken by themselves, would indicate that she did in fact have some part in the conversation of which she speaks as having occurred between the testator and his wife; but whether these discrepancies and inconsistencies in her testimony were the result of confusion, occasioned by the rapid fire of cross-examination, or of an attempt to manufacture testimony to fit the needs of her case, is an inquiry which goes to her credibility, and not, we think, to her competency to testify. Our statute upon this subject (Code, sec. 4604) has been frequently construed by us as not prohibiting the testimony of an interested party to communications and transactions between the deceased and a third person in which the witness took no part. The plaintiff, in the present instance, does repeatedly state that she took no part in the conversation which she attempts to relate; and although this assertion by her is somewhat weakened by her further statements upon cross-examination, the fact of her participation is not so clearly revealed that the court would be justified in excluding the testimony.

It is further objected that the plaintiff was permitted to testify as to the kind and amount of work required in caring for the testator's household and for his wife during her illness. In this, we think, there was no error. The plaintiff was neither asked nor permitted to state what service she herself rendered; and so far as her testimony is concerned, the labor and service performed in caring for the testator's wife and for his household may have been performed by any other member of the family.

Other errors are assigned by the appellant upon the admission and exclusion of evidence by the trial court. These objections are too numerous to permit of their discussion separately. We have examined the record, however, with refer-

ence to each of them, and find no error of which the appellant can justly complain.

5. As already stated, one of the defenses pleaded to.²⁰⁴ the plaintiff's claim is that she lived with the testator as a member of his family, receiving her support and maintenance as such, and that the services for which she claims payment were rendered in that capacity, and without any contract or agreement for the payment of wages. It is conceded that plaintiff became a member of testator's family, as alleged by the answer, when she was about ten years old, and continued to live with him until she was married, when about twenty-four years of age. It is too well established to require the citation of authorities that no legal right exists to recover for services thus rendered in the absence of an agreement therefor, and such agreement will not be presumed or implied from the mere fact that the services were performed. The presumption that the services were gratuitous is, of course, not conclusive, and may be rebutted by competent testimony, but the fact in this respect, as in others, is for the jury under proper instructions.

The trial court in its charge to the jury wholly omitted any instruction or direction upon this issue, and in this we find there was prejudicial error. The issue having been tendered by the answer, and the burden under the conceded facts being upon the plaintiff to establish the alleged contract or agreement by the testator to pay for her services, it was material and important that the law pertaining to the rights of the parties occupying these relations to each other should have been clearly stated to the jury. It is a familiar rule that the court is required to state to the jury all the issues joined by the pleadings upon which any testimony has been offered, and the error in failing so to do is not waived by the omission of the party to ask or formulate an instruction thereon. In this case the appellant did ask an instruction upon this issue; and while it was properly refused because of its defective form, it did serve to direct attention to this branch of the defense, and²⁰⁵ the court should have given proper instruction as to the law governing this defense.

We find no merit in other errors assigned, but for the reasons stated a new trial must be ordered.

Reversed.

STATEMENT OF CLAIMS AGAINST ESTATES OF DECEDENTS.**I. Form and Requisites of Statement.**

- a. General Requisites of Statement, 311.
- b. Necessity of Following Rules of Pleading, 312.
- c. Necessity of Writing, 313.
- d. Itemizing Accounts, 313.
- e. Stating Claims for Services, 314.
- f. Waiver of Insufficiency of Statement, 314.

II. Matters Necessary to Set Forth.

- a. Justness of Claim, 315.
- b. Credits, Payments, Offsets, Security and Usury, 315.
- c. Particulars of Unmatured or Contingent Claims, 317.
- d. Production of Instrument or Copy Thereof, 317.
- e. Reference to Lien or Security, 318.

III. Verification of Claim.

- a. Necessity of Verification, 318.
- b. Waiver of Verification, 320.
- c. Sufficiency of Verification, 320.
- d. Persons Verifying Claim, 322.

IV. Amendment of Claim.

- a. Right to Amend in General, 323.
- b. Effect of Statute of Limitations, 324.

I. Form and Requisites of Statement.

a. General Requisites of Statement.—The law does not prescribe any special form in which claims against the estate of a decedent must be stated. A statement is sufficient, without any particular formality, which will distinguish the claim from other similar claims, and inform the executor or administrator and the probate judge of the nature and the amount of the claim so as to enable them to act and pass advisedly upon it. The facts on which the claim is founded may be stated in general terms; and while they should be stated clearly, distinctly and concisely, they need not be recited with the precision and particularity of a complaint: *McGrath v. Carroll*, 110 Cal. 79, 42 Pac. 466; *Pollitz v. Wickersham*, 150 Cal. 238, 88 Pac. 911; *Appeal of Mead*, 46 Conn. 417; *Henderson v. Ilsley*, 19 Miss. (11 Smedes & M.) 9, 49 Am. Dec. 41; *Lenk Wine Co. v. Caspari*, 11 Mo. App. 382; *Walker v. Gay's Estate*, 73 Mo. App. 89; *Douglass v. Folsom*, 21 Nev. 441, 33 Pac. 660; *Kirman v. Powning*, 25 Nev. 378, 60 Pac. 834, 61 Pac. 1090; *Little v. Little*, 36 N. H. 224; *Goltra v. Penland*, 42 Or. 18, 69 Pac. 925; *Trigg v. Moore*, 10 Tex. 197. Other cases supporting these rules are *Halfman's Exr. v. Ellison*, 51 Ala. 543; *Appeal of Merwin*, 72 Conn. 167, 43 Atl. 1055; *Hannum v. Curtis*, 13 Ind. 206; *Noble v. McGinnis*, 55 Ind. 528; *Stapp v. Messeke*, 94 Ind. 423; *Culver v. Yundt*, 112 Ind. 401, 14 N. E. 91; *Thomas v. Merry*, 113 Ind. 83, 15 N. E. 244; *Worley v. Hineman* (Ind. App.), 29 N. E. 570; *Pickrell v. Hiatt*, 81 Iowa, 537, 46 N. W. 1062; *Hayner v. Trot*, 46 Kan. 70, 26 Pac. 415; *Schlee v. Darrow's Estate*, 65 Mich. 362, 32 N. W. 717; *Coots v. Morgan's Admr.*, 24 Mo. 522; *State v. Seehorn*, 139 Mo. 582, 39 S. W. 809; *In re Weeks*, 23 App. Div. 151, 48 N. Y. Supp. 908; *Hansell v. Gregg*, 7 Tex. 223.

Nevertheless, the law requires that claims be stated and described with such fullness and certainty as to apprise the personal representative of the decedent and the probate court of the facts involved, to the end that they may properly discharge their trust and defend the estate against unjust demands: *Floyd v. Clayton*, 67 Ala. 265; *McGrath v. Carroll*, 110 Cal. 79, 42 Pac. 466; *Carter v. Pierce*, 114 Ill. App. 589; *Dorsey v. Burns*, 5 Mo. 334; *Corson v. Waller*, 104 Mo. App. 621, 78 S. W. 656. It is said that the statement should so describe the claim that it may be distinguished from all similar claims: *Bibb v. Mitchell*, 58 Ala. 657. In Connecticut there is a rule requiring, in case of appeal from the proceedings of commissioners on estates in passing upon claims, "a statement of the amount and nature of the claim, and of the facts on which it is based," to be filed. Under this rule it has been held that a simple statement of a claim as an indebtedness, "To cash, \$1,700," is in proper form: *Appeal of Corr*, 62 Conn. 403, 26 Atl. 478.

The rule prevailing in Indiana is, that the statute does not require a regular complaint constructed according to the ordinary rules of pleading, but merely a succinct statement sufficient to advise the executor or administrator of the nature of the claim and the amount demanded, and sufficient also to bar another action on the same demand: *Crabb v. Atwood*, 10 Ind. 322; *Thompson v. Ristine*, 13 Ind. 459; *Post v. Pedrick*, 52 Ind. 490. The creditor is required to file only a succinct and definite statement of his claim, embracing therein those facts essential to make a prima facie showing of a subsisting indebtedness against the estate. But such a showing, at least, he must make. He must set forth such facts as are essential to constitute a prima facie claim, such as prima facie show the estate lawfully indebted to him: *Huston v. First Nat. Bank*, 85 Ind. 21; *Moore v. Stephens*, 97 Ind. 271; *Walker v. Heller*, 104 Ind. 327, 3 N. E. 114; *Culver v. Yundt*, 112 Ind. 401, 14 N. E. 91; *Thomas v. Merry*, 113 Ind. 83, 15 N. E. 244; *Lockwood v. Robbins*, 125 Ind. 398, 25 N. E. 455; *Stanley's Estate v. Pence*, 160 Ind. 636, 66 N. E. 51, 67 N. E. 441; *Taggart v. Tevanny*, 1 Ind. App. 339, 27 N. E. 511; *Cooper v. Griffin*, 13 Ind. App. 212, 40 N. E. 710.

Indefiniteness and uncertainty in the statement of a claim may be aided by the accompanying affidavit: *Stewart v. Small*, 11 Ind. App. 100, 38 N. E. 826; *Hyatt v. Bonham*, 19 Ind. App. 256, 49 N. E. 361.

b. Necessity of Following Rules of Pleading.—The law does not contemplate that the technical rules of pleading shall be observed in stating claims against estates of decedents. No formal complaint or pleadings are necessary. It is enough that the requirements stated in preceding paragraphs are observed: *Flinn v. Shackelford*, 42 Ala. 202; *Floyd v. Clayton*, 67 Ala. 265; *Stewart v. Cantrall*, 6 Blackf. 74; *Hannum v. Curtis*, 13 Ind. 206; *Ginn v. Collins*, 43 Ind. 271; *Wright v. Jordan*, 71 Ind. 1; *Davis v. Huston*, 84 Ind. 272; *Hileman v. Hileman*, 85 Ind. 1; *Davis v. Watts*, 90 Ind. 372; *Stapp*

v. Messeke, 94 Ind. 423; Windell v. Hudson, 102 Ind. 521, 2 N. E. 303; Stricker v. Barnes, 122 Ind. 348, 23 N. E. 263; Wolfe v. Wilsey, 2 Ind. App. 549, 28 N. E. 1004; Brown v. Sullivan, 3 Ind. App. 211, 29 N. E. 453; Sheeks v. Fillion, 3 Ind. App. 262, 29 N. E. 786; Doan v. Dow, 8 Ind. App. 324, 35 N. E. 709; Parrett v. Palmer, 8 Ind. App. 356, 52 Am. St. Rep. 479, 35 N. E. 713; Cooper v. Griffin, 13 Ind. App. 212, 40 N. E. 710; Gibbs v. Ely, 13 Ind. App. 130, 41 N. E. 351; Thornburg v. Buck, 13 Ind. App. 446, 41 N. E. 85; Woods v. Matlock, 19 Ind. App. 364, 48 N. E. 384; Hyatt v. Bonham, 19 Ind. App. 256, 49 N. E. 361; Walker v. Gay's Estate, 73 Mo. App. 89; Monumental Bronze Co. v. Doty, 99 Mo. App. 195, 73 S. W. 234, 78 S. W. 850; Fitzgerald's Estate v. Union Sav. Bank, 65 Neb. 97, 90 N. W. 994. It has been said that statements of claims in probate courts are on a footing with complaints in causes originating before justices of the peace: Taggart v. Tevanny, 1 Ind. App. 339, 27 N. E. 511; Knight v. Knight, 6 Ind. App. 268, 33 N. E. 456.

A claimant need not aver in what capacity, whether as a corporation, a partnership, or person, it acts in presenting the claim, as is required by statute of Iowa in ordinary actions, at least not unless objection is made by motion: University of Chicago v. Emmert, 108 Iowa, 500, 79 N. W. 285.

c. Necessity of Writing.—Administration statutes contemplate that claims against the estate of a decedent shall be presented in writing, and have a tangible form and substance which will enable the executor or administrator to act intelligently upon them. A mere verbal statement of a claim does not satisfy the requirements of the law: Millett v. Millett, 72 Me. 117; Williams v. Gerber, 75 Mo. App. 18; King v. Todd, 27 Abb. N. C. 149, 15 N. Y. Supp. 156; In re Morton's Estate, 7 Misc. Rep. 343, 28 N. Y. Supp. 82. Although the statutes may not positively demand that claims shall be put in writing, nevertheless there obviously is no other proper manner for placing them before the personal representative of the decedent and the probate judge: Pike v. Thorp, 44 Conn. 450.

d. Itemizing Accounts.—It is said that an executor may allow a claim against the estate which he is satisfied is just if found to be correct, although it is not made out in an itemized form: Lancaster v. Gould, 46 Ind. 397; Kinnan v. Wight, 39 N. J. Eq. 501. And an account stated may be presented without specifying the items: Estate of Swain, 67 Cal. 637, 8 Pac. 497. Yet it has been affirmed that a claim based upon an account should give the items in detail, and not simply a statement of the balance: Roethlisberger v. Caspari, 12 Mo. App. 514; and that in case of an open account, the items composing it, with the respective dates and amounts, should be stated: McHugh v. Dowd's Estate, 86 Mich. 412, 49 N. W. 216. A statement in a plain and formal manner of the items of an account, duly verified, is sufficient: Dodds v. Dodds, 57 Ind. 293; Ramsey v. Fouts, 67 Ind. 78. A demand consisting of several items must be presented in its entirety for allowance, and not piecemeal:

Pfeiffer v. Suss, 73 Mo. 245. But if one item is well stated, the complaint is not demurrable because of the insufficiency of other items of the claim: *Sheeks v. Fillion*, 3 Ind. App. 262, 29 N. E. 786.

e. Stating Claims for Services.—A statement for work and labor which sets forth that the services were rendered, by whom and for whom rendered, the nature, extent and value of the services, together with an affidavit that the amount stated is justly due and owing is sufficient: *Taggart v. Tevanny*, 1 Ind. App. 339, 27 N. E. 511; *Wood v. Land*, 35 Mo. App. 381. A claim presented for services rendered, stating the number of days' service in each month, the total for each year, and the grand total for all, with the wages per day, stating the full amount, and then crediting the amounts received on account during each year, leaving a certain balance is sufficient: *Ducan v. Thomas*, 81 Cal. 56, 22 Pac. 297. A claim showing to whom it is payable, and that it is for board, washing, fuel and attention during certain years at a specified amount per month for a specific number of months, is sufficiently definite: *Borum v. Bell*, 132 Ala. 85, 31 South. 454. To the same effect, see *Stewart v. Small*, 11 Ind. App. 100, 38 N. E. 826. A statement in a claim for "services in the care and aiding and supporting" the decedent's sister and minor children, is sufficiently broad to embrace a contribution of money: *Grimm v. Taylor's Estate*, 96 Mich. 5, 55 N. W. 447. If the claim is for services rendered to the decedent under an agreement for payment when she sold certain land which has not been sold, the claim is not defective because it does not describe the land: *Thompson v. Orena*, 134 Cal. 26, 66 Pac. 24. Presenting a claim "for services rendered the decedent at her request" is not a presentation of a claim for services rendered in consideration of the promise of the deceased to make a will in the claimant's favor: *Etchas v. Orena*, 127 Cal. 588, 60 Pac. 45.

A claim for services rendered by a married woman while living with her husband is community property, and should be presented in his name. But where such a claim, verified by the wife, is presented in her name by the husband, and is rejected, and an action is subsequently brought thereon by them, a judgment in their favor will not be reversed on account of the informality in the manner of the presentation: *Smith v. Furnish*, 70 Cal. 424, 12 Pac. 392; approved in *Sixta v. Heiser*, 14 S. D. 346, 85 N. W. 598.

A claim for medical services need not allege that the physician who rendered them was licensed as required by law: *Cooper v. Griffin*, 13 Ind. App. 212, 40 N. E. 710.

f. Waiver of Insufficiency of Statement.—Where no objection is made by the executor or administrator against the sufficiency of the form in which a claim is stated he may be deemed to have waived the insufficiency. If he relies on defects in form in refusing to allow a claim, he should make known his objection seasonably: *Brown v. Forst*, 95 Ind. 248; *Waltemar v. Schnick's Estate*, 102 Mo. App.

133, 76 S. W. 1053; *Ross v. Knox*, 71 N. H. 249, 51 Atl. 910; *Merino v. Munoz*, 99 App. Div. 201, 90 N. Y. Supp. 985; *Aiken v. Coolidge*, 12 Or. 244, 6 Pac. 712. As to the waiver of the absence or insufficiency of the verification of a claim, see post, p. 320. To quote from *Britain v. Fender*, 116 Mo. App. 93, 92 S. W. 179: "The demand must be in writing and must state the amount and nature of the claim with a copy of the instrument of writing or account upon which the claim is founded. These requisites are all jurisdictional, and, if the claimant fails to perform any of them, neither the probate court in the first instance, nor the successive courts to which an appeal may be prosecuted, obtains jurisdiction over the cause. But, to confer jurisdiction, no more is required of the claimant than the identification of his claim, in the exhibition thereof, to the extent that the administrator may be apprised of its amount and origin and thus be enabled to investigate it intelligently, and that a recovery upon it may operate as a bar to any other action based upon the same cause. With these purposes accomplished, the court acquires jurisdiction over the demand, and notwithstanding it may be meager, and to some extent indefinite, in statement, if the administrator is satisfied to go to trial upon the merits without first moving to have it made more definite and certain, he waives all such defects, and will not be heard to object to them, especially after verdict."

II. Matters Necessary to Set Forth.

a. **Justness of Claim.**—The statutes generally provide that a claim which is due when presented to the executor or administrator must be supported by an affidavit of the claimant or some one on his behalf that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same: Cal. Civ. Code, sec. 1494; Ariz. Rev. Stats., sec. 1743; Idaho Rev. Stats., sec. 5464; Mont. Code Civ. Proc., sec. 2604; Okl. Rev. Stats., sec. 1620; Wyo. Rev. Stats., sec. 4750. Without an affidavit of the justness of the claim it is not properly authenticated nor duly presented: *Green v. Brooks*, 25 Ark. 318; *Strickland v. Sandmeyer*, 21 Tex. Civ. App. 351, 52 S. W. 87; *Thurber v. Miller*, 14 S. D. 352, 85 N. W. 600. In Kentucky the claim must also be verified by another person than the claimant, who must state in his affidavit that he believes the claim to be just and correct and give the reasons for his belief: *Dewhurst v. Shepherd's Exr.*, 102 Ky. 239, 43 S. W. 253. An affidavit to a claim which is actually owing, but not then payable, is not false in stating that the claim is "due," since the word is here used in its primary sense of "owing": *Crocker-Woolworth Nat. Bank v. Carle*, 133 Cal. 409, 65 Pac. 951.

b. **Credits, Payments, Offsets, Security and Usury.**—Administration statutes usually provide that a claim presented to an executor or administrator must be supported by affidavit that no payments have been made thereon which are not credited and that there are no offsets to the same: See statutes cited in preceding paragraph:

McWhorter v. Donald, 39 Miss. 779, 80 Am. Dec. 97. This statutory requirement must be at least substantially complied with in order to entitle the claim to allowance: Perkins v. Onyett, 86 Cal. 348, 24 Pac. 1024; Cecil v. Rose, 17 Md. 92; Walters v. Prestidge, 30 Tex. 65; but a substantial compliance with the statute is enough: State v. Collins, 16 Ark. 32; Griffith v. Lewin, 129 Cal. 596, 62 Pac. 172; Merchants' Bank v. Ward's Admr., 45 Mo. 310; Gaston v. McKnight, 43 Tex. 619. The rule, as expressed in some jurisdictions, is that the affidavit must show what amounts, if any, have been paid, and any debts due from the claimant to the estate: Brown v. Brown, 45 S. C. 408, 23 S. E. 137. A verification stating that the sum is justly due, that no payments have been made thereon which are not credited, and that there are no offsets except some small items the exact amount of which is not known to the affiant, but which she is willing to have credited upon the same, is sufficient, since the exception is as definite as the claimant can truthfully make it: Guerin v. Joyce, 133 Cal. 405, 65 Pac. 972. An affidavit presenting a note with credits indorsed thereon is not defective in not stating the amount claimed to be due: Waltemar v. Schnick's Estate, 192 Mo. App. 133, 76 S. W. 1053.

An affidavit to a claim presented by an administratrix is insufficient if it does not state that no payments have been made: In re Clapsaddle's Estate, 4 Misc. Rep. 355, 24 N. Y. Supp. 313.

A claimant is not required to specify in his affidavit an independent demand due from him to the estate which the administrator may or may not plead as a counterclaim at his option: Osborne v. Parker, 66 App. Div. 277, 72 N. Y. Supp. 894. And the Missouri statute requiring a claimant to make affidavit that all just credits and offsets have been allowed does not apply in case the claim is made as a counterclaim by the creditor in an action in another court than the probate tribunal to establish a claim against him in favor of the estate: Stiles v. Smith, 55 Mo. 363.

The statutory provision that the credits to which the estate is entitled shall be set forth in the claim is complied with where the credit is not itemized but is stated in gross: Miller v. Eldridge, 126 Ind. 461, 27 N. E. 132. But in Delaware, under the rule that the claim must disclose all credits within the plaintiff's knowledge, it has been held not sufficient to make a general reference to the defendant's books for credits: Lolley v. Needham's Exrs., 1 Har. 86.

The statutes of some states require that the affidavit shall state that there is no setoff or discount: Worthley's Admrs. v. Hammond, 76 Ky. (13 Bush) 510; Ex parte Hanks, Dud. Eq. 231; or any usury therein: Leach v. Kendall's Admr., 76 Ky. (13 Bush) 424; Cheairs' Exrs. v. Cheairs' Admrs., 81 Miss. 622, 33 South. 414. A "setoff" is not a "discount" within this rule, and hence the claimant must swear both that there is no setoff and no discount, otherwise his claim is not well presented: Trabue's Exr. v. Harris, 58 Ky. (1 Met.) 597.

In some of the states the affidavit should state, if such is the case, that no security has been received for the payment of the debt: *Smoot's Admr. v. Bunbury's Exr.*, 1 Har. & J. 136; *McWhorter v. Donald*, 39 Miss. 779, 80 Am. Dec. 97.

c. Particulars of Unmatured or Contingent Claims.—Some states have a statutory provision that if the claim is not due when presented, or is contingent, the particulars of the claim must be stated, but no affidavit is necessary: *Verdier v. Roach*, 96 Cal. 467, 31 Pac. 554. Where a decedent had contracted to take certain shares of stock at a certain time, the presentation to his administrator of a verified claim for the price agreed, including a copy of the contract, and an offer to surrender the certificate, is a sufficient statement of the "particulars of the claim": *Maurer v. King*, 127 Cal. 114, 59 Pac. 290. And where a claim is for services rendered to the decedent under an agreement that they should be paid when she sold certain land, which she did not sell, the claim is not defective because it fails to describe the land: *Thompson v. Orena*, 134 Cal. 26, 66 Pac. 24. A promissory note, whether matured or not, requires no statement of particulars other than that found upon its face. Hence a claim based thereon is sufficient if it contains a copy of the note followed by the statutory affidavit: *Landis v. Woodman*, 126 Cal. 454, 58 Pac. 857; *Crocker-Woolworth Nat. Bank v. Carle*, 133 Cal. 409, 65 Pac. 951. An affidavit to a claim, actually owing but not then payable, is not false in stating that the claim is "due," for the word is here used in its primary sense of "owing": *Crocker-Woolworth Nat. Bank v. Carle*, 133 Cal. 409, 65 Pac. 951.

d. Production of Instrument or Copy Thereof.—If a claim against the estate of a decedent is founded upon a written instrument, a copy thereof must accompany the claim. The original instrument, however, need not be exhibited, unless demanded; the copy is sufficient. In case the original is demanded, it must be exhibited unless lost or destroyed: *Posey v. Decatur Bank*, 12 Ala. 802; *Estate of McDougald*, 146 Cal. 191, 79 Pac. 878; *Pulley v. Perfect*, 30 Ind. 379; *Bryson v. Kelley*, 53 Ind. 486; *Baker v. Chittuck*, 4 G. Greene, 480; *Kentucky Title Co. v. English*, 20 Ky. Law Rep. 2024, 50 S. W. 968; *McKinney v. Hamilton's Estate*, 53 Mich. 497, 19 N. W. 263; *Waltemar v. Schnick's Estate*, 102 Mo. App. 133, 76 S. W. 1053; *Britain v. Fender*, 116 Mo. App. 93, 92 S. W. 179; *Dorias v. Doll*, 33 Mont. 314, 83 Pac. 884; *McFarland v. Fairlamb*, 18 Wash. 601, 52 Pac. 239; *First Nat. Bank v. Root*, 19 Wash. 111, 52 Pac. 521. In Indiana, it is sufficient to file a note against the estate without accompanying it with a formal complaint: *Garrigus v. Home Frontier etc. Soc.*, 3 Ind. App. 91, 50 Am. St. Rep. 262, 28 N. E. 1009. See, too, *Price v. Jones*, 105 Ind. 543, 55 Am. Rep. 230, 5 N. E. 683. In a statement based upon a note so torn and mutilated that the signature of the maker does not fully appear thereon, and alleging that the torn portion is lost, it must also be alleged that the mutilation was done innocently and was the result of accident or mistake:

McCullough v. Smith, 24 Ind. App. 536, 79 Am. St. Rep. 281, 57 N. E. 143.

Where a note secured by mortgage given by the decedent has been assigned to the administratrix, the filing of a copy of the note with the claim is sufficient without a copy of the assignment: Estate of McDougald, 146 Cal. 191, 79 Pac. 878.

e. Reference to Lien or Security.—If the claim is secured by a mortgage or recorded lien it is sufficient, according to the statutes of some states, to describe the lien or mortgage, and refer to the date, volume and page of its record: Consolidated Nat. Bank v. Hayes, 112 Cal. 75, 44 Pac. 469; Moore v. Russell, 133 Cal. 297, 85 Am. St. Rep. 166, 65 Pac. 624; Estate of McDougald, 146 Cal. 191, 79 Pac. 878. But either this must be done, or the claim be accompanied by a copy of the mortgage; it is not enough to present the note, which recites that it is secured by mortgage: Bank of Sonoma County v. Charles, 86 Cal. 326, 24 Pac. 1019; Evans v. Johnston, 115 Cal. 180, 46 Pac. 906; Estate of Turner, 128 Cal. 388, 60 Pac. 967. In case the mortgage is ineffectual because the decedent had no interest in the encumbered property, the note is properly presented without making any reference to the mortgage: Otto v. Long, 127 Cal. 471, 59 Pac. 895. According to some authorities, the affidavit should state, if such is the case, that no security for the debt has been received: Smoot's Admr. v. Bunbury's Exr., 1 Har. & J. 136; McWhorter v. Donald, 39 Miss. 779, 80 Am. Dec. 97.

III. Verification of Claim.

a. Necessity of Verification.—The statutes usually require that claims presented to an executor or administrator for allowance must be supported by affidavit that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same: Perkins v. Onyett, 86 Cal. 348, 24 Pac. 1024. Other decisions on this question are: Winningham v. Holloway, 51 Ark. 385, 11 S. W. 579; Smith v. Denman, 48 Ind. 65; Clawson v. McCune, 20 Kan. 337; Leach v. Kendall's Admr., 76 Ky. (13 Bush) 424; Hood v. Maxwell, 23 Ky. Law Rep. 1791, 66 S. W. 276; Swift Iron & Steel Works v. Schulte, 8 Ky. Law Rep. 787; Watson v. Watson, 58 Md. 442; Walker v. Nelson, 87 Miss. 268, 39 South. 809; In re Baker, 27 Misc. Rep. 126, 57 N. Y. Supp. 398; Terry v. Dayton, 31 Barb. 519. It is sometimes said that the statutory requirement that the claim be verified is imperative: Worley v. Hineman (Ind. App.), 29 N. E. 570; or that the verification is a step preliminary to the conferring of jurisdiction on the court, and a condition precedent to the authority of the court to allow the claim: McWhorter v. Donald, 39 Miss. 779, 80 Am. Dec. 97; Cheairs' Exrs. v. Cheairs' Admr., 81 Miss. 662, 33 South. 414; Fitzpatrick v. Stevens, 114 Mo. App. 497, 89 S. W. 897; Clancey v. Clancey, 7 N. M. 405, 37 Pac. 1105, 38 Pac. 168; modified, if not overruled, in Gutierrez v. Scholle, 12 N. M. 328, 78 Pac. 50. Some courts, how-

ever, regard the statute prescribing verification as merely directory; *Wile v. Wright*, 32 Iowa, 451; *Wise v. Outtrim*, 139 Iowa, 192, ante, p. 301, 117 N. W. 264; and we shall presently see that other courts hold that the affidavit may be waived, and that an insufficient verification does not necessarily vitiate the allowance of the claim.

In Arkansas a plaintiff who sues an executor without first making the affidavit authenticating his claim prescribed by statute will be nonsuited: *Ross v. Hine*, 48 Ark. 304, 3 S. W. 190. But in Kentucky where there is a failure to make affidavit of the justness of the claim as required by statute, before suing an heir thereon, the petition should not be dismissed absolutely, but simply without prejudice: *Teeter v. Anderson*, 8 Ky. Law Rep. 108.

Under the Alabama statute claims presented directly to the executor or administrator need not be verified, but only those filed with the judge of probate. A valid presentation of a claim, therefore, may be made to the executor or administrator directly without verification: *Peevey v. Farmers' & Merchants' Nat. Bank*, 132 Ala. 82, 31 South. 466; *Nicholas v. Sands*, 136 Ala. 267, 33 South. 815. This rule appears to be recognized also in *Rayburn v. Rayburn*, 130 Ala. 217, 30 South. 365.

Only those demands created by the decedent, not those created by his administrator, need be verified by the claimant: *Polly's Exr. v. City of Covington*, 10 Ky. Law Rep. 361; *Berry v. Graddy*, 58 Ky. (1 Met.) 553. And no verification seems to be required in Arkansas of a claim on which action was pending at the time of the death of the decedent: *State Bank v. Tucker*, 15 Ark. 39; but in other states such claims must be authenticated as required in other cases: *Faulkner v. Hendy*, 123 Cal. 467, 56 Pac. 99; *Anderson v. Schloesser*, 153 Cal. 219, 94 Pac. 885.

An affidavit seems unnecessary to support a judgment claim: *Goodrich v. Fritz*, 9 Ark. 440; *Cullerton v. Mead*, 22 Cal. 95; *Crane v. Moses*, 13 S. C. 561. But in Kentucky, before a judgment can be admitted as a claim against a decedent's estate, it must be verified: *Curry's Admr. v. Bryant's Admr.*, 70 Ky. (7 Bush) 301.

Under the Texas statute specifying the manner in which "claims for money," etc., shall be verified before presentation to the executor or administrator, it has been decided that a mortgage is not a "claim for money": *Simpson v. Reily*, 31 Tex. 298. But in Kentucky a judgment for the enforcement of a mortgage lien on the land of a decedent should not be rendered without a verification of the claim as prescribed by statute: *Tatum v. Gibbs*, 19 Ky. Law Rep. 695, 41 S. W. 565.

The Arkansas statute requiring that claims shall be authenticated by affidavit has been held to have no application where a bank seeks to enforce a lien conferred by the statutes of that state on a deceased debtor's stock: *Mellroy Banking Co. v. Dickson*, 66 Ark. 327, 50 S. W. 868.

A judgment cannot be rendered on a claim against the estate of a decedent on an indebtedness for an express trust fund for which

he failed to account, if the claim is not authenticated by affidavit that it is just and has not been paid: *McIlroy Banking Co. v. Dickson*, 66 Ark. 327, 50 S. W. 868.

b. **Waiver of Verification.**—Undoubtedly, the executor or administrator or the probate judge may object to a claim and decline to allow it if it is not supported by the affidavit prescribed by statute, or if the affidavit is defective and does not fulfill the statutory requirements. But it would seem that the omission to verify a claim may be waived, and without doubt defects in the affidavit not seasonably objected to may be regarded as waived: *Hollinger v. Holly*, 8 Ala. 454; *Albertson v. Prewitt*, 20 Ky. Law Rep. 1309, 49 S. W. 196; *Lyon's Exr. v. Logan County Bank's Assignee*, 25 Ky. Law Rep. 1668, 78 S. W. 454; *Seymour v. Goodwin*, 68 N. J. Eq. 189, 59 Atl. 93. In New Mexico a judgment allowing a claim against an estate which is not sworn to is not void for want of jurisdiction; *Gutierrez v. Scholle*, 12 N. M. 328, 78 Pac. 50. And in California the rule is that the allowance of claims, upon a defective verification, is not void; it is a judicial act, which entitles the claims to rank as acknowledged debts of the estate, to be paid in due course of administration, although the heirs, not being parties, are not concluded, and have the right to question the allowance at the settlement of the estate: *Estate of Swain*, 67 Cal. 637, 8 Pac. 497; *Consolidated Nat. Bank v. Hayes*, 112 Cal. 75, 44 Pac. 469. But in Texas the statutes seem to contemplate that the allowance of an unverified claim is of no force and effect: *Anderson v. Cochran*, 93 Tex. 583, 57 S. W. 29.

In *Alter v. Kinsworthy*, 30 Ark. 756, it is said that the omission to verify a claim may be taken advantage of at any time before trial and final judgment. And in *Guerin v. Joyce*, 133 Cal. 405, 65 Pac. 972, it is said that when no objection to a verification is raised in an action to recover thereon by demurrer or answer, the defendant should not be allowed to make such objection at the trial.

c. **Sufficiency of Verification.**—The affidavit to support a claim against the estate of a decedent is only a verification: *Empire State Min. Co. v. Mitchell*, 29 Mont. 55, 74 Pac. 81. In making it the requirements of the statute must be substantially complied with: *Pico v. De La Guerre*, 18 Cal. 422; *Perkins v. Onyett*, 86 Cal. 350, 24 Pac. 1024; but a substantial compliance is all the law demands: *Griffith v. Lewin*, 129 Cal. 596, 62 Pac. 172; *Taggart v. Tevanny*, 1 Ind. App. 339, 27 N. E. 511; *Thompson v. Bailey*, 1 Ky. Law Rep. 321; *Cochran v. Germania Nat. Bank*, 8 Ky. Law Rep. 790; *Foster v. Shaffer*, 84 Miss. 197, 36 South. 243. It is not necessary to use or aver in the affidavit the exact words of the statute, but only the substance: *Story's Admr. v. Story*, 32 Ind. 137; *Taggart v. Tevanny*, 1 Ind. App. 339, 27 N. E. 511; *Crosby v. McWillie*, 11 Tex. 94. Still the affidavit must contain the substantial requisites prescribed by the statute: *Gillmore v. Dunson*, 35 Tex. 435. In *Beddow v. Wilson*, 28 Ky. Law Rep. 661, 90 S. W. 228, a verified answer, contain-

ing the proper statutory averments, is held a sufficient affidavit of a claim.

An affidavit to an account that it is correct according to the claimant's best knowledge and belief is declared insufficient in *Dennis v. Coker's Admr.*, 34 Ala. 611.

In some of the earlier cases it is decided that the omission of the affiant's signature to the affidavit is not a fatal defect, at least if the jurat is properly authenticated: *Mahan v. Owen*, 23 Ark. 347; *Alford's Admrs. v. Cochrane*, 7 Tex. 485. But the statutes now generally contemplate that a claim cannot be duly presented unless the affidavit is signed by the affiant, and it is held that the omission of such signature is not cured by a properly signed jurat: *Anderson v. Cochran*, 93 Tex. 583, 57 S. W. 29; *Lanier v. Taylor* (Tex. Civ. App.), 41 S. W. 516.

When it appears from the affidavit that the same person is "claimant" and "affiant," the use of one of these words rather than the other is immaterial: *Davis v. Browning*, 91 Cal. 603, 27 Pac. 937; *Warren v. McGill*, 103 Cal. 153, 37 Pac. 144; *Dorais v. Doll*, 33 Mont. 314, 83 Pac. 884. And the omission of the word "dollars," in stating the amount of the claim, is not fatal: *Hall v. Superior Court*, 69 Cal. 79, 10 Pac. 257.

Claims must be accompanied by the original affidavit, rather than copies: *Ash v. Clarke*, 32 Wash. 390, 73 Pac. 351.

Under the early probate practice in some jurisdictions the affidavit to a claim could be made ore tenus. If the claimant stated as a witness on oath the necessary facts required in an affidavit under the statute, it would supply the absence of the affidavit: *Overly's Exr. v. Overly's Devises*, 58 Ky. (1 Met.) 117; *Kincheloe v. Gorman's Admrs.*, 29 Mo. 421. But the statutes now very generally demand a written affidavit to support claims against the estate of a decedent.

If a statute requiring the verification of claims is regarded as merely directory, then the oath may be administered after the claim has been filed: *Goodrich v. Conrad*, 24 Iowa, 254. But if the statute is regarded as mandatory, perhaps an affidavit given after the filing of the claim comes too late: *Hanna v. Fisher*, 95 Ind. 383. In Indiana, if a claim has been properly verified, acceptance of an additional unverified statement subsequently filed in open court, with leave first obtained, is no ground for reversing a judgment for the claimant: *Taggart v. Tevanny*, 1 Ind. App. 339, 27 N. E. 511. And in Arkansas, if a creditor presenting a claim for services rendered the testator rendered an account for the same services to the testator, in which the amount was smaller, the smaller account may be allowed without being sworn to, the original account having been properly authenticated: *Clark v. Bomford*, 20 Ark. 440. The statutory requirement of verification is not fulfilled by an affidavit, made within the lifetime of the decedent, to the effect that he was then justly indebted to the affiant and had paid nothing toward the satis-

faction of the demand: *Wilkerson v. Gorden*, 48 Ark. 360, 3 S. W. 183.

d. Persons Verifying Claim.—The affidavit to a claim should ordinarily be made by the claimant himself, not by his attorney, agent or other representative: *Beirne v. Imboden*, 14 Ark. 237; *Macoleta v. Packard*, 14 Cal. 178; *Zachary v. Chambers*, 1 Or. 321. An affidavit by the husband of the creditor is insufficient: *McWhorter v. Donald*, 39 Miss. 779, 80 Am. Dec. 97. And an attorney cannot prove a claim by swearing that he has it for collection; he must prove it in the name of the owner of the claim: *Westfield v. Westfield*, 13 S. C. 482.

The statutes of many states now recognize that a claim may be verified by another person than the claimants, provided he is cognizant of the facts: *Mason v. Bull*, 26 Ark. 164; *Lanigan v. North*, 69 Ark. 62, 63 S. W. 62; *Hansell v. Gregg*, 7 Tex. 223; *McIntosh v. Greenwood*, 15 Tex. 116; *Heath v. Garrett*, 46 Tex. 23. The rule expressed in some states is that when the affidavit is made by a person other than the claimant, he must set forth in the affidavit the reason why it is not made by the claimant; and under this rule it has been held that an affidavit by an agent must state why the principal does not make it: *Perkins v. Onyett*, 86 Cal. 348, 24 Pac. 1024; and that an affidavit by an officer of a corporation must assign an excuse for his company not making it when it does not disclose that the claimant is a corporation: *Empire State Min. Co. v. Mitchell*, 29 Mont. 55, 74 Pac. 81. An affidavit by one of the attorneys of the claimant, reciting that the claimant is a corporation and none of its officers except such attorneys reside in the county, is sufficient: *Empire State Min. Co. v. Mitchell*, 29 Mont. 55, 74 Pac. 81. A form of verification of a claim presented by a corporation will be found in *Consolidated Nat. Bank v. Hayes*, 112 Cal. 75, 44 Pac. 469. An affidavit to support the claim of a corporation must, under the Arkansas statute, be made by its cashier or treasurer, not by its president: *Lanigan v. North*, 69 Ark. 62, 63 S. W. 62. And according to *Cox v. Higginbotham's Admr.*, 25 Ky. Law Rep. 1057, 76 S. W. 1079, where the president of a bank is administrator, its claim against the estate may be properly sworn to by its cashier, who is familiar with its books and accounts, and by its managing agent. The sufficiency of the affidavit of the treasurer of a corporation is passed upon in *Deringer's Admr. v. Deringer's Admr.*, 5 Houst. 528; *Fidelity Ins. Trust & Safe Deposit Co. v. Niven*, 6 Houst. 64.

According to *Gregory v. Bailey's Admr.*, 4 Har. 256, the acting partners of a firm must all join in probating a demand, but dormant or retired partners, or partners permanently absent from the country, need not join. Generally, however, the affidavit of one joint claimant is sufficient to authenticate the claim: *Ashley v. Gunton*, 15 Ark. 415. But it has been held that a debt due from the estate of a decedent to six persons in severalty cannot be verified by the oaths of three alone: *Cecil v. Rose*, 17 Md. 92.

The affidavit of a third person to a claim must state that the affiant has knowledge of the correctness of the claim, and that it is due: *Pickle's Admr. v. Ezzell*, 27 Ala. 623. An affidavit by an agent that "he knows the within claim is just, true, and unpaid, as charged against the estate of Jesse Beene, deceased," is sufficient: *Beene's Admr. v. Collenberger*, 38 Ala. 647.

It has been said that an affidavit supporting a claim, made by an agent, is not invalid because it does not show the agency: *Heath v. Garrett*, 46 Tex. 23. But if the affidavit of an agent is defective for failure to show that it is made by an agent, the defect may be cured by amendment: *Dawson v. Wombles*, 104 Mo. App. 272, 78 S. W. 823.

In an early Missouri case it was said that an affidavit to a claim can be made by an agent of the creditor only when he has the management and transaction of the business out of which the demand originated: *Peter v. King*, 13 Mo. 143. But more recently in that state it has been decided that an affidavit by an agent is not defective for not stating that he had such management, or had means of knowing the verified facts. Those matters may be shown by evidence aliunde: *Dawson v. Wombles*, 104 Mo. App. 272, 78 S. W. 823.

In Arkansas, where a claim is properly authenticated when presented to the executor or administrator, and is thereafter assigned, it is not necessary for the assignee to verify the claim: *Collier v. Trice*, 79 Ark. 414, 96 S. W. 174.

The Kentucky statute requiring the verification of claims against deceased persons has been held not to apply to the commonwealth: *Arnold's Exr. v. Commonwealth*, 80 Ky. 135.

IV. Amendment of Claim.

a. **Right to Amend in General.**—An improper attempt to present a claim against the estate of a decedent does not estop the claimant from again presenting it in due form within the proper time: *Warren v. McGill*, 103 Cal. 153, 37 Pac. 144; *Westbay v. Gray*, 116 Cal. 660, 48 Pac. 800. And a statement may be amended to supply any deficiency or omission in order to promote substantial justice, provided a different claim or a new cause of action is not added by the amendment. In fact, courts are liberally disposed to permit the amendment of claims as to formal or technical matters: *Appeal of Merwin*, 72 Conn. 167, 43 Atl. 1055; *Belleville Sav. Bank v. Borman (Ill.)*, 7 N. E. 686, 10 N. E. 552; *Wolfe v. Wilsey*, 2 Ind. App. 549, 28 N. E. 1004; *Wise v. Outtrim*, 139 Iowa, 192, ante, p. 301, 117 N. W. 264; *Simmons v. Tongue*, 3 Bland, 341; *Corson v. Waller*, 104 Mo. App. 621, 78 S. W. 656. But "while it is proper," said the court in *Carter v. Pierce*, 114 Ill. App. 589, "to permit an amended claim, or an amendment to an original claim, to be filed for the purpose of correcting the same, or making it more specific, or increasing or reducing the amount thereof, the identity of the claim

with the original must appear. The substitution of one cause of action for another entirely foreign thereto cannot be treated as an amendment."

The omission of the Christian name of the plaintiff in his statement of a claim may be cured by amendment: *Peden's Admr. v. King*, 30 Ind. 181. And where a claim is filed by the administrator of another state, the court may subsequently allow an amendment introducing the real claimant as plaintiff instead of the administrator: *McCall v. Lee*, 24 Ill. App. 585, affirmed in 120 Ill. 261, 11 N. E. 522.

b. Effect of Statute of Limitations.—Where a claim is so stated that it apparently is barred by the statute of limitations, the allegation of additional facts preventing the bar of the statute does not destroy the identity of the claim. And after the expiration of the period limited for presenting claims, a creditor should be permitted in furtherance of justice to amend his claim as to formal or technical matters: *Wise v. Outtrim*, 139 Iowa, 192, ante, p. 301, 117 N. W. 264; *Kirman v. Powning*, 25 Nev. 378, 60 Pac. 834, 61 Pac. 1090; but it is then too late, by amendment or otherwise, substantially to change his demand or substitute another therefor: *Estate of Sullenberger*, 72 Cal. 549, 14 Pac. 513. It is erroneous to allow one who has filed a claim for a loan of money to the decedent to amend it, after the expiration of the time prescribed for filing claims, by substituting a claim for a different loan, although the claim is for the same amount: *Dickey v. Dickey*, 8 Colo. App. 141, 45 Pac. 228. And a creditor will not be allowed to amend his claim by adding that it is secured by mortgage, after the expiration of the time for the presentation of claims, and a refusal to permit the amendment is not appealable: *Estate of Turner*, 128 Cal. 388, 60 Pac. 967.

FARMERS' SAVINGS BANK OF ARISPE v. ARISPE MERCANTILE COMPANY.

[139 Iowa, 246, 117 N. W. 672.]

BILLS AND NOTES—Effect of Invalid Renewal.—The giving of a renewal note does not discharge either the makers or the indorsers of the original obligation, if, for any reason not chargeable to the wrong or fraud of the holder, the renewal proves to be invalid. (p. 326.)

BILLS AND NOTES—Separate Counts in Declaration.—A plaintiff may declare in one count upon a promissory note, and in another upon the original indebtedness or consideration for which the note was given; the two claims are not inconsistent, and no election is required if but one recovery is sought. (p. 326.)

BILLS AND NOTES—Pleading Want of Consideration.—A mere denial of indebtedness upon a promissory note or written promise to pay does not put the consideration of the promise in issue. (p. 327.)

B. Brown and J. H. Macomber, for the appellant.

Sullivan & Fry, for the appellees.

²⁴⁶ WEAVER, J. This action was begun upon a promissory note purporting to have been made by the Arispe Mercantile Company, by Burr Forbes, president, and Frank Forbes, secretary, payable to the order of Burr Forbes & Son, and indorsed by that firm to the plaintiff bank. To this claim the ²⁴⁷ defendants, Forbes & Son, who are sued as indorsers, answer, denying any indebtedness thereon, and alleging that the note was never delivered to the bank, but placed in its custody for safekeeping, and was never indorsed by the payee therein named. The mercantile company also pleaded substantially the same matter in defense. After this defense had been raised, the plaintiff amended its petition by adding a second count, alleging that on May 25, 1904, and prior to the making of the note in suit, the Arispe Mercantile Company made to Burr Forbes & Son its promissory note for one thousand dollars, due August 25, 1904, which note was then indorsed to the plaintiff. It is further alleged that this note fell due, and, not being paid, the mercantile company made, and Burr Forbes & Son indorsed to the plaintiff in renewal thereof, the note mentioned in the first count; but said plaintiff further says that doubts having arisen as to the validity of said renewal note, it asks that, in case it be found not entitled to recover thereon, it may have judgment against the defendants upon the original note, which it alleges has never been paid.

1. It is not material that we consider the evidence bearing upon the genuineness of the indorsement upon the note described in the first count of the petition; for if its forgery has been established, it does not necessarily defeat the plaintiff's recovery on the second count. The only instruction given by the trial court with reference to the matters pleaded in the second count is in the fifth paragraph of its charge, and the following is the material part thereof:

"You are instructed that if the plaintiff has shown and proved by a preponderance of the evidence that the note in question, 'Exhibit A,' was renewal of the note of date May 25, 1904, and that one of the defendants, Burr Forbes, or Frank Forbes, delivered said note in question, 'Exhibit A,' to the plaintiff in renewal of the note for one thousand dollars, of date May 25, 1904, and you further find that at the time of the delivery of the note in question, 'Exhibit A,'

to plaintiff by one ²⁴⁸ of the defendants that the indorsement now appearing on said note was then on the note, then you are instructed that this in law would amount to an adoption of the signatures then appearing on said note, and on this issue of the indorsement you should find for the plaintiff and against Burr Forbes & Son. And in connection herewith, if you find that the defendants Burr Forbes & Son indorsed 'Exhibit A,' then you are instructed that a valuable consideration would be presumed, and plaintiff should recover against the defendants Burr Forbes & Son, unless Burr Forbes & Son show and prove by a preponderance of the evidence that there was no valuable consideration for said note in question, 'Exhibit A.' But if you find the fact to be that the defendant Burr Forbes & Son received one thousand dollars for the sale of the first note of date May 25, 1904, and that this note in question, 'Exhibit A,' is a renewal thereof, and you find that the defendants Burr Forbes & Son indorsed 'Exhibit A' as heretofore defined, then your verdict should be for the plaintiff, and against Burr Forbes & Son. Should you find under the evidence that there was no valuable consideration, or should you find that the defendant did not indorse the note as heretofore defined, then your verdict should be for the defendants Burr Forbes & Son."

It will be observed that this instruction gives the jury no authority to find for plaintiff on the second count of its petition, but, at most, authorizes them to look to the original note only as bearing upon the consideration of the note mentioned in the first count. In this we think there was error; for as we have already said, we may assume the proof of the alleged forgery to have been complete, yet the right of recovery on the original note would not necessarily be impaired. The giving of a renewal note had no effect, in the absence of an agreement therefor, to discharge either the makers or indorsers of the original obligation, if, for any reason not chargeable to the wrong or fraud of the holder, the renewal proves to be invalid. Indeed, in accordance with a long line of precedents, it is always allowable for the plaintiff to declare in his petition in one count upon a promissory note or other written obligation, and in another upon the original ²⁴⁹ indebtedness or consideration for which the note was given: *Kimball v. Bryan*, 56 Iowa, 632, 10 N. W. 218. The two claims are not inconsistent, and where but one recovery is sought, no election is required: *O'Connor v. Hurley*, 147 Mass.

145, 16 N. E. 764; Rhodes v. Pray, 36 Minn. 392, 32 N. W. 86; Winstead v. Webb, 39 N. Y. 325, 100 Am. Dec. 435.

It should be noted, also, in the case before us that the answer to the claim set up on the original note is a mere denial. No want of consideration for said note is pleaded, and while the plea refers to and incorporates by reference the answer to the first count, there is nothing which by the most liberal construction can be held to constitute a plea to the consideration for the note. A mere denial of indebtedness upon a promissory note or written promise to pay does not put the consideration of the promise in issue: Nelson v. White, 61 Ind. 139; Sharpless v. Giffen, 47 Neb. 146, 66 N. W. 285; Phoenix Ins. Co. v. Hague (Tex. Civ. App.), 34 S. W. 654; University of Des Moines v. Livingston, 57 Iowa, 307, 42 Am. Rep. 42, 10 N. W. 738. We call attention to the condition of the issues principally to emphasize our conclusion that the failure of the court to instruct upon this branch of the law of the case was clearly prejudicial. Moreover, a reading of the record makes it very evident that there was such a manifest failure of justice as requires the granting of a new trial.

For the reasons stated, the judgment of the district court is reversed.

Promissory Notes Given as a Renewal of Other Notes are but evidences of the same indebtedness: Wallowa Nat. Bank v. Riley, 29 Or. 289, 54 Am. St. Rep. 794. If the original note was without consideration, each renewal thereof is also without consideration: Turle v. Sargent, 63 Minn. 211, 56 Am. St. Rep. 475. A negotiable instrument, given in renewal of another, suspends the right of action on the debt, during its currency or until it is dishonored by nonacceptance or nonpayment: Bank of Hanover v. Bridgers, 98 N. C. 67, 2 Am. St. Rep. 317. Acceptance of a note, the signature of one of makers of which is forged, in renewal of a note signed by the same makers, does not discharge the maker whose name is forged from his liability on the original note, where the acceptance was without knowledge of the forgery, and there was no consideration for the surrender of the original note: Stratton v. McMakin, 84 Ky. 641, 4 Am. St. Rep. 215.

If a Defendant Alleges in an Action upon Promissory Notes that he received no consideration for them, this is a sufficient plea of want of consideration for their execution: Anderson v. Nystrom, 103 Minn. 168, 123 Am. St. Rep. 320.

BRADLEY v. BURKHART.

[139 Iowa, 323, 115 N. W. 597.]

BOUNDARY—Establishing by Acquiescence.—A line between adjoining owners may be established by recognition and acquiescence, as where they erect a permanent fence to mark the division line and for over ten years regard it as the true line, although neither of them intends to claim more than his deed gives him. The doctrine of adverse possession, strictly speaking, does not apply to such a case. (p. 330.)

QUIETING TITLE—Jury Trial.—An Action to Quiet Title is an Equitable one which should not be tried to a jury. (p. 330.)

Jordan & Moffitt and Dale & Harrison, for the appellant.

Wm. M. Wilcoxon and McHenry & Jones, for the appellee.

324 DEEMER, J. Lots 1 and 2 in block 1 of Griffith's subdivision of lot 5 of the Pursley estate, now in the city of Des Moines, run north and south. They are each sixty feet wide and one hundred and thirty-two feet in length. Plaintiff is the owner of the south one-third of these two lots, and defendant of the middle one-third. Each of their holdings should be forty-four feet north and south by one hundred and twenty feet east and west. This is a controversy over the division or boundary line between the two tracts. It seems that shortly before this action was commenced defendant tore down a fence extending eastward from the west end of the line for some distance in the direction of plaintiff's dwelling-house, and had erected a new fence something like two feet south of the old one. Plaintiff claims that the old fence, together with some water-pipes put in the ground at the east end of the line, mark the boundary as established by recognition and acquiescence of the parties and their grantors, and that, wherever the true line, plaintiff is entitled to claim to these monuments by adverse possession. There is some controversy about the location of the true line according to the original paper subdivision of the lots, but the preponderance of the testimony shows that it is near where defendant erected the new fence. It appears, however, that many years ago a fence was erected upon what was supposed to be the true line between the parcels of ground now occupied by these parties, and that the then owners recognized this fence as being on the true line. Some time thereafter plaintiff or his grantor built a house upon his south one-third, the foundation of which was placed something like two feet south of the line as marked by the original fence. The east-

erly part of the fence which separated the front yards of the owners of these tracts was removed by agreement for aesthetic reasons, but shortly thereafter a trench was dug along the line marked by the fence for the purpose of bringing water ³²⁵ upon the premises owned by the respective parties. The pipes for this water were laid four or five inches apart, and as nearly as could be estimated, along the line of the old fence. The eaves of the house occupied by plaintiff extended from fifteen to eighteen inches north of a perpendicular line from the foundation, and plaintiff has used the strip claimed by him north of the foundation of his house for the water-pipes before spoken of, for use in washing the windows of his house, and in putting up and taking off screens and storm sash. Defendant has occasionally mowed this two-foot strip, and has also sown some grass seed upon it.

The preponderance of the testimony shows that the old fence referred to, so long as it stood, was regarded by all parties as marking the boundary line, and no controversy arose until a few years ago, when defendant concluded to build a flat upon his portion of the lots. Plaintiff requested defendant to put this flat as far north from the division line as possible, and the parties agreed that it was well to have sufficient space between the two buildings for a passageway, and to enable them to care for the windows of the buildings. Defendant proposed to plaintiff that he (plaintiff) pay part of the expense of changing the plans so as to provide ample passageway. Thus matters stood when defendant concluded to have his property surveyed. He asked plaintiff to join in this, but plaintiff refused to do so. A survey was made, however, and the true line as fixed by this survey was something like two feet south of the one marked by the old fence. The parties then renewed their conversations regarding the division line, and it is claimed that a tentative agreement was made whereby defendant was to build a fence upon the west end of the line established by the new survey extending from the northwest corner of plaintiff's lots to his building, leaving the east end of the line unfenced, and leaving the matter of the method of construction of defendant's flat to further negotiations, and that in consideration thereof defendant was to put a gate in the fence built upon the new ³²⁶ line. There is also some testimony to the effect that plaintiff was to pay his proportion of the cost of the new fence, but we fail to find that such an agreement was made. Indeed, the evidence fairly shows that while negotiations were

pending for an amicable settlement of the matter, defendant went ahead and built the fence of which plaintiff is complaining.

The doctrine of adverse possession, strictly speaking, does not apply to the case, for the reason that plaintiff has failed to show any intent to claim more than his deed calls for. But a line may be established by recognition and acquiescence, although neither of the parties intends to claim more than his deed gives him. This is the doctrine established by *Miller v. Mills Co.*, 111 Iowa, 654, 82 N. W. 1038, and recognized in almost innumerable cases since that time. That the parties hereto recognized the old fence as being upon the true line and acquiesced therein for more than ten years can hardly be questioned. The fence was a permanent one, was erected to mark the division line between the two tracts, and was regarded and recognized by the parties as being upon the true line for many years. Indeed, the line as thus acquiesced in was never challenged until defendant concluded to erect a flat upon his strip of ground. These facts clearly bring the case within the rule of *Miller v. Mills Co.*, 111 Iowa, 654, 82 N. W. 1038. The cases of *Kitchen v. Chantland*, 130 Iowa, 618, 105 N. W. 367, and *Palmer v. Osborne*, 115 Iowa, 714, 87 N. W. 712, are not in point.

There is no merit in defendant's claim of estoppel, based upon what happened after defendant concluded to find the true line. Nothing was done which would constitute the basis of an estoppel. While negotiations were pending for some kind of an amicable settlement, defendant went ahead and built his fence, and almost immediately plaintiff brought this action to secure the removal of the same. None of the essential elements of an estoppel are here.

³²⁷ The original petition was in form what might be denominated an action of right. Defendant moved to transfer the case to the law docket for trial to a jury. Plaintiff then filed an amended and substituted petition to quiet his title to the strip in dispute, and with it a motion to transfer to the equity calendar. This motion was sustained. When the case was called defendant demanded a jury, and this was refused. In these rulings there was no error. An action to quiet title is an equitable one, and should not be tried to a jury.

Our examination of the record leads us to the conclusion that the decree granting the prayer of the petition is correct, and it is affirmed.

Establishing Boundaries by the Agreement or Acquiescence of the parties is discussed in the note to *Washington Rock Co. v. Young*, 110 Am. St. Rep. 682-689. According to *Pereles v. Gross*, 126 Wis. 122, 110 Am. St. Rep. 901, practical location and use and occupation, in order to be evidence of original location, must be open to the inference that it commenced with some reference to the original survey lines or markings, and cannot prevail when clearly referable to a mistaken or deluding subsequent survey. Boundary agreements are further considered in the recent cases of *Hazard Powder Co. v. Somerville Mfg. Co.*, 78 Conn. 171, 117 Am. St. Rep. 144; *American Bonding Co. v. Morrow*, 80 Ark. 49, 112 Am. St. Rep. 72.

VOSS v. CHAMBERLAIN.

[139 Iowa, 569, 117 N. W. 269.]

BILLS AND NOTES—Unauthorized Pledge by Banker.—

Where a banker abstracts, from a private receptacle of a customer, negotiable paper indorsed in blank, pledges it for his own indebtedness, subsequently recovers it from the pledgee ostensibly for collection, and then returns it to the receptacle, the owner, who has had no knowledge of these transactions, is not a new holder in due course with rights superior to the pledgee. (pp. 333-335.)

BILLS AND NOTES.—The Indorsement by the Payee of a Note, under a guaranty of payment combined with waiver of demand, notice and protest, constitutes a blank indorsement, and the subsequent delivery of the instrument to one in due course passes title. (p. 334.)

BILLS AND NOTES—Consideration—Collateral by Substitution.—One who takes collateral by way of substitution for other collateral surrendered becomes a holder for value. (pp. 334, 335.)

BILLS AND NOTES—Consideration—Pre-existing Debt.—One who takes negotiable paper by way of security for a pre-existing indebtedness is a holder for value under the Iowa negotiable instrument act. (p. 335.)

BILLS AND NOTES—Amount of Recovery.—The Rule of the Iowa Statute that a bona fide holder may not recover against the maker of negotiable paper a greater sum than the holder paid for the instrument, if it has been procured by fraud on the maker, has reference to recovery on instruments to which the maker has a defense. (p. 335.)

BILLS AND NOTES—Purchaser from One Without Title.—Where current money, or negotiable paper payable to bearer or indorsed in blank which is considered as standing for money, comes into the hands of the holder before maturity for value and without notice of defect in title, his title is not dependent upon that of the person from whom the money or paper has been obtained. (p. 336.)

BILLS AND NOTES—Reason of Negotiability.—Money, bills and notes are negotiable, not because they have no earmarks, but on account of their currency. (p. 336.)

BILLS AND NOTES—Wrongful Pledge—Bona Fide Holder.—Where a bank takes notes as collateral security in due course of business, its title is not affected by the fact that the pledgor banker

has unlawfully abstracted them from the private receptacle of a customer to whom they belonged. (p. 337.)

BILLS AND NOTES—Showing of Diligence by Holder.—One who takes negotiable paper as collateral security is not required to prove diligence in ascertaining the right of the pledgor, who was in actual possession of the paper indorsed in blank. To defeat the title of the pledgee, the owners of the paper have the burden of proving want of good faith on his part. (p. 338.)

BILLS AND NOTES—Innocent Holder.—Between a Holder of Negotiable Paper and a person who has given it approved validity in the hands of one transferring it without right, the rule applies that when one of two innocent persons must suffer by reason of the wrongful act of a third person, that one must bear the loss who made it possible for the third party to commit the wrong. (p. 339.)

Mayne & Hazelton, for the appellants.

Shaw, Sims & Kuehnle, for the appellee.

570 McCLAIN, J. In April, 1903, one H. S. Green, a banker at Dow City, Iowa, acting as agent for the defendants, effected a sale for them of a tract of land in Nebraska, receiving in payment a small sum in cash and certain promissory notes which were made payable to "E. N. Chamberlain, Amos Weatherbee, and H. S. Green, or order." Green appropriated the cash payment and the proceeds of the first of the notes to become due in point of time which he collected to the payment of his commission, and turned over the other notes, of the face value of four thousand three hundred and fifty dollars, to the defendant Chamberlain as the property of defendants, signing his name on the back of the notes to a stamped guaranty of payment, waiving demand, notice of nonpayment and protest. In November, 1903, defendant Chamberlain, intending to negotiate **571** the notes, indorsed his own name, and had the name of his co-owner, Weatherbee, indorsed under the name of Green on the back, but as the sale of the notes was not then effected, they were replaced among the private papers of Chamberlain, which were kept for safety in the Exchange Bank of Dow City, of which Green was owner. At some time between November, 1903, and March 19, 1904, these notes were pledged by H. S. Green to the Bank of Denison, of which C. L. Voss, the plaintiff, is cashier, and L. M. Shaw and C. L. Kuehnle owners, by way of substitution for other collateral held by the Denison bank as security for antecedent indebtedness of H. S. Green to the extent of six thousand one hundred and seventy-five dollars. On March 19, 1904, these notes were delivered by the Bank of Denison to H. S. Green, who in the receipt given therefor describes them as collateral, and promises that, if paid or

sold, the proceeds will be applied by him in payment of his notes, and if not paid or sold, they will be returned to the Bank of Denison by about April 10, 1904. On April 8, 1904, in pursuance of bankruptcy proceedings against H. S. Green, a receiver was appointed for the Exchange Bank of Dow City, and after that time the notes in question were found among the private papers of defendant Chamberlain, where they had been before they were pledged by Green to the Denison bank. It is clear from the evidence that without authority of defendants, who were the owners of these notes, Green, who had no interest therein or right to the custody thereof, abstracted them from the wallet in which Chamberlain kept them with other private papers in the Exchange Bank, and pledged them to the Denison bank as collateral security for his own indebtedness, and that subsequently, having obtained them from the Denison bank for the purpose of selling or collecting them, or collecting interest as the agent of the Denison bank, he returned them to the wallet containing Chamberlain's private papers, neither Chamberlain nor Weatherbee having had any knowledge in the meantime that they had been abstracted and pledged to the Denison bank. It also appears ⁵⁷² that plaintiff Voss, as cashier of the Denison bank, accepted these notes from Green as collateral by way of substitution for other collateral surrendered without knowledge of any right thereto on the part of Chamberlain and Weatherbee, and in the belief that they were the property of Green.

If the Bank of Denison became the holder of the notes in question as collateral security in due course, and for valuable consideration, it is entitled to recover the value of the notes as subsequently found in the possession of Chamberlain, claiming to hold them as the property of Chamberlain and Weatherbee, and refusing to deliver them up on demand; for the delivery of the notes to Green for a specific purpose as the agent or custodian of the bank did not constitute a surrender of the lawful possession of such notes by the bank as the holder for value: *Palmtag v. Doutrick*, 59 Cal. 154, 43 Am. Rep. 245; *Burley v. Rose*, 57 Iowa, 651, 11 N. W. 629; *Clark v. Iselin*, 21 Wall. (U. S.) 360, 22 L. ed. 568; *Jones on Pledges*, 2d ed., secs. 40-48. If Green, having possession of the notes indorsed in blank, had transferred them to an innocent holder for value, such transferee would no doubt have acquired rights prior to those of the Bank of Denison; but his surreptitious return of the notes to the wallet containing

the papers of defendant Chamberlain did not invest the defendants with any other rights than those which they had prior to the abstraction of the notes from the wallet by Green and their delivery to the Bank of Denison. The return of the notes to Chamberlain's possession without his knowledge, and without his having parted with any new consideration or voluntarily incurring any detriment, did not make the defendants new holders for value in due course.

The sole question to be determined, then, is whether by the original pledge of the notes by Green the Bank of Denison became holder thereof in due course for value and without notice of the wrongful act of Green in thus transferring paper to which in fact he had no title. The notes were not yet ⁵⁷³ due at the time of their transfer by Green to the Bank of Denison, and the bank, therefore, took any rights which it acquired before maturity. But it is contended for appellants that it acquired no rights whatever, because the notes were payable to the persons named therein or order, and were not so indorsed as that title would pass by delivery. As appears from the facts stated, the indorsement by Green when the notes were first procured by him and delivered to the defendants was by means of his signature to a guaranty of payment entered on the back of the notes with a waiver of demand, notice and protest. The names of defendants were at a subsequent time written by them under the name of Green following this guaranty. If it were material to determine whether defendants indorsed the notes in blank, or merely joined with Green by the subsequent act in guaranteeing payment, it might be difficult to say whether they became blank indorsers or only guarantors. But according to the weight of authority and the recent holding of this court, the signing of a guaranty of payment, combined with waiver of demand, notice and protest, constitutes the signers of such an indorsement who are payees of the note indorsers, and not guarantors, and as no indorsee is named, such indorsement is a blank indorsement and the subsequent delivery of the instrument to one who takes in due course and for value passes title: *German-American Sav. Bank v. Hanna*, 124 Iowa, 374, 100 N. W. 57.

In determining whether the Bank of Denison became a holder for value, it is not necessary to consider the conflict in authorities as to whether a transfer as security for a pre-existing debt constitutes the transferee a holder for value, for the evidence shows that the notes were delivered to the Bank

of Denison by way of substitution for other collateral which was surrendered in the same transaction; and beyond question, a transferee who thus takes collateral by way of substitution for other collateral surrendered becomes a holder for valuable consideration: *Park Bank v. Watson*, 42 N. Y. 490, 1 Am. Rep. 573; ⁵⁷⁴ *Greenwell v. Haydon*, 78 Ky. 332, 39 Am. Rep. 234; *Cherry v. Frost*, 7 Lea (Tenn.), 1; *Sawyer v. Turpin*, 91 U. S. 114, 23 L. ed. 235; 1 *Daniel on Negotiable Instruments*, sec. 827. Since the adoption in this state of the "negotiable instruments act" (Act 29th Gen. Assem. [Laws 1902, p. 86], c. 130), there is no question, however, as to a holder who takes by way of security for pre-existing indebtedness being a holder for value. By section 52 of that act (Code Supp. 1907, sec. 3060a52) a holder in due course must be a holder "for value," and the term "value" means valuable consideration (section 191), and by section 25 it is declared that "an antecedent or pre-existing debt constitutes value." In no view of the case, therefore, can the Bank of Denison be said not to have been a holder for value.

In this connection it is contended, however, that as the value of the collateral surrendered when the notes in question were accepted by the Bank of Denison is not shown, the bank is not entitled to recover because, under Code, section 3070, a bona fide holder for value may not recover as against the maker of negotiable paper a greater sum than the holder paid for the instrument if it has been procured by fraud upon such maker. This section evidently has reference, however, to recovery on instruments as to which the maker has a defense. The defendants in this action were not the makers of the notes which they are charged with having converted, nor are they sued as makers. There is no contention that any fraud was perpetrated upon the maker, and there is no occasion, therefore, to limit the recovery of plaintiff to the amount or value of the security surrendered when these notes were accepted by way of substitution. The indebtedness of Green to the Bank of Denison exceeds the amount of this collateral, and plaintiff is entitled to recover, therefore, if at all, in the full value of the notes converted. If the bank was holder in due course and free from defenses, it might enforce payment against the maker of the notes and the defendants as indorsers for the ⁵⁷⁵ full amount thereof: See *Negotiable Instruments Act*, Code Supp. 1907, sec. 3060a57. And the amount which the bank might have recovered on the

notes had they not been converted by the defendants would be the measure of recovery against defendants for their unlawful conversion.

The main contention for the appellant is that Green had no title to these notes when he transferred them to the Bank of Denison, and that the bank could not, therefore, acquire title or right thereto as against defendants, the lawful owners. The rule invoked is that applicable to personal property in general, that one who has such property in his custody, but without any title—as, for instance, a thief or the finder of lost goods—cannot by delivery even to a purchaser in good faith and for value transfer title which will be valid as against the real owner, who has not by any act of his conferred apparent authority to transfer title upon the one who has such apparent custody. This rule is applicable not only to goods and chattels, but to instruments quasi negotiable in character, representing property and intended to pass for it by delivery, such as bills of lading: *Shaw v. Merchants' Nat. Bank*, 101 U. S. 557, 25 L. ed. 892; *McMahon v. Sloan*, 12 Pa. 229, 51 Am. Dec. 601. But to this rule there is a distinct and universally recognized exception in case of current money and negotiable instruments payable to bearer or indorsed in blank which are considered as standing for and representing money, coming into the hands of a holder in due course; that is, before maturity for value and without notice of defect in the title. In such cases the title of the holder is not dependent upon that of the person from whom the money or instrument is obtained. This is, as said by Lord Chief Justice Holt in 1 Salk. 126 (Anonymous), “by reason of the course of trade which creates a property in the assignee or bearer,” and this reason is repeated by Lord Mansfield in *Miller v. Race*, 1 Burr. 452, with the suggestion that “the ‘bearer’ is a more proper expression than assignee,” and with the more explicit ⁵⁷⁶ statement with reference to bank notes payable to bearer that “they are not goods, not securities nor documents for debts, nor are they so esteemed, but are treated as money, as cash in the ordinary course and transaction of business by the general consent of mankind which gives them the credit and currency of money to all intents and purposes.” Lord Mansfield in the later case of *Peacock v. Rhodes*, 2 Doug. 633, stated the law to be “well settled that a holder coming fairly by a bill or note has nothing to do with the transaction between the original parties”; and he continues: “I see no difference between a note

indorsed blank and one payable to bearer. They both go by delivery and the possession proves property in both cases." And he adds with reference to the particular case under consideration that, as the jury had found that the bill indorsed in blank on which action was brought by a holder taking by delivery was received in course of trade, the case was clear that the holder could recover, although it had been stolen from a previous holder. In *Miller v. Race*, 1 Burr. 452, Lord Mansfield further explains the rule with reference to bank bills payable to bearer, in answer to the suggestion that it was based on the lack of earmarks, which would limit it to money. "'Tis pity that reporters sometimes catch at quaint expressions that may happen to be dropped at the bar or bench, and mistake their meaning. It has been quaintly said that the reason why money cannot be followed is because it has no earmarks; but this is not true. The true reason is upon account of the currency of it. It cannot be recovered after it has passed in currency. So in case of money stolen the true owner cannot recover it after it has been paid away fairly and honestly upon a valuable and bona fide consideration; but before money has passed in currency an action may be brought for the money itself." This reasoning of Lord Mansfield has received unqualified approval both as to money and as to negotiable instruments payable to bearer or indorsed in blank. In *Saltus v. Everett*, 20 Wend. (N. Y.) 267, 277, 32 Am. 577 Dec. 541, it is said: "A long series of decisions, beginning with *Miller v. Race*, 1 Burr. 452, has so settled the law that possession of such paper is presumptive proof of property, and that he who received it in the course of trade for a fair consideration, without any reason for just suspicion, can hold it against the true owner, and recover on it against the drawer, maker and other parties, even if the paper had been stolen from or lost by the former holder, such former holder retaining all his original rights only against the thief or the finder, or whoever received the paper from them under suspicious circumstances": See, also, *Murray v. Lardner*, 2 Wall. (U. S.) 110, 17 L. ed. 857; *Tucker v. New Hampshire Sav. Bank*, 58 N. H. 83, 42 Am. Rep. 580; 2 Randolph on Commercial Paper, 2d ed., sec. 736; 1 Daniel on Negotiable Instruments, secs. 663, 729. If the bank took these notes in due course of business, its title was not affected by the fact that Green unlawfully abstracted them from the possession of defendants: *Wheeler v. Guild*, 20 Pick. (Mass.) 545, 32 Am. Dec. 231; *Greenwell v. Haydon*, 78 Ky. 332, 39

Am. Rep. 234; Negotiable Instruments Act, Code Supp. 1907, secs. 3060a56, 57.

It is argued, however, that plaintiffs did not show the Bank of Denison to be a holder in due course, because there was no competent evidence with reference to one of the owners of the bank that he had no notice of the want of right or authority on the part of Green to transfer the notes by delivery, and counsel rely upon cases of which *McNight v. Parsons*, 136 Iowa, 390, 125 Am. St. Rep. 265, 113 N. W. 858, and *Keegan v. Rock*, 128 Iowa, 39, 102 N. W. 805, are examples, holding that, as against a defense by the maker that the instrument was procured and negotiated through fraud or in breach of trust, the holder must affirmatively establish want of notice. But the cases thus relied upon are those in which it is held that, by reason of defective execution of the instrument itself or lack of assent on the part of the person sought to be charged as maker, it has not become a negotiable ⁵⁷⁸ instrument to which the rules relating to indorsement and transfer are applicable. No such question arises in this case. The notes were fully executed and delivered as negotiable instruments to the defendants, and as such were held by them when they were abstracted from the possession of defendant Chamberlain and delivered by Green to the bank. The authorities already cited expressly negative any obligation on the part of the holder to prove diligence in ascertaining the right of the person in actual possession purporting to transfer title and charge the holder with the defective title of the person making the transfer only where bad faith is shown. In the United States there has been a continuing conflict of authority on this question: See 2 Randolph on Commercial Paper, secs. 996-1001; 2 Daniel on Negotiable Instruments, sec. 1680. This uncertainty in the law has been remedied by the adoption in this state of the negotiable instruments act by which it is provided in section 59 (Code Supp. 1907, sec. 3060a59), as follows: "Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title." Defendants cannot, therefore, overcome the presumption that the Bank of Denison became the holder

of the notes in due course—that is, without notice—by showing that the title of Green to such notes was defective. In other words, to defeat the title of the bank, defendants have the burden of proving want of good faith on the part of the bank in accepting the notes from Green.

A rule often applied in deciding a controversy like this, between a holder of negotiable paper and a party who has given it apparent validity in the hands of one transferring ⁵⁷⁹ it without right is that, when one of two innocent persons must suffer by reason of the wrongful act of a third party, that one must bear the loss who made it possible for the third party to commit the wrong. It is not always easy to say whether in a particular case the one upon whom it is sought to cast the responsibility under this rule has done an act such as to charge him for the wrongdoing of another who has proceeded without legal authority; but the case before us is one coming well within the rule as often applied. The defendants held these notes payable to the order of Green and themselves and indorsed by Green. In this condition the notes could not have been put in circulation so as to come into the hands of a holder in due course without notice. Defendants intentionally indorsed the notes with the purpose that they should be negotiated, and, although this purpose was not at the time carried out, they left the notes in this condition, apparently indorsed for negotiation and transfer by delivery, in the custody of the Exchange Bank of which Green was the owner and manager. By this act of placing the notes within the control of Green they enabled him to make a transfer of them by delivery as owner, and to put the Bank of Denison in such condition as to suffer a loss without any fault on its part if the apparent title acquired by it from Green should be held defective. It has often been held that, under such circumstances, the rights of the holder are superior to those of the previous party who has made the transfer of the instrument practicable: *Emerson v. Crocker*, 5 N. H. 159; *Tucker v. New Hampshire Sav. Bank*, 58 N. H. 83, 42 Am. Rep. 580; *Cherry v. Frost*, 7 Lea (Tenn.), 1. A motion of appellants submitted with the case to strike appellee's additional abstract from the files is overruled. The judgment is affirmed.

Bona Fide Ownership of Negotiable Paper is considered in the notes to *Bedell v. Herring*, 11 Am. St. Rep. 309; *Willard v. Nelson*, 37 Am. St. Rep. 458.

The Rights of Bona Fide Holders of Lost or Stolen Negotiable Instruments are discussed in the note to *Ehrlich v. Jennings*, 125 Am.

St. Rep. 802. An innocent purchaser of negotiable paper may acquire good title though he buys from a thief: *First Nat. Bank v. Gates*, 66 Kan. 505, 97 Am. St. Rep. 383. But if a person, without negligence, and by fraud and deceit, is induced to sign a note, not intending to sign it as such, the note is not valid in the hands of a bona fide purchaser for value: *Biddeford Nat. Bank v. Hill*, 102 Me. 346, 120 Am. St. Rep. 499.

A Bank to Which Stolen Coupon Bonds Payable to Bearer have been pledged as collateral security for a loan by the thief in the ordinary course of business, without notice to the bank of any infirmity in the title, and without any circumstances to put the bank on inquiry, takes a good title thereto as against him from whom they were stolen: *Cochran v. Fox Chase Bank*, 209 Pa. 34, 103 Am. St. Rep. 976.

One Who Acquires Negotiable Paper as Security for a pre-existing indebtedness is a holder for value and in due course of business: *Birket v. Elward*, 68 Kan. 295, 104 Am. St. Rep. 405, and see cases cited in the cross-reference note thereto. A pledgee of a check may be a holder in due course: *Boston Steel etc. Co. v. Steuer*, 183 Mass. 140, 97 Am. St. Rep. 426.

The Burden of Proof, in an Action to Enforce a Negotiable Instrument which has been wrongfully put in circulation and come into the hands of an alleged bona fide holder, to show the good faith of the holder, is discussed in the recent cases of *McNight v. Parsons*, 136 Iowa, 390, 125 Am. St. Rep. 265; *Yates v. Spofford*, 7 Idaho, 737, 97 Am. St. Rep. 267; *Manhattan Sav. Inst. v. New York etc. Bank*, 170 N. Y. 58, 88 Am. St. Rep. 640; *Clark v. Skeen*, 61 Kan. 526, 78 Am. St. Rep. 337.

RICE v. CROZIER.

[139 Iowa, 629, 117 N. W. 984.]

HUSBAND AND WIFE—Action by Her Against Him.—A wife has a right of action against her husband for a debt due her from him. (pp. 341, 342.)

HUSBAND AND WIFE—Limitation of Actions.—The statute of limitations begins to run against a right of action by a wife against her husband upon a promissory note at the date of its maturity. (p. 342.)

HUSBAND AND WIFE—Limitation of Actions.—Upon the removal by statute of the disability of a wife to sue her husband for her separate property, her right of action becomes complete and the statute of limitations then begins to run against her. (p. 342.)

Action on a note signed by the decedent. The defendant demurred on the ground that the action was barred by the statute of limitations. The demurrer was sustained, and plaintiff stood on her petition. From a judgment for the defendant plaintiff appealed.

John F. and Wm. R. Lacey, for the appellant.

John O. Malcom, for the appellee.

630 EVANS, J. The plaintiff avers that she was married to the deceased, William Rice, in 1859. That in 1864 or 1865 he received in her behalf certain moneys, amounting to two thousand three hundred dollars, from the administrator of the estate of her deceased father, and that he signed a receipt therefor jointly with the plaintiff. That on September 18, 1865, as evidence of said trust he executed an instrument in writing as follows:

“September 18, 1865.

“Two years after date I promise to pay Emily M. Rice the sum of \$2,100 for value received. The condition of this note is that it is to draw no interest for twelve months after my death.

[Signed] “WILLIAM H. H. RICE.”

That under the said instrument an express trust was created, and the said William H. H. Rice never denied the said trust in his lifetime and never repudiated the same. The plaintiff's principal contention is that, under the law in force at the time said contract was made, she could not maintain an action at law against her husband, and that her only remedy under the statutes at that time was to present her claim against the estate of her husband after death, or after insolvency or bankruptcy, if living. She contends that the law then existing became a part of the contract, and that it could not be altered by subsequent legislation, and that the statute of limitations, therefore, has never commenced to run against her until the death of her husband.

This argument is, of course, bottomed upon the proposition that under the statutes of Iowa in September, ⁶³¹ 1865, a wife had no legal remedy for the collection of a debt against her husband during his lifetime and solvency. Assuming this proposition to be correct, there is plausibility in the argument offered. But we are convinced that this initial proposition of the plaintiff is not tenable. In *Jones v. Jones*, 19 Iowa, 236, and *Logan v. Hull*, 19 Iowa, 491, the court did sustain actions brought by the wife against her husband. Section 2771 of the Revision of 1860 by clear implication, if not by its express terms, removed from a married woman the disability to sue her husband in relation to her separate estate. Even at common law, and before any statute was enacted, she had a complete remedy by bill in equity. *Jones v. Jones*, 19 Iowa, 236, was an action at law, being a replevin by the wife for certain household furniture, and the wife, as plaintiff, was allowed to prevail therein. It is true that an im-

portant fact in that case was that the plaintiff wife had separated from her husband "for good cause"; but that fact had no relevancy to her ability or disability to sue her husband, but to her right of possession of the household goods. Except for such separation for good cause, the husband, as head of the family, would be deemed entitled to such possession. In *Logan v. Hull*, 19 Iowa, 491, it was urged by the defendant that the wife, as plaintiff, had no right to maintain the action at law. The court held it immaterial whether the action be regarded as at law or in equity, and ordered a recovery by the plaintiff wife. If, therefore, the wife had a right of action against her husband, then the statute of limitations necessarily began to run at the date of the maturity of the note.

2. If we should hold that the wife had no right of action against her husband until the enactment of section 2204 of the Code of 1873, we do not see how it could avail the plaintiff as a protection against the bar of the statute. Such legislation ⁶³² had reference solely to the remedy, and it has always been held in this state that such legislation did not impair the obligation of a contract. No person has a vested right in a particular remedy, provided adequate remedy be given. If the plaintiff was under disability to sue prior to 1873, her disability was fully removed by the enactments of that year. Her right of action at law against her husband for her separate property was complete. We know of no rule that would prevent the running of the statute: *Wooster v. Bateman*, 126 Iowa, 552, 102 N. W. 521; *Allerton v. Monona Co.*, 111 Iowa, 560, 82 N. W. 922.

3. The plaintiff pleads in her petition that the money was held by her husband in express trust. She necessarily relies upon the written instrument as evidence of such trust. Her counsel do not press this proposition in argument. It is not tenable. The writing does not purport to declare a trust, either directly or inferentially. On the contrary, it purports to create the relation of debtor and creditor. No claim is made of implied or resulting trust, and we need not consider that phase of the question. The result here reached presents apparent hardship, but we know of no way to avoid it under the law.

The trial court properly sustained the demurrer, and the judgment is affirmed.

The Question as to When Suits may be Maintained Between Husband and wife is considered in the note to Frankel v. Frankel, 73 Am. St.

Rep. 268. Subsequent cases on this subject are *Heckman v. Heckman*, 215 Pa. 203, 114 Am. St. Rep. 953; *State v. Jones*, 132 N. C. 1043, 95 Am. St. Rep. 688; *Baum v. Baum*, 109 Wis. 47, 83 Am. St. Rep. 854; *Cook v. Cook*, 125 Ala. 583, 82 Am. St. Rep. 264; *Heacock v. Heacock*, 108 Iowa, 540, 75 Am. St. Rep. 273.

The Statute of Limitations does not, according to some authorities, run against claims between husband and wife: *Fawcett v. Fawcett*, 85 Wis. 332, 39 Am. St. Rep. 844; *Charmley v. Charmley*, 125 Wis. 297, 110 Am. St. Rep. 827.

BURGER v. OMAHA AND COUNCIL BLUFFS STREET RAILWAY COMPANY.

[139 Iowa, 645, 117 N. W. 35.]

EVIDENCE—Second Objection to Introduction.—If evidence properly admitted over objection afterward on cross-examination appears incompetent, a further objection should be interposed in order to secure a review on appeal. (pp. 344, 345.)

STREET RAILWAY—Starting Car Before Passenger is Aboard.—It is negligence for a street railway company to start a car which has stopped on signal, before passengers have an opportunity to board it; and in case a passenger, while attempting with due care to board the car, is thrown to the ground, such negligence is the proximate cause of his injury. (p. 346.)

NEGLIGENCE—Proximate Cause.—Where One by His Negligent Act thrusts another into a position of danger, the act, and the negligence by which it is clothed, continue and control as long as the danger continues, unmodified by any independent, affirmative and voluntary act on the part of the person affected, or by some intervening controlling circumstance. (p. 347.)

STREET RAILWAY—Starting Car Before Passenger is Aboard.—Where a street railway company starts a car while a passenger is boarding it, but he does not immediately relinquish his hold on the hand-rail, but runs alongside the moving car until thrown to the ground, the negligence in starting the car is the proximate cause of the injury. (p. 347.)

NEGLIGENCE—Acts in Emergency.—Whether or not a Person, brought to face an emergency, has acted with due care for his own safety is to be determined in all cases by the method of conduct. If what was done was no more than might have been expected from an ordinarily prudent person, placed under the like circumstances, then due care is not wanting. And if in the situation presented there is room for reasonable minds to differ as to the proper conclusion to be drawn, the question is one for a jury. (p. 348.)

STREET RAILWAY—Starting Car Before Passenger is Aboard. Where a street railway company starts a car when a passenger has partially effected a boarding, and he does not immediately relinquish his hold but runs alongside the car attempting to regain his footing, the question whether he is guilty of contributory negligence in so doing is for the jury. It cannot be said as a matter of law that due care requires him to release his hold upon the car the moment he is aware that it is in motion. (p. 348.)

STREET RAILWAY—Starting Car Before Passenger is Aboard. Where one who sustains the relation of passenger is thrown from his

position by a negligent starting of the car while he is boarding it, he is not negligent per se if he attempts, either as a result of impulse or in the reasonable belief that he can succeed, to regain his position and board the car. (p. 349.)

NEGLIGENCE—Emergency.—In the Sudden and Unexpected Starting of a Street-car, while a passenger is attempting to board it, there is presented an "emergency." (p. 350.)

WORDS AND PHRASES.—An "Emergency" is a Sudden or Unexpected Happening or Occasion calling for immediate action; an emergency is presented where a street-car starts while a passenger is attempting to board it. (p. 350.)

WITNESS—Instruction as to Credibility.—The refusal of an instruction, "If the jury found that any witness in the case had willfully and intentionally sworn falsely with reference to any material fact in the case, they were at liberty to disregard the testimony of such witness, or to give it only the weight and credit to which in their judgment it was entitled," is without prejudice, if the jury is also instructed: "You are the judges of the credibility of the witnesses and the weight to be given to each and all of them. Where there is a conflict in the evidence you should harmonize it if you can; but if you cannot do so, you should give to each witness such credit as you deem him entitled, or none if entitled to none." (pp. 350, 351.)

NEGLIGENCE—Pleading Freedom from Contributory Negligence.—Where the complaint in an action for personal injuries alleges that the "accident and injury was not caused by any act of negligence on the part of this plaintiff," and the trend of fact specifications in the petition is to the effect that he was in the exercise of due care, the pleading is not wholly wanting in an allegation of freedom from contributory negligence, and if the defendant desires more he should move therefor. (p. 351.)

Harl & Tinley, for the appellant.

S. B. Wadsworth, F. E. Gates and George B. Lynch, for the appellee.

⁶⁴⁸ BISHOP, J. Defendant operates a street railway line in Council Bluffs, and the claim of plaintiff is that, while attempting to board one of defendant's cars at what is known as the "Gun Club Station," the car was suddenly started forward, whereby he was thrown to the ground and injured. We shall take up the several matters of error occurring on the trial in the order of their presentation in argument.

1. As a witness in his own behalf, plaintiff testified, in chief, that his occupation was that of a barber; that before the accident in question he was an able-bodied man. He was then asked: "What was your earning capacity per month before the time of the accident?" This question was objected to as incompetent and immaterial, and the objection was overruled. The ruling is assigned as error. We think there was no error. At the time of the ruling only the fact that plaintiff was by trade a barber appeared of record. All

the matters on which the argument for error is built up came out subsequently on cross-examination. If counsel conceived that the effect of such matters was to make clear the incompetency of the evidence given on direct examination, respecting earning capacity, it was open to them to prefer challenge thereto, but this they did not do.

2. At the close of all the evidence defendant moved for an instructed verdict in its favor on the grounds: (1) Negligence on the part of the defendant had not been proven; (2) the acts of negligence sought to be established were not the proximate cause of the injury of which plaintiff complains; (3) freedom from contributory negligence had not been proven. The motion was overruled, and of this defendant complains. A determination of the question thus made involves, of course, a review of the evidence.

Presenting the same in the light most favorable to ⁶⁴⁹ plaintiff, as we are required to do, there was warrant for a jury finding of this state of facts. Defendant's line of railway at the point in question runs east and west and is double tracked, the east-bound cars using the south track. While there is a platform on the north side of the tracks at the Gun Club Station, there is none on the south, and entrance to cars must be made from the ground. Plaintiff had been attending a shoot at the gun club, and in company with one Craybill came down from the club grounds—carrying his gun case in his hand—to take the car east from the station. As the car approached a stop signal was given, and they stepped across to the south side of the tracks. Plaintiff says that when the car stopped, three or four passengers got off; that "Craybill got on the car first, and I took my gun in my right hand and set it on the platform, and he took the gun. I took hold of the [hand] rail with my left hand and put my right foot on the step, and just started to get on, and took hold of the opposite rail, when the car started with a jerk, and I fell on the rail behind the car. The car was standing still when I put my gun on the platform, and the instant I put my foot on the step it started, just as I went to take hold of the opposite rail." Craybill, as a witness for plaintiff, says: "Three or four persons got off the car. I climbed right on as soon as these people got off. Burger took hold of the rail; handed me his gun first, just as quickly as I got on. He got hold of the railing and tried to get on. He undertook to make a step up there. I think he had a foot on the step. The car started as tight as it could go

from the start. Burger fell down. It dragged him down. After he fell the car went from one hundred and fifty to two hundred feet." Discussion ought not to be necessary to make it clear that here was a case to go to the jury. Accepting plaintiff's story—as the jury might well do—he was in ⁶⁵⁰ the exercise of due care. The defendant was negligent in starting its car before passengers had opportunity to board the same, and in the manner of starting; and such negligence was the proximate cause of the accident.

3. Some of the witnesses for defendant testified that plaintiff continued his hold upon the hand-rails after the car started, and ran along beside the car a distance of several feet before his hold was broken or relinquished, and he fell. Predicating its request on the testimony to this effect, defendant asked an instruction directing the jury that, if the facts were found to be as thus testified to, plaintiff could not recover, because the wrongful starting of the car, if it was wrongfully started, was not the proximate cause of plaintiff's injury. In a further request the court was asked to say that, upon a state of facts so found, defendant could not be held liable for the injury sustained, and this because, "by holding to the moving car and attempting to get on the same, plaintiff assumed any danger of injury arising therefrom." In a still further request the court was asked to say that upon a state of facts so found plaintiff was guilty of contributory negligence as a matter of law, and hence could not recover. Each of these requests were refused, and the refusal as to each is denounced as error. We think there was no error. According to our understanding, it is no part of the contention of counsel that plaintiff acted in violation of any duty he owed to himself when he seized the hand-rails and made his initial attempt to step upon the car platform. On the contrary, as we gather, this seems to be the theory of counsel, upon which the requests are based: That conceding the premature starting of the car, and that the same was negligent, if the immediate effect thereof was not to throw plaintiff to the ground, but, instead, he maintained his handhold on the rail, and ran alongside for some distance in an effort to ⁶⁵¹ accomplish a boarding, but finally relinquished his hold because unable longer to maintain the same, and there being no intervening act of defendant following the starting of the car save the continued forward movement thereof, then the fall was not the proximate result of the wrongful act in starting the car, and as that act is the sole

matter of negligence complained of, as matter of law there can be no recovery. So, also, that under such circumstances the act of plaintiff in running alongside amounted in law to contributory negligence, and he assumed all risk of accident in so doing. The theory is well conceived in the interests of defendant, but it will not bear analysis. Of necessity it is based upon the supposition that the negligence of defendant ceased of effect once the immediate shock, incident to the premature starting of the car, had spent its force; that with the forward movement of the car, due care resumed its dominant sway. To hold in conformity with the view thus taken would be to write a new chapter on the law of negligence. Instead, it is the law, as universally applied, that where one by his negligent act thrusts another into a position of danger, the act—and the negligence by which it is clothed—continues and controls as long as the danger continues, unmodified by any independent, affirmative and voluntary act on the part of the person affected, or by some intervening controlling circumstance. And it is for the jury to say at what point or juncture and in what particular such person ceased to be dominated in his conduct by the act of negligence, and resumed voluntary control over his own actions. To search out and cite authorities in support of these conclusions would seem to be a work of supererogation. The case, as here made, is quite different from one where an intending passenger approaches a moving car and attempts to board it. And such are the cases principally relied upon by appellant. In such cases the continued movement of the car cannot ⁶⁵² be considered, in any sense known to the law of negligence, as the proximate cause of an accident and injury attendant upon the attempt to board. If the operating company can be held responsible at all for such an injury, it must be upon proof of some affirmative act of negligence intervening between the attempt to board and the accident complained of, and from which act of negligence the accident and injury proceeded. Here, however, the plaintiff occupied the relation of a passenger when the start of the car was made: 3 Thompson on Negligence, sec. 2638. Another question—simple in its last analysis—is this: Where did the force which led up to and culminated in the accident which befell plaintiff have its origin? If traceable to the negligent conduct of defendant in starting and moving forward the car, and the accident would not have happened but therefor, then such conduct must be regarded as the proximate cause and the question

in the case—if, indeed, the facts permitted of a question—was one for the jury.

Giving attention, for a moment, to the question of contributory negligence, as made by the request, there is no theory on which to conclude, as matter of law, that due care for his own safety required of plaintiff that he release his hold upon the car the moment he was made aware of the fact that the same was in motion. Whether or not a person—brought to face an emergency—has acted with due care for his own safety is to be determined in all cases by the method of conduct. If what was done was no more than might have been expected from an ordinarily prudent person, placed under the like circumstances, then due care is not wanting. And if in the situation presented there is room for reasonable minds to differ as to the proper conclusion to be drawn, the question is one for a jury. And as far as we know, all the opinion and text writers agree upon this. Now, as we understand it, the car platform, ⁶⁵³ approached by a step, was not guarded by a door or gate, so that, in getting on and off, passengers were not dependent on any action of the employés in charge of the car. As we have seen, plaintiff had partially effected a boarding when the car started. And if the witnesses for defendant were to be believed, the car started slowly and without any jerk. It is not improbable that reasonable minds might conclude that plaintiff was not negligent in trying to regain his footing on the car step, and thence to the platform. The question was therefore for the jury. Of course, if plaintiff on his own voluntary motion—and wholly disconnected and independent from the sudden start—ran alongside the car, and his fall was proximately due to some cause transpiring after the start was made, there might be room for the application of the principle of the cases on which appellant relies. But in the evidence there was no warrant for a finding that such was the situation with which the jury had to deal. As the argument concedes that the starting of the car was negligent, and assuming the truth of the testimony of defendant's witnesses, in our view the only question in the case is whether plaintiff was guilty of contributory negligence in not releasing his hold at once upon being made aware of the starting of the car. And such, by all the authorities, was a question for the jury.

4. Further, on the subject of contributory negligence, the defendant requested the court to instruct the jury that, if found that plaintiff retained his hold upon the car after the

start was made, and ran alongside the same for some distance before he fell, "said action would be prima facie negligence on his part, . . . and he cannot recover, unless he has shown by a preponderance of the evidence that said act was excusable by reason of danger, real or apparent, to him—that of falling and receiving injury, if he should release his hold upon the car." This request was also ⁶⁵⁴ refused, and, as we think, rightly so. Fairly analyzed, it is the doctrine of the request that on finding that plaintiff retained his hold upon the car, and ran alongside thereof, justification for his conduct in so doing was possible in law only on the theory that it was, or appeared to him to be, necessary to so act in order to prevent injury to his person. It excludes the idea that justification for his conduct was possible, even though his motive in so acting was to regain his footing and complete an entrance in the car. By the great weight of authority it is the rule that in the case of one not yet a passenger contributory negligence does not arise, as matter of law, from the mere fact that an attempt has been made to board a moving car: 3 Thompson on Negligence, sec. 3536. This being so, on no theory is it possible to say that one who sustains the relation of a passenger, and who has been thrown from his position by an act of negligence in the handling or operation of the car, must be held guilty of negligence per se if he attempts—either as the result of impulse or in the reasonable belief that he can succeed—to regain his position and accomplish a boarding of the car. And especially such ought not to be the rule where, as here, according to defendant's witnesses, the start of the car was easy and slow.

5. In the eleventh instruction, given by the court on its own motion, the subject of contributory negligence was dealt with. In the instruction the law of the case—after advising the jury that plaintiff could not recover if, by his own negligence, he contributed to the happening of the accident and injury of which he complains—was thus stated: "The fact, if it be a fact, that plaintiff did not let go of the car, but clung to the rail and ran along the side of the car trying to get on, after it had started, will not necessarily show that he was guilty of contributory negligence. If, by reason of the starting of the car at the ⁶⁵⁵ time and in the manner in which it was started, an emergency arose, then, even though plaintiff's action was ill-judged, if, under all the facts and circumstances shown by the evidence, he acted as would a man of ordinary prudence in a like situation, and had used ordin-

ary care in his original attempt to get on the car, then he was not guilty of contributory negligence," etc. This instruction is assailed on the grounds: "(1) That there was neither pleading nor evidence upon which to submit to the jury the question of such emergency; (2) that the instruction failed to tell the jury what would have constituted contributory negligence of the plaintiff in clinging to the car and running along beside it; (3) that the said instruction was confused and misleading upon the question of contributory negligence, and incorrectly stated the law on the subject." There is no merit in any of these grounds. Most certainly it is within bounds to say that, in the sudden and unexpected starting of a street-car, while a passenger is attempting to board the same, there is presented an emergency. According to the lexicographers, an emergency is a sudden or unexpected happening or occasion calling for immediate action: Webster's Dictionary; Century Dictionary. And in the pleading it was alleged, and without dispute the evidence made proof, at least that the car was started suddenly and without warning. In a previous instruction the court had correctly defined negligence, and the jury had been told that it was incumbent on plaintiff to show his own due care; that "on his part he was bound, where attempting to get on the car, and in all his conduct with relation to it, to exercise reasonable and ordinary care for his safety, and if he failed so to do, he was negligent and cannot recover." We think no more could, in reason, be required. The instruction correctly stated the law, and without confusion.

6. Defendant asked an instruction to the effect ⁶⁵⁶ that "if the jury found that any witness in the case had willfully and intentionally sworn falsely with reference to any material fact in the case, they were at liberty to disregard the testimony of such witness, or to give to it only the weight and credit to which in their judgment it was entitled." The request was refused, and, on its own motion, the court told the jury that: "You are the judges of the credibility of the witnesses and the weight to be given to each and all of them. Where there is a conflict in the evidence, you should harmonize it if you can; but if you cannot do so, you should give to each witness such credit as you deem him entitled, or none if entitled to none." Conceding the propriety of an instruction as required, we think the refusal was without prejudice, in view of the instruction given; and this we say

in the light of our reading of the evidence of each of the witnesses.

7. As one element of his damage, plaintiff alleged in his petition a loss of time, in the sum of one thousand dollars. In the instruction devoted to the subject of measure of damages the court did not place any limitation upon the amount which plaintiff might recover for loss of time. As there were other elements of damage alleged, to which evidence was addressed, and as the verdict was for five thousand dollars, there was no prejudice.

8. After verdict defendant filed a motion in arrest of judgment, one of the grounds being that the petition failed to allege freedom from contributory negligence. Pending the motion, plaintiff asked leave to amend, to make allegation of that fact, and over the objection of defendant, leave was granted, and an amendment was filed. Thereupon the defendant filed answer to the amendment, denying generally, and demanded a trial on the issue thus joined. The demand was refused and the motion in ⁶⁵⁷ arrest was overruled. In disposing of the contention for error arising out of this, it is sufficient to say that in the petition, after relating the facts leading up to and culminating in the accident and injury of which plaintiff complains, it is alleged "that said accident and injury was not caused by any act of negligence on the part of this plaintiff." As the trend of the fact specifications in the petition was to the effect that plaintiff was in the exercise of due care for his own safety, the allegation we have quoted above was sufficient as a conclusion. At least, the pleading was not wholly wanting in allegation on the subject; and if defendant had desired more, it should have moved therefor.

Other errors assigned are either without merit or are disposed of by what has already been said.

No reversible error entered into the judgment, which must be and it is affirmed.

The Negligence of a Railway Company in Starting a Car or Train while a passenger is boarding it, and his contributory negligence in attempting to board the same, are discussed in the recent cases of Atchison etc. Ry. Co. v. Holloway, 71 Kan. 1, 114 Am. St. Rep. 462; Clark v. Durham Traction Co., 138 N. C. 77, 107 Am. St. Rep. 526; Boulfrois v. United Traction Co., 210 Pa. 263, 105 Am. St. Rep. 809; Sharp v. New Orleans City R. R. Co., 111 La. 395, 100 Am. St. Rep. 488. And the negligence of a railway company in starting a car or quickening its speed while a passenger is alighting is considered in McGann v. Boston Elevated Ry. Co., 199 Mass. 446, 127 Am. St. Rep. 509; Besecker v. Delaware etc. Ry. Co., 220 Pa. 507, 123 Am. St. Rep. 714; Martin v. Southern Ry., 77 S. C. 370, 122 Am. St. Rep. 574.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

ENNIS v. TUCKER.

[78 Kan. 55, 96 Pac. 140.]

QUITCLAIM DEED, Notice Implied from Taking.—Whoever takes a quitclaim deed is notified by the very limitations in the conveyance that the grantor does not undertake to convey a full title to the premises. As a general rule, the grantee takes the lands subject to all outstanding interests and equities shown by the records and such as are discoverable by the exercise of reasonable diligence. (By the editor.) (pp. 353, 354.)

A QUITCLAIM DEED Vests All Present Interest of the Grantor in the premises as effectually as any other conveyance. (By the editor.) (p. 354.)

QUITCLAIM DEED, Interests Over Which will Take Precedence.—If there are outstanding unrecorded equities and interests which are unknown to the purchaser and which cannot be ascertained by a reasonably diligent search, and the purchase is made in good faith and for value, then the conveyance will take precedence thereof. (By the editor.) (p. 354.)

QUITCLAIM DEED, When Vests Title as Against Prior Unrecorded Deed.—An unrecorded quitclaim deed will be held to be inferior and subordinate to a subsequent quitclaim deed from the same grantor, where the holder of the later deed is a purchaser in good faith, for value, is ignorant of the former conveyance, and when the existence of the prior deed was so concealed that it could not be discovered by the exercise of reasonable diligence on the part of the subsequent grantee. (pp. 354, 355.)

QUITCLAIM DEED—Purchase for Value Need not be at an Adequate Price.—One acquiring title in good faith by a quitclaim deed is protected from a prior unrecorded deed, though the price paid by him is not adequate. (By the editor.) (p. 356.)

(Syllabi by the court except where stated to be by the editor.)

Suit to quiet title. The property was claimed by the plaintiff, Frank Tucker, under a tax deed, and this suit was commenced for him by W. H. Wagner, as his attorney, as against the owner of the property, W. W. Drury, who ap-

peared and was represented by his attorney, John B. Ennis. The tax deed was invalid, but during the pendency of the suit Ennis acquired the title of his client, Drury, under a quitclaim deed which he neglected to record, thinking thereby to make more favorable negotiations for the claim of Tucker, and with that object in view, he addressed letters both to Wagner and to Tucker. Wagner, in ignorance of the transfer to Ennis, opened negotiations with Drury for the purpose of obtaining a quitclaim deed from him, and succeeded in doing so for the sum of forty dollars, placing his conveyance on record February 27, 1905. On the 2d of April following, Ennis recorded the conveyance to himself and subsequently had himself substituted as defendant in place of Drury, and set up his acquisition of title by answer and cross-petition. The court nevertheless entered a decree in favor of Tucker, and Ennis appealed.

John B. Ennis, pro se.

W. H. Wagner, Lee Monroe and George A. Kline, for the defendant in error.

58 GRAVES, J. The tax deed being void, the title of the parties to the land in controversy must depend upon their respective quitclaim deeds. Drury was the owner and conveyed the premises first to Ennis, and afterward to Wagner for Tucker. Upon this situation Ennis contends that Wagner, having taken a quitclaim deed, obtained thereby only such interest in the land as his grantor, Drury, held at the date of the conveyance, which was nothing, as the latter had previously **59** conveyed it to Ennis. On the other hand, Wagner insists that the public records showed a clear title in Drury, and that he in good faith accepted the conveyance from Drury relying upon the record; that Ennis, by failing to have his deed recorded, lost the advantage of being a prior purchaser.

The rule concerning the rights of persons holding real estate under quitclaim deeds is not the same in all jurisdictions, but in this state it has been frequently considered and may be regarded as settled. Whoever takes a quitclaim deed is notified by the very limitations in the conveyance that the grantor does not undertake to convey a full title to the premises. This limitation is a sufficient suggestion that other interests may be outstanding to place the grantee upon inquiry as to what such possible interests may be. It may be stated, therefore, that as a general rule the holder of such a deed takes the

land conveyed subject to all outstanding interests and equities shown by the records and such as are discoverable by the exercise of reasonable diligence. A quitclaim deed, however, will convey the present interest of the grantor in the premises as effectually as any other instrument. The chief distinguishing feature between this kind of a deed and other forms of conveyance is that it furnishes notice to the grantee of outstanding interests and equities additional to those of which constructive notice is imparted by the public record. If the grantor holds the full title to the premises, a quitclaim deed will convey the complete estate; if there are outstanding unrecorded interests or equities of any kind, the conveyance will be subject to such of these as a reasonably diligent search would discover. If there be outstanding unrecorded equities or interests, however, which are unknown to the purchaser, and which cannot be ascertained by a reasonably diligent search, and the purchase is made in good faith and for value, then the conveyance will take precedence thereof. The degree of diligence necessary to give this preference will depend upon the circumstances ⁶⁰ of each particular case. It is vigorously contended by the plaintiff in error that the holder of a quitclaim deed takes subject to all outstanding equities, without restriction or limitation, but such is not the rule in this state: *Lewis v. Kirk*, 28 Kan. 497, 42 Am. Rep. 173; *Lee v. Birmingham*, 30 Kan. 312, 1 Pac. 73; *Johnson v. Williams*, 37 Kan. 179, 1 Am. St. Rep. 243, 14 Pac. 537; *Merrill v. Hutchinson*, 45 Kan. 59, 23 Am. St. Rep. 713, 25 Pac. 215; *Fountain v. Kenney*, 71 Kan. 642, 81 Pac. 179; *Eger v. Brown*, 77 Kan. 510, 94 Pac. 803, 15 L. R. A., N. S., 459.

Tested by the rule recognized here, we think the district court properly found that the quitclaim deed from Drury to Wagner conveyed the premises free from the claim of Ennis under the older, unrecorded deed. The situation of the parties and the circumstances of the transaction show that Wagner was deceived by both Drury and Ennis, and was thereby induced to make the purchase. This suit, which involved the title to the land in question, was pending; Wagner was the attorney for the plaintiff, Tucker, and Ennis was the attorney for Drury. So long as the suit was pending Wagner might, and naturally would, think that Ennis was in good faith representing the interest of his client, and that the client continued to be the owner of the land in litigation. Nothing has been shown which would justify the suspicion on the part of Wagner that the land had been sold by Drury to his at-

torney, and that the litigation was being continued under its original style to accomplish the purposes of such attorney. The circumstances under which Ennis acquired his deed from Drury, and his subsequent conduct of the lawsuit, were well calculated to conceal his interest in the land, so that no reasonable amount of diligence upon the part of Wagner would have enabled him to discover it.

On the other hand, Ennis knew that Tucker desired to buy the interest of Drury, and might negotiate therefor with him directly, but with this knowledge the ⁶¹ fact that Drury had parted with his title was concealed from both Tucker and Wagner. Ennis not only failed to have his deed recorded, but paid the taxes on the land in the name of Drury, showing a purpose on his part to prevent Wagner from discovering the real situation. The fact that the tax appeared by the record to have been paid by Ennis disclosed nothing unusual to Wagner; it merely showed the payment of taxes by an attorney on the land of his client—a very common and proper proceeding. It contained no suggestion of ownership on the part of the attorney. On the contrary, it indicated ownership in Drury, and was evidently intended to convey that impression.

The letters written by Ennis after Wagner had obtained the deed from Drury could not, it is insisted, have influenced Wagner in making the purchase. These letters were probably admitted for the purpose of showing why the deed from Drury to Ennis was not recorded, and the general purpose on the part of Ennis to keep that conveyance from the knowledge of Wagner.

It is also urged that the deed from Drury to Wagner is void because made in violation of sections 2091 and 2092 of the General Statutes of 1901, which make it a crime to convey real estate with intent to defraud prior purchasers or other persons, and also require persons who make conveyances to mention therein all prior instruments which may have been made relating to the same lands. We are unable, however, to see how these sections apply to this case, as there is no evidence of an intent to defraud on the part of either party. The only evidence upon this subject was that of Drury, who testified that he supposed when he made the second deed that the first one had been recorded and no one would be deceived or misled by the later one.

Complaint is made that Ennis took the deposition of Drury, whose testimony proved unsatisfactory and disappointing to

such an extent that he declined to offer it in evidence, and the defendant in error was thereupon ⁶² permitted to do so, although Ennis objected. We are unable to find any objections in the abstract, and therefore we cannot say such action of the court was erroneous.

It is further contended that Wagner was not a purchaser for value, having only paid forty dollars for the deed. We cannot consent to this conclusion. We do not understand the rule to be that a purchaser for value must necessarily give an adequate price.

There are other questions discussed by the plaintiff in error, but in the view we have taken they are not material, and need not be considered. We find that the interest in the real estate held by Ennis under his quitclaim deed was a secret and concealed equity, of which Wagner had no notice or knowledge when he received the deed from Drury, and the existence of which could not, by the exercise of any reasonable degree of diligence, have been discovered by him; and that the latter was a purchaser in good faith and for value. We therefore conclude that the purchase by Ennis, though prior in time, is subsequent in right to that of Tucker.

The judgment of the district court is affirmed.

The Operation and Effect of Quitclaim Deeds are discussed in the note to *Babcock v. Wells*, 105 Am. St. Rep. 854. That a bona fide purchaser under a quitclaim deed is protected against an outstanding unrecorded conveyance, see *Bannard v. Duncan*, 79 Neb. 189, 126 Am. St. Rep. 661.

METROPOLITAN LIFE INSURANCE COMPANY v. BRUBAKER.

[78 Kan. 146, 96 Pac. 62.]

INSURANCE, LIFE—Answer as to Consultation with Physician, When Immaterially False.—An applicant for life insurance who, from motives of his own, has sought and obtained a professional interview with a physician regarding the state of his health cannot truthfully answer the question referred to in the negative merely because the interview concerned some temporary ailment or indisposition slight in character and not seriously affecting health. The fact of a consultation with a physician does not depend upon the gravity of the subject of the interview. (pp. 359, 361.)

INSURANCE, LIFE, Warranty by Applicant, What Amounts to.—If an applicant for life insurance warrant the truthfulness of his answer to the question, "Have you consulted any other physician?" and agree that the policy issued in consideration of the warranty

shall be void if the answer be false, the liability of the insurer depends upon the truthfulness of the answer. (pp. 360, 361.)

INSURANCE, LIFE, Minor's Warranty and False Answers.—The beneficiary of a life insurance policy based upon a warranty of the character described cannot disaffirm the warranty on the ground that the applicant was a minor and still enforce the policy. (p. 362.)

INSURANCE, LIFE, Waiver by Applicant of Right to Exclude Physician's Testimony.—An applicant for life insurance may make a valid contract with the insurer waiving the privilege afforded him by section 323 of the Code of Civil Procedure, which renders a physician incompetent to testify to professional communications from his patient and knowledge of his patient obtained in a professional way. (pp. 363, 364.)

(Syllabi by the court.)

Frank Doster, for the plaintiff in error.

R. F. Hayden, George P. Hayden, R. H. Gaw and Z. T. Hazen, for the defendant in error.

147 BURCH, J. The plaintiff brought suit to recover the amount of a policy of insurance issued by the defendant on the life of Frank E. Quinn. In connection with his application for insurance the insured stated in answer to a question propounded to him by the defendant's medical examiner that he had never had consumption. He also returned answers to questions relating to illness, medical attendance, and consultation with physicians, as follows:

"3. Give full particulars of any illness you may have had since childhood and name of medical attendant or attendants.

"Doctor Miller; smallpox; three years ago; Topeka, Kan."

"6a. Name and residence of your usual medical attendant?

"Have none.

"6b. When and for what have his services been required?

"Except smallpox, not since childhood.

"7. Have you consulted any other physician? If so, when and for what?

"No."

The insured agreed that the answers and statements in his application, including those made to the medical examiner, should be the basis of the contract of insurance, that such statements and answers were full and true, and that any false, incorrect or untrue answer or suppression or concealment of facts in any answer should render the policy null and void. The policy provided that it was issued in consideration of the answers and statements contained in the application, that all of such answers and statements were made warranties and a part of the contract, that if any answer or statement were not true the policy should be void, and that ¹⁴⁸ the

contract was completely set forth in the policy and application, taken together.

The defendant resisted payment on the ground the insured had consumption when he applied for insurance, and that the answer to question No. 7 was false. Evidence was introduced upon which the jury might very well have found the insured had consumption before and at the time the contract was made. Evidence was also introduced showing that on October 6, 1902, the insured was admitted to the Atchison, Topeka and Santa Fe Railway Company's hospital at Topeka upon the recommendation of the hospital surgeon, who stated that he was then suffering from tuberculosis pulmonum; that his history was then taken and a physical examination of him made by one of the hospital physicians, with the result that his disease was diagnosed as pulmonary tuberculosis. It was further proved that upon January 14, 1903, and January 24, 1903, the insured consulted Dr. S. G. Stewart, of Topeka, professionally, who examined him and diagnosed his case as inflammation of the bronchial tubes, indigestion, and catarrhal condition of the stomach and bowels, but the doctor feared consumption and advised him to go to Colorado for his health. The application for insurance was made on January 29, 1903. The insured died on March 14, 1904, of acute tuberculosis.

The court instructed the jury as follows:

"The word 'illness,' as used in question No. 3 above, means a disease or ailment of such character as to affect the general soundness and health of the system seriously, and not a mere temporary indisposition which does not tend to undermine or weaken the constitution of the insured.

"The defendant claims that the insured consulted with Dr. S. G. Stewart on two occasions prior to the application for insurance, and therefore that the insured did not truthfully answer question No. 7, above quoted, with reference to consulting any other physician.

"The mere calling into a doctor's office for medicine ¹⁴⁹ to relieve a temporary ailment or indisposition or the calling at the home of the insured by a doctor for the same purpose cannot be said to be consulting a physician within the meaning of question No. 7. If the insured consulted Dr. Stewart prior to the making of the application for some illness, it was the duty of the insured to so state in his answer to this question, but if in calling upon Dr. Stewart he simply desired relief from some ailment or indisposition not amounting to illness or disease as herein explained, then the insured could

truthfully answer this question as he did. It will be for you to determine from the evidence in this case whether the insured answered question No. 7 truthfully or not.

"It is the duty of a person applying for life insurance under an application such as was made by the insured in this case to truthfully answer all questions therein contained to the best of his ability; but in answering a question calling for information concerning previous illness or medical attendance it is a matter of no importance whether or not the applicant at some previous time may have had some temporary ailment or indisposition, not serious or substantial in its nature, but soon over with, such as headache, belly-ache, cold, or any such temporary disorder or disturbance of the physical health as would ordinarily yield to what is called home treatment. The applicant is not expected to remember all such ailments he has had during his life, or to disclose the same in his answers to such questions.

"The purpose of the insurance company in asking questions and securing answers in the application for insurance is to obtain information as to the kind of risk it is assuming when it issues a policy to the applicant.

"As to question No. 7 in the application, which the insured, Frank E. Quinn, answered to the effect that he had not consulted any other physician, I instruct you that this question calls only for consultations with respect to matters material to the risk and not for consultations in respect to some indisposition not properly called a disease. The burden is upon defendant to establish the falsity of any answer of the insured and the truth of any fact which would constitute a breach of the warranty upon which defendant relies."

The jury found for the plaintiff, and judgment was ¹⁵⁰ entered on the verdict. The defendant prosecutes error, and among other matters assigns as error the giving of the instructions quoted.

It is true that the word "illness," as used in question No. 3 of the medical examination, is open to interpretation. No man ought to give lasting regard to all his little ailments, bruises, aches and pains; he cannot fix them in his memory if he would; they do not affect the risk in life insurance, and the insuring company cares nothing about them. Therefore, illness clearly means something more than a temporary indisposition, slight and trivial in its nature, which does not really affect the soundness of the system, substantially impair the health, materially weaken the vigor of the constitution, or

seriously derange the vital functions. It is also true that consultation with a physician implies more than a casual meeting with a doctor and a passing remark in reference to some bodily state or condition. Incidental conversations of this character are not kept in mind, and are inconsequential when considered in relation to a life insurance risk. But if a man, from motives of his own, has sought and obtained an interview with a physician regarding the state of his health, the fact of a consultation with the physician does not depend upon the gravity of the subject of the interview, as the court instructed the jury. A man may believe that he is in sound health, but he desires an expert opinion upon the subject. He may think he detects certain disturbances of his normal condition which apparently are not serious, but he desires to know what those disturbances indicate. He goes to a physician, tells his story, answers questions, submits to an examination, receives advice, perhaps is given medicine or other treatment, perhaps is assured there is nothing the matter with him, and is sent away without more. He has consulted a physician, whether he was sick or well. The man may have been wise or foolish to consult a doctor. Bread pills may have been an efficacious remedy ¹⁵¹ for him or he may have been stricken with a fatal disease. The fact of the consultation remains, and cannot be negatived by any showing whatever relating to the true state of his health.

Very often men who are not strictly honest seek insurance on their lives, and a life insurance company may properly be allowed to take full precautions against death-bed insurance. It is entirely reasonable that such a company should ask an applicant for insurance if he has consulted a physician. The question is simple and unambiguous. It is not like questions relating to illness, which may call for the opinion and judgment of the applicant upon a debatable matter hard to decide. It involves nothing which the applicant cannot answer categorically out of his own personal knowledge. It relates to a fact which may be recollected as well as an illness. The question is important, because if an affirmative answer be given the company may make an investigation and ascertain the exact truth regarding the cause for the consultation and the state of health it revealed or ought to have revealed. It requires no argument to show that the action of the company may well be influenced by the answer to this question. Taking, therefore, even a narrow view of the right of the insurer to exercise its own judgment and stipulate as to what

is material, it is entirely fair that the truthfulness of such answer should be made the subject of a warranty. In this case the insured warranted the truthfulness of his answer to question No. 7, and accepted the policy upon the express condition that the insurer should not be liable to pay the stipulated indemnity if that answer were false. It was false, and the plaintiff cannot recover.

The plaintiff cites some cases from Vermont and elsewhere holding contrary to these views. They cannot be approved. In the case of *Hoover v. Royal Neighbors*, 65 Kan. 616, 70 Pac. 595, an applicant for life insurance warranted the truthfulness of his answer to ¹⁵² the following question: "Have you within the last seven years consulted any physician in regard to personal ailment?" The answer was "No," and was false. The syllabus of the case reads: "When, in a contract of insurance, the application of the insured is made the basis for, and a part of, the contract between the parties, and in the contract so made it is stipulated and warranted that the answers of the insured to questions propounded in the application are literally true, and it is also stipulated that if any such answer be found to be not literally true the contract shall become absolutely null and void, the validity of the contract depends on the truthfulness of the answers, and not on the materiality of the answers to the risk assumed. The contract of the parties having made the answers of the insured material, the same is avoided if such answers be found untrue."

The point is made that in the *Hoover* case the warranty was of the "literal" truth of the answer. The court is not disposed to distinguish between the literal truth and the truth unqualified of an answer which must be "yes" or "no." The *Hoover* case and the present decision are supported by the following authorities cited by the defendant: *Jeffries v. Economical Mut. Life Ins. Co.*, 89 U. S. 47, 22 L. ed. 833; *McDermott v. Modern Woodmen*, 97 Mo. App. 636, 71 S. W. 833; *Providence L. Assur. Soc. v. Reutlinger*, 58 Ark. 528, 25 S. W. 835; *Mutual Life Ins. Co. v. Arhelger*, 4 Ariz. 271, 36 Pac. 895; *Connecticut Mut. Life Ins. Co. v. Young*, 77 Ill. App. 440; *Nelson v. Nederland Life Ins. Co.*, 110 Iowa, 600, 81 N. W. 807; *Cobb v. Covenant Mutual Benefit Assn.*, 153 Mass. 176, 25 Am. St. Rep. 619, 26 N. E. 230, 10 L. R. A. 666; *Dimick v. Metropolitan Life Ins. Co.*, 69 N. J. L. 384, 55 Atl. 291, 62 L. R. A. 774; *Metropolitan Life Ins. Co. v. McTague*, 49 N. J. L. 587, 60 Am. Rep. 661, 9 Atl. 766;

Price v. Phoenix Mutual Life Ins. Co., 17 Minn. 497, 10 Am. Rep. 166; Roche v. Supreme Lodge, 21 App. Div. 599, 47 N. Y. Supp. 774; United Brethren Mut. Aid Soc. ¹⁵³ v. O'Hara, 120 Pa. 256, 13 Atl. 932; Caruthers v. Kansas Mut. Life Ins. Co., 108 Fed. 487; Hubbard v. Mutual Reserve Fund Life Assn., 100 Fed. 719, 40 C. C. A. 665.

The insured was a minor when the contract was made and at the time of his death. In the case of O'Rourke v. John Hancock Mut. Life Ins. Co., 23 R. I. 457, 91 Am. St. Rep. 643, 50 Atl. 834, 57 L. R. A. 496, the court held a minor is not bound by the warranties contained in a contract for life insurance, but that the policy is nevertheless enforceable against the insurer. In this state a minor is bound not only by contracts for necessities but also by all other contracts, unless he disaffirms them within a reasonable time after he attains his majority. If he disaffirm, he must restore to the other party all money or property received by him by virtue of the contract and remaining within his control: Gen. Stats. 1901, sec. 4183. This contract was not disaffirmed by the minor. It is binding upon him until disaffirmed, and the court knows of no one who can exercise the right to disaffirm except the minor. But if the plaintiff be allowed to represent the minor, the same consequences must follow as if the minor had acted. The contract of insurance is an entirety, and the statute gives the minor no right to disaffirm provisions which he finds burdensome and to enforce those which are to his advantage. If any material portion of the contract be disaffirmed, unexecuted provisions fall. The warranty is an integral part of the contract. It is an indispensable condition of liability on the part of the insurer. If the warranty be disaffirmed, liability on the contract must necessarily be destroyed. The contract cannot be disaffirmed and then money be taken from the company by virtue of the contract when the return of such money, if it were in the minor's hands, would be a necessary element of disaffirmance. The Rhode Island case is disapproved.

Another question is discussed in the briefs which ¹⁵⁴ will be of vital importance upon a retrial of the case. The application contains the following agreement: "The provisions of section 834 of the Code of Civil Procedure of the state of New York, and of similar provisions in the laws of other states, are hereby waived; and it is expressly consented and stipulated that in any suit on the policy herein applied for any physician who has attended, or may hereafter attend,

the insured may disclose any information acquired by him in any wise affecting the declarations and warranties herein made."

Section 834 of the New York code forbids a physician to disclose any information which he acquires in attending a patient in a professional capacity. The corresponding provision of the law of this state is section 323 of the Code of Civil Procedure, which reads as follows:

"The following persons shall be incompetent to testify:

"Sixth. A physician or surgeon, concerning any communication made to him by his patient with reference to any physical or supposed physical disease, or any knowledge obtained by a personal examination of any such patient; provided, that if a person offer himself as a witness, that is to be deemed a consent to the examination also if [of] an attorney, clergyman or priest, physician or surgeon on the same subject."

Section 836 of the New York code requires that any waiver of the provisions of section 834 must be made upon the trial or examination in which the question of competency arises. The statutes of this state do not so provide.

It is insisted the contract is a New York contract and must be construed according to the laws of that state. The New York statutes referred to relate to procedure, and to procedure in that state only. They do not undertake to regulate procedure in this state or to limit the right of parties to contract with reference to privileges granted by the laws of this state. If the trial had occurred in New York, the procedure there ¹⁵⁵ would have been followed and the stipulation would have been ineffectual. Since it occurred in this state, the only question is if the waiver is good under the law here.

The statute quoted contemplates that the patient may consent to his physician's testifying. Therefore, no question of public policy is involved. The public policy of the state does not depend upon the will of individuals who are free to act as circumstances may suggest them. It is elementary law that communications made in professional confidence are not incompetent. If a third person hear them, he may testify. The disqualification is imposed upon the lawyer, physician or priest only, and not for his benefit or for the benefit of the public, but merely as a privilege to the client, patient or person confessing. This privilege, like many others, even those protected by constitutional guaranty, may be waived. By If he publish the confidential matter to the world the priv-
statute, if the party himself testify the privilege is waived.

ilege is waived: See *In re Elliott*, 73 Kan. 151, 84 Pac. 750; *In re Burnette*, 73 Kan. 609, 85 Pac. 575. And it would deprive him of a valuable right if he were prohibited from making a waiver by contract in advance of litigation.

"The privilege may be waived, like all other privileges. It is astonishing to find that this question could ever have been regarded as debatable. Nothing but a confusion of fundamental ideas could ever create any doubt. . . . That a waiver may be irrevocably made by contract before litigation begun has generally been conceded by the courts. It should certainly be sanctioned unless made under conditions of duress or fraud which would have rendered the contract in other respects voidable": 4 Wigmore on Evidence, sec. 2388.

It is not necessary to pursue the discussion further. The contract is valid, and the waiver is binding.

The judgment of the district court is reversed and the cause is remanded for a new trial.

If an Applicant for Life Insurance intentionally mistakes the facts as to the condition of his health or his attendance by physicians in the past, the policy is thereby avoided: *Mudge v. Independent Order of Foresters*, 149 Mich. 467, 119 Am. St. Rep. 686; *Rinker v. Aetna Life Ins. Co.*, 112 Am. St. Rep. 773; *Cobb v. Covenant Mut. Ben. Assn.*, 153 Mass. 176, 25 Am. St. Rep. 619; except where the ailment or disease is of a trivial character: *Franklin Life Ins. Co. v. Galligan*, 71 Ark. 295, 100 Am. St. Rep. 73; *Blumenthal v. Berkshire Life Ins. Co.*, 134 Mich. 216, 104 Am. St. Rep. 604. A statement by an applicant for life insurance that he has never had a certain ailment, which is an obscure disease, concerning which the insurer should know that the applicant could not have certain knowledge, saving as he might be told by a physician or other expert, is properly construed as a warranty only of the bona fide belief and opinion of the applicant: *Owen v. Metropolitan Life Ins. Co.*, 74 N. J. L. 770, 122 Am. St. Rep. 413. But a negative answer to the question, "Have you personally consulted a physician, been prescribed for, or personally treated within the past ten years?" will avoid a policy of insurance if the applicant had, within the time named, being, as he supposed, in need of a physician, gone to one for the purpose of consulting him as to what was the matter, had an interview, answering questions, and receiving aid, advice, or assistance from him. The question thus answered in the application should not be considered as referring to any specific case. If the applicant had consulted a physician, who had prescribed for him, and administered a hypodermic injection of morphine, he was personally treated within the meaning of the interrogatory: *Cobb v. Covenant Mutual Benefit Assn.*, 153 Mass. 176, 25 Am. St. Rep. 619.

An Infant is not Bound by His Warranties in a Contract of Insurance. Hence a policy insuring his life cannot be defeated, where he has died before his majority, by proving that the answers made to questions propounded in the application were false: *O'Rourke v. Hancock Mut. Life Ins. Co.*, 23 R. I. 457, 91 Am. St. Rep. 643. That an infant may avoid a policy of life insurance taken out by him, and recover the money paid by him as premiums thereon, see *Simpson v. Prudential Ins. Co.*, 184 Mass. 348, 100 Am. St. Rep. 560.

BEST v. TATUM.

[78 Kan. 215, 96 Pac. 140.]

JOINT TENANCY, Statute Abolishing, When not Retro-spective.—The act of 1891 abolishing the right of survivorship did not affect joint tenants who became such prior to the passage of the act. (p. 365.)

(Syllabus by the court.)

John J. McCurdy, George D. Abel and David Ritchie, for the plaintiffs in error.

F. T. Burnham, G. W. Dashiell and M. E. Michaelson, for the defendant in error.

215 Per CURIAM. Several persons acquired and held a tract of land as joint tenants. A number of them died, and no severance of the estate was made during their lifetime. A contention has arisen between the heirs of the deceased tenants and the survivor as to the ownership of the land. Under the conveyance each joint tenant held one and the same interest, and upon the death of one the entire estate vested in the survivors. An act abolishing joint tenancy was enacted in 1891 (Laws 1891, c. 203), after the estate in question had vested, but it only had prospective operation. The rights of the joint tenants became vested under the deed of conveyance, and subsequent legislation did not apply to estates previously created nor deprive any joint tenant of the right of survivorship. It has been held here that the act did not affect vested estates, and the district court rightly held that the title of the land was in the survivor: *Simons v. McLain*, 51 Kan. 153, 32 Pac. 919; *Holmes v. Holmes*, 70 Kan. 892, 79 Pac. 163.

The judgment is affirmed.

A Statute Converting Existing Estates in Joint Tenancy into estates in common is constitutional, because not impairing vested rights but rendering the tenure more beneficial: Holbrook v. Finney, 4 Mass. 566, 3 Am. Dec. 243.

THORP v. FLEMING.

[78 Kan. 237, 96 Pac. 470.]

CHATTEL MORTGAGE, Right of Mortgagee to Take Possession Because He Deems Himself Insecure.—Under a clause in a chattel mortgage providing that the mortgagee may take possession of the property if he deem himself insecure, it is immaterial whether the mortgagee has good cause to believe that he is insecure, if he in fact deem himself to be so. (p. 368.)

APPEAL AND ERROR, Ruling, When Deemed Prejudicial.—Erroneous rulings, if not prejudicial to the rights of a party, may be disregarded; but where the findings are contrary to the evidence, and such errors may have misled the jury, they are material. (p. 368.)

(Syllabi by the court.)

Action by Fleming for the conversion of wheat raised on lands rented by him under an agreement that he would deliver one-third, when harvested, to the lessor for the use of the land. After putting in the crop, Fleming gave a promissory note to the Citizens' State Bank, and secured it by a mortgage on his share of the crop. Of this bank Thorp was the cashier, and he also by purchase from the landlord became the owner of the leased premises and entitled to the landlord's share of the crop. When the wheat was ripe, Thorp caused it to be cut, stacked and partly threshed. On the demand of Fleming for two-thirds of the moneys realized from the wheat marketed, Thorp replied that the moneys received had not paid the expenses incurred in harvesting. Fleming then told Thorp to let the balance of the wheat alone, which the latter promised to do. Later on, Thorp caused the threshing to be completed and placed in a bin the wheat remaining on hand, and Fleming sued him for conversion.

The defendant pleaded his right to one-third as owner of the land; that the plaintiff had neglected to cut and care for the wheat, and that to preserve his interest as owner and to collect the amount due the bank under the lien of the mortgage, the defendant rightfully harvested the wheat.

The testimony at the trial tended to show that the defendant entered and cut the wheat to secure his own share and also to collect for the bank the amount due upon the mortgage, and that the bank then felt itself insecure, and its president directed the harvesting to be done.

The jury found that Thorp, when entering and harvesting the wheat, intended to convert it to his own use; that he had not been willing to account between himself and the plaintiff

and to pay the latter such sum as should be found due upon a settlement; that the president of the bank caused Thorp, as its cashier, to look after the wheat and protect the bank's interest; that Thorp, when entering, acted in the interest of himself as landlord; that he did not act in good faith, believing it necessary to do so in order to protect his interest as landlord, and that the president of the bank told Thorp before the wheat was cut to protect the interest of the bank under the chattel mortgage, and not to let the wheat get away. Judgment for the plaintiff; defendant appealed.

George A. Vandever and F. L. Martin, for the plaintiff in error.

W. H. Lewis, for the defendant in error.

240 BENSON, J. The defendant claims that the findings are not supported by the evidence. There was abundant evidence that the wheat was ripe and falling down when defendant commenced to cut it. The defendant testified that he took possession and cut it for the bank as well as to secure his own interest. The justice before whom the case was first tried testified that Thorp swore that he took it under his lien, and the plaintiff's attorney testified that the defendant said he took it under the lease, but he also testified that he knew that the defendant had set up both claims in his answer, which was not withdrawn. In the light of this evidence, and the finding that the president of the bank cautioned the defendant to protect its interest in the wheat, it is difficult to discover any warrant for finding that the defendant intended wrongfully to convert **241** the wheat to his own use. It is also difficult to see how the finding that he did not harvest the wheat for the bank as well as for himself is supported. His statement that the quantity sold was insufficient to cover the expenses appeared to be true, and no further disposition of the wheat was made until after the action was brought. The plaintiff might have proceeded to market the remainder of the wheat and take out his interest, and this we must presume was his purpose when he exacted from the defendant the promise to let the rest of it alone; or he might have allowed the defendant to complete the marketing, and then demanded an accounting; but instead of doing either, he sued for conversion.

The findings challenge a careful scrutiny of the instructions to ascertain if there was any error that would lead the jury to find as they did. The court fairly instructed the jury upon

the right of the defendant to harvest the wheat, giving in substance the following instruction requested by the defendant, excepting, however, the words in italics:

"If you find from the evidence that at the time he entered and had the wheat cut he was acting in the interest of, and for and on behalf of, the bank, as well as for himself, and that the bank deemed itself insecure, then his actions were rightful under the chattel mortgage, and the plaintiff cannot recover in this action and your verdict should be for the defendant. *In determining this last question it is wholly immaterial whether the bank had good cause to deem itself insecure or not.*"

The proposition so refused was a correct statement of the law: *Werner v. Bergman*, 28 Kan. 60, 42 Am. Rep. 152. The mortgage contained the following clause: "In case . . . the party of the second part shall deem itself insecure, then and thenceforth it shall be lawful for the said party of the second part, or its authorized agent, to enter upon the premises of the said ²⁴² party of the first part, or any other place or places wherein the said goods and chattels aforesaid may be, to remove and dispose of the same, and all the equity of redemption of the said party of the first part, at public auction or private sale."

Under this clause the defendant had the right to take possession if the proper officers deemed the bank insecure, and whether they had just cause for such belief was not an issue to be tried.

In the cross-examination of the defendant he was asked whether he had proceeded to advertise the wheat for sale by written or printed handbills. An objection to this question was overruled, and the defendant answered that he had not. This was an erroneous ruling. No demand had been made for such proceedings (Gen. Stats. 1901, sec. 4253), and the mortgagor had consented to a private sale by provision in the mortgage. The finding of the jury that the defendant did not act in good faith in harvesting the wheat may have been, and probably was, influenced by this admission. The ruling of the court would naturally lead the jury to suppose that the failure to advertise was evidence of a wrongful purpose. In this erroneous ruling, in connection with the failure to give the instruction referred to, may perhaps be found the reason why the jury found, apparently against the evidence, that the defendant in harvesting this wheat intended thereby to convert it to his own use, in violation of the plaintiff's

rights, and not for the protection of the bank or to protect his own interests as landlord. Errors not prejudicial to the rights of the defendant should be disregarded, but the reasonable inference from the findings, in view of the fact that there was little, if any, evidence to support them, is that the jury were misled thereby.

The judgment is reversed, with directions to grant a new trial.

A Chattel Mortgagee cannot Arbitrarily Create a Forfeiture of the mortgage upon the ground that he deems himself insecure, as authorized by the mortgage, without just cause therefor based upon the existence of facts constituting reasonable ground of belief, which is a question for the determination of a jury: Nash v. Larson, 80 Minn. 458, 81 Am. St. Rep. 272. See, also, Newlean v. Olson, 22 Neb. 717, 3 Am. St. Rep. 286. But in Francisco v. Ryan, 54 Ohio St. 307, 56 Am. St. Rep. 711, it is said that a mortgage of chattels, authorizing the mortgagee to take possession of the property when he deems it necessary for his better security, gives him the right to take such possession whenever, in his judgment, it is best for him to do so; and the rightful exercise of that authority does not depend on his having reasonable grounds of deeming it necessary for his security.

CITY OF OSAWATOMIE v. MIAMI COUNTY.

[78 Kan. 270, 96 Pac. 670.]

LIMITATION OF ACTIONS—Municipal Corporations, Exemption of from Statutes Concerning.—The rule that statutes of limitation do not apply to actions by the state unless a legislative intention that they shall do so is shown by express language or appears by the clearest implication also applies to subordinate political bodies, including municipal corporations, with respect to any litigation to enforce governmental rights. (p. 370.)

LIMITATION OF ACTIONS by City to Recover Taxes Withheld.—Where a county diverts to its own treasury a part of the money it has collected upon taxes levied by a city, no statute of limitation runs against an action by the city to recover the amount so wrongfully withheld. (p. 371.)

(Syllabi by the court.)

B. T. Riley and H. S. Maynard, for the plaintiff in error.

Thomas H. Kingsley and Frank M. Sheridan, for the defendant in error.

²⁷⁰ MASON, J. The city of Osawatomie brought an action against Miami county, alleging in substance that for a period of some fifteen years the county had retained ²⁷¹ for its own

benefit a part of the money collected upon taxes levied by the city, especially with respect to the portion paid as interest by delinquents. The petition asked an accounting and a judgment for the amount found due. The county filed a motion, to require the plaintiff to state separately its causes of action, upon the theory that an independent right of recovery accrued upon the failure to pay the amount due at each quarterly distribution. This motion was sustained, and an amended petition was filed containing twenty-eight distinct counts. A demurrer was sustained as to all of them based upon transactions that took place more than three years before the commencement of the action, upon the ground that the statute of limitations had barred a recovery thereon. The plaintiff prosecutes error.

We need not determine whether the trial court erred in requiring the plaintiff to recast the petition, for the order was complied with, and the controversy can be tried upon the new pleading as well as upon the one it superseded. The important question to be decided is whether the statute of limitation applies to an action of this character.

"It is universally held by the courts that no statute of limitations will run against the state or the sovereign authority unless the statute itself expressly so provides, or unless the implications of the statute to that effect are so strong as to be utterly unavoidable": *State v. School District*, 34 Kan. 237, 8 Pac. 208. See, also, *State v. American Book Co.*, 69 Kan. 1, 76 Pac. 411, 1 L. R. A., N. S., 1041.

And it is generally held that the same immunity attaches to subordinate political divisions of the state, including municipal corporations, whenever the character of the litigation is such that the reasons for the exemption apply with substantially equal force. The following are illustrative statements of the rule:

"The general rule is that statutes of limitations run not only for but against municipalities, except in litigation ²⁷² respecting public rights, or property held upon a public trust": 25 Cyc. 1009.

"The better rule seems to be that where a municipality seeks to assert rights which are of a public nature and such as pertain purely to governmental affairs, the exemption in favor of sovereignty applies, and the statute of limitations will not constitute a bar unless it is expressly so provided": 19 Am. & Eng. Ency. of Law, 191.

"The statute does not run against the state unless expressly so provided, and all doubts as to whether it does so run are

to be resolved in favor of the state. This rule extends to minor municipalities created as local governmental agencies in respect to governmental affairs affecting the general public": 8 Cur. Law, 770.

In an elaborate note upon the general subject of the maxim, "Lapse of time does not bar the right of the crown," in 101 Am. St. Rep. 144, its application to public bodies other than the state is fully considered. The authorities there gathered show that while the broad statement is often made that statutes of limitation run against municipal corporations in the same manner as against individuals, the distinction noted, based upon the character of the right asserted, is generally recognized. The courts, however, are not in harmony as to its precise scope or the reasons for it. In *Ralston v. Town of Weston*, 46 W. Va. 544, 76 Am. St. Rep. 834, 33 S. E. 326, it was held, overruling three earlier decisions, that an action by a municipality for the recovery of possession of ground claimed as a street was not barred by lapse of time, even under a statutory provision that "every statute of limitation, unless otherwise expressly provided, shall apply to the state": W. Va. Code, 1906, sec. 1137. The court said: "That the statute of limitations applies to municipal corporations there can be no question; that it now applies to the state in like manner as to individuals, by express statutory provision, there can be no question; but it does not apply to the sovereign rights of the ²⁷³ people, except as they are restricted in the constitution by their manifest will therein contained. . . . The state is not the sovereign in this country. The people who make it are sovereign, and all its officers are but their servants. So statutes of limitations which are made to apply to the state do not apply to the people or their public rights. But they only apply to the state in the same cases that they apply to individuals. The entry upon, or recovery of, lands held for sale, suits on bonds, contracts, evidences of debt, or for torts—all these, though the state is a party, are subject to bar. As to all such things, there is no reason why the state should have any longer time than an individual. Such is not the case with the right of taxation, the right of eminent domain, the right to use the public highways, and other rights which pertain only to the sovereignty of the people. None of these can ever be lost by the negligence of the public servants, who have no power of disposal over them in any way whatever, except according to the express will of the people": Pages 547, 549.

In *United States v. McElroy*, 25 Fed. 804, the view was taken that under some circumstances the lapse of time might

operate to bar a claim of the general government, the court saying: "It may . . . be conceded that neither the statute of limitations nor laches bars the government as to any claim for relief in a purely governmental matter; but when the government comes as a complainant into a court of equity, asserting the same rights as a private individual—a mere matter of dollars and cents, involving no questions of governmental right or duty—it seems that, although technically the statute of limitations may not bar, the ordinary rules controlling courts of equity as to the effect of laches should be enforced": Page 804.

This case, however, was reversed by the supreme court: *United States v. Insley*, 130 U. S. 263, 9 Sup. Ct. Rep. 485, 33 L. ed. 968. A very satisfactory expression of the rule is found in *Simplot v. Chicago M. etc.* ²⁷⁴ *Ry. Co.*, 16 Fed. 350, 5 *McCrary*, 158, in these words:

"The true rule is that when a municipal corporation seeks to enforce a contract right, or some right belonging to it in a proprietary sense, or, in other words, when the corporation is seeking to enforce the private rights belonging to it, as distinguished from rights belonging to the public, then it may be defeated by force of the statute of limitations; but in all cases wherein the corporation represents the public at large or the state, or is seeking to enforce a right pertaining to sovereignty, then the statute of limitations, as such, cannot be made applicable.

"In the latter cases, the courts may apply the doctrine or principle of an estoppel, and by means thereof, where justice and right demand it, prevent wrong and injury from being done to private rights": Page 361.

A summary of the doctrine discussed is thus stated by the author of the note referred to: "Theoretically, the rule that statutes of limitation do not run against governmental bodies when asserting a public right or protecting property held for public use, and that such statutes do run against such bodies when asserting private rights or enforcing rights arising from out of ordinary business transactions, is sound. The rule is supported by the weight of authority, although there are some cases which seem to hold that the pecuniary interests of the United States are matters of sovereignty. The difficulty of any rule in regard to the subject lies in its application to the varied circumstances of each particular case. There are, of course, many circumstances under which it would be readily conceded that the governmental body is acting strictly in a

sovereign capacity, but, on the other hand, there are many other circumstances when it seems to us that it is extremely doubtful whether the governmental body is acting in a strictly sovereign capacity in attempting to enforce alleged property rights. It would seem that when all the people of the United States or of the state (both of which seem to be recognized as representing the sovereignty) are interested in the subject matter of the litigation, that there is no question about the maxim applying, but that when only a portion of the people of the state—²⁷⁵ for instance, that part of the people residing in some minor subdivision of the state, such as a county or municipal corporation—are the sole parties interested in the subject matter of the litigation, then the maxim does not apply. It seems to be held by some of the courts that in so far as a municipal corporation acts merely for the benefit of the people within the limits of the municipality its actions are similar to those of a private corporation acting in the interest of its stockholders, and that as to such actions the municipality is bound to use the same degree of vigilance as a private corporation, but that when the municipality acts in regard to some matter or thing in which all the people of the state are interested, though, perhaps, in a lesser degree than the people within the limits of the municipality, it then acts as the representative of the sovereignty, and its maxim applies": 101 Am. St. Rep. 184.

The geographical or territorial test proposed may be helpful in some instances, and even determinative in certain classes of cases, but we doubt its universal applicability. Inasmuch as the city exists in part as an agency of the state for general governmental purposes, and its maintenance depends upon its power to levy and collect taxes, it might be argued that the state itself, or the general public, has an interest in protecting the exercise of that power. But the same argument might apply, although with less force, to the prosecution of any money demand, upon the ground that the purposes of enforcing it is to aid in meeting the expenses of maintaining the municipality. We think the more vital consideration has relation to the character of the power in exercise of which the demand originates. The power of taxation is an essential attribute of sovereignty. This is true no less of taxes levied by minor political divisions than of those directly imposed by the state: 27 Am. & Eng. Ency. of Law, 620. No statute of limitation should apply to any step in the exercise of that power unless a legislative intention that it should do so is

expressly stated or ²⁷⁶ appears by the clearest implication. In *City of Burlington v. Burlington etc. R. R. Co.*, 41 Iowa, 134, it was held that the recovery of city taxes by action was subject to the bar of the statute of limitations. But this excerpt from the opinion shows the grounds of the decision: "The right of the city to maintain this action can only be supported upon the ground that the taxes are debts, properly held by it in its proprietary character. It appears in this action in that character, claiming to recover on the ground that the defendant is its debtor upon an obligation created by the assessment and levy of the taxes. In the debt thus created it has a right of property in its proprietary character": Page 141.

A tax is not ordinarily regarded as a "debt." (See note on recovery of personal judgment for taxes, 42 Am. St. Rep. 655.) The argument of the Iowa court seems to be that when the city chooses to collect its taxes through the courts it thereby elects to treat its claim as an ordinary contract obligation, and must submit to all the consequences of such election, one of which is that its demand must be considered as contractual for all purposes—including that of determining the effect of the statute of limitations. Even granting the soundness of this reasoning, it does not necessarily reach the facts of the present case. Here the tax has been paid by the property owners, but its proper distribution is prevented by the misconduct of one of the agencies which the law has provided for that purpose. True, mandamus would doubtless lie against the county treasurer to compel a proper application of funds on hand, but if the money collected for the city has been diverted to the use of the county the present action, which is in effect for an accounting, seems to be an appropriate, if not the only adequate, remedy: *Board of Education v. Spencer*, 52 Kan. 574, 35 Pac. 221. The distribution is not required or expected to be made in the very moneys received. The matter is ²⁷⁷ largely one of bookkeeping. Although the county may have misappropriated the city's money, and thereby obliged the latter to sue for its recovery, the action is essentially to compel the performance of a public duty, and not to enforce a private contract.

In *State v. Mayor etc. of City of Columbia (Tenn.)*, 52 S. W. 511, it was held that statutes of limitation barring taxes not collected or sued for within a stated time had no application to an action to recover an amount which the city received from taxpayers and wrongfully withheld from the state, the court

saying: "These statutes have reference only to suits or proceedings to collect taxes from the taxpayer, and do not apply to suits against persons who may get the revenue of the state in their possession, and who are by such suit called upon to restore the same to the state. And it is immaterial whether we view the city of Columbia as one who has converted the state's funds to its own use, or as one who holds a fund on which the state has a lien for its taxes and refuses to surrender it to the state, or as a person charged by law with collecting the state's funds of the character here involved, and who, having collected, refuses to account for and pay over the fund to the state. The result is the same in either view, so far as concerns the statute of limitations. They do not apply in either event."

The present controversy involves no element of private contract. It does not concern the vindication of any private use. It is between public officers or public bodies with respect to the performance of a public duty, in which the people of the state at large have at least an indirect interest. It is not affected by mere general provisions of the statute, and no statutory limitation is made to apply to it either in express terms or by necessary implication. This conclusion is in keeping with what has been said on the subject by courts generally, and by this court so far as the matter has been touched upon. The authorities are so fully collected in the note already referred to (101 Am. St. Rep. 144) as to make additional citation unnecessary.

²⁷⁸ The judgment is reversed and the case remanded, with directions to overrule the demurrer to the amended petition.

The Application of the Statute of Limitations to Municipal Corporations is the subject of a note to *Bannock County v. Bell*, 101 Am. St. Rep. 144. Adverse possession of property of a public nature is discussed in the notes to *Schneider v. Hutchinson*, 76 Am. St. Rep. 479; *Northern Pacific Ry. Co. v. Ely*, 87 Am. St. Rep. 775.

BENTON v. BENTON.

[78 Kan. 366, 97 Pac. 378.]

PROMISSORY NOTE Promising to Pay as Soon as Maker Can—Construction of.—A written instrument by which the maker acknowledges an indebtedness and agrees to pay it as soon as he can is to be construed as a promissory note payable within a reasonable time. (p. 378.)

PLEADING A PROMISSORY NOTE Payable as Soon as Maker can.—In an action upon such an instrument the plaintiff is not required to plead that the defendant has the financial ability to pay it. (p. 379.)

PROMISSORY NOTE, Consideration for, Contradicting Statement of.—A statement of consideration made in a writing may ordinarily be contradicted. (By the editor.) (p. 381.)

PROMISSORY NOTE, Plea of Want of Consideration for, When Sufficient.—A promissory note recited as its consideration a personal indebtedness owing by the defendant to the plaintiff. In an action thereon the answer alleged that the note was given without consideration, and set out additional facts showing that at the time of its execution the defendant held the amount of the note in trust for the plaintiff and another person. Held, that the answer was good as a plea of want of consideration, and that the recital of a personal indebtedness in the note did not conclusively establish a settlement of the trust. (p. 381.)

(Syllabi by the court except where stated to be by the editor.)

E. D. Woodburn, F. T. Woodburn and A. E. Crane, for the plaintiff in error.

Z. T. Hazen and R. H. Gaw, for the defendant in error.

367 MASON, J. But two questions are presented in this case—whether a petition stated a cause of action, and whether an answer stated a defense or a partial defense. The action was brought by Mrs. May Benton against J. O. Benton. The petition, which was filed May 25, 1906, merely declared upon a written instrument in these words:

“Onaga, Kan., 2-24-1904.

“In the matter of the trusteeship of H. H. Benton and myself, I hereby acknowledge that I am personally indebted to Mrs. May Benton to the amount of \$5,993.62, which I agree to pay as soon as I can, together with annual interest at the rate of 6 per cent per annum.

“J. O. BENTON.”

The defendant maintains that the obligation he assumed in signing this was to pay the amount named only when he should be financially able to do so, and that it was incumbent upon the plaintiff to plead the existence of that condition to show that the paper had matured. The plaintiff contends that

the words "as soon as I can" are too vague and indefinite to fix a time of payment, and that the note was therefore payable within a reasonable time.

Courts generally hold that a right of action does not accrue upon a promise to pay when the debtor is able, or when he can, until such time as he shall have the financial ability to make payment, and therefore that in declaring upon such a promise the pleader must allege the existence of that condition. A number of decisions to that effect are gathered in volume 8 of Words and Phrases Judicially Defined, at page 7441, in volume 33 of the American Digest, Century edition, chapter 1125, section 609, paragraphs c and l, and in volume 2 of Lewis' edition of Greenleaf on Evidence, section 440, note 3. The following are additional cases to the same effect: *Veasey v. Reeves*, 6 ³⁶⁸ Ind. 406; *Barnett v. Bullett*, 11 Ind. 310; *Stainton's Admr. v. Brown*, 36 Ky. *248; *Eckler v. Galbraith & Lail*, 75 Ky. 71; *Martin v. Ferguson*, 3 Ky. Law Rep. 445; *Chism v. Barnes*, 104 Ky. 310, 47 S. W. 232, 875; *Mattocks v. Chadwick*, 71 Me. 313; *Halladay v. Weeks*, 127 Mich. 363, 89 Am. St. Rep. 478, 86 N. W. 799; *Denney v. Wheelwright*, 60 Miss. 733; *Barker v. Heath*, 74 N. H. 270, 67 Atl. 222; *Cocks v. Weeks*, 7 Hill (N. Y.), 45; *Ingersoll v. Rhoades*, Hill & D. Supp. (N. Y.) 371; *Work v. Beach*, 13 N. Y. Supp. 678; *In re Knab*, 38 Misc. Rep. 717, 78 N. Y. Supp. 292; *Tebo v. Robinson*, 100 N. Y. 27, 2 N. E. 383; *Cooper v. Jones*, 128 N. C. 40, 38 S. E. 28; *Nelson v. Bonnhorst*, 29 Pa. 352; *Scott v. Thornton*, 104 Tenn. 547, 58 S. W. 236; *Ruzeoski v. Wilrodt* (Tex. Civ. App. 1906), 94 S. W. 142; *Wright v. Farmers' National Bank*, 31 Tex. Civ. App. 406, 72 S. W. 103.

In *Kincaid v. Higgins*, 1 Bibb (4 Ky.), 396, a contrary doctrine is announced in these words, which, however, seem to be in conflict with the later utterances of the Kentucky court: "A promise to pay as soon as the debtor possibly can is, in the contemplation of law, a promise to pay presently. The law supposes every man able to pay his debts, and if the ability to pay was a question to be tried, the only practicable mode of trial is per execution, and of this it is not yet too late for the defendant in the court below to have full benefit": Page 397.

In the collection of Words and Phrases already referred to, four cases are cited which are against the general trend of the decisions. One of these (First Cong. Soc. in *Lyme v. Miller*, 15 N. H. 520) has recently been disapproved, if not

formally overruled (*Barker v. Heath*, 74 N. H. 270, 67 Atl. 222). The others are *Horner v. Starkey*, 27 Ill. 13; *Norton v. Shepard*, 48 Conn. 141, 40 Am. Rep. 157; *Cummings v. Gasset*, 19 Vt. 308. To the minority list may perhaps be added: *Walker v. Freeman*, 209 Ill. 17, 70 N. E. 595, and *Rolfe v. Pilloud*, 16 Neb. 21, 19 N. W. 615, 970.

In most of the cases referred to the question presented was whether one who, for the purpose of avoiding the bar of the statute of limitations, relies upon a written promise of his debtor to pay when able must show that the promisor's financial condition is such as to enable him to meet the obligation. Possibly a distinction might be made based upon that fact, although no reason is apparent why the rule adopted, if sound, should not apply to an original contract as well as to one made in renewal of a former obligation. Some of the cases seem to recognize a difference between the expressions "as soon as I am able" and "as soon as I can." The latter form, being more informal and colloquial, may perhaps be regarded as a shade less definite, but the difference is too slight to justify a refusal to give it the same effect as the former. Notwithstanding the number of adjudications apparently to the contrary, we are of the opinion that the instrument here sued upon should be regarded as a promissory note payable within a reasonable time. In *Jones v. Eisler*, 3 Kan. 134, action was brought upon an instrument reading as follows:

"\$237.37. Ottawa Creek, April 20th, 1860.

"For value received (in cutting stone) by Gouliep Anders, I promise to pay when I receive it from government for losses sustained in August, 1856, or as soon as otherwise convenient, the sum of two hundred and thirty-seven dollars and thirty-seven cents.

"JOHN T. JONES."

The court said: "The first question presented by the record is, When did the note sued on become due? The note is not a conditional one. The maker owed the payee, who had performed labor for him. He declares in the paper that he has received the consideration, which all must admit was a valuable one. The existence of the debt was not made to depend upon a condition or contingency. Everything necessary to constitute a promissory ³⁷⁰ note, except the time of payment, is clearly expressed. As to the time the language is peculiar. It could not have been contemplated that if Jones never got his money from the government, or never should be in a situa-

tion when he could conveniently pay, that the money never was to be payable. Jones evidently expected within a reasonable time to get the money from the government, or, failing in that, within a like time it would otherwise be convenient to pay. After having performed work to the full amount of the note, it could not have been intended that Anders should never get his money unless Jones got his from the government or should find it otherwise convenient to pay. The intention of the parties doubtless was that it should in any event be payable in a reasonable time, and such is the legal effect of the instrument": Page 138.

This reasoning applies with equal force in the present case. It is true that so far as the actual decision is concerned a distinction could readily be made based upon the difference between a promise to pay when one should be able and a promise to pay when it should be convenient. The latter form is held to be tantamount to an agreement to pay within a reasonable time, upon the theory that otherwise the practical effect would be to give the promisor the option to refuse payment altogether: *Smithers v. Junker*, 41 Fed. 101, 7 L. R. A. 264, and cases there cited. See, also, *Kreiter v. Miller*, 1 Penny. (Pa.) 46, and 7 Cyc. 857, par. d. But the argument quoted is as convincing in the one case as in the other. A note in which the maker without qualification acknowledges an indebtedness to the payee and promises to pay as soon as he can, when subjected to a reasonable interpretation, cannot be construed as a conditional contract—as a contract to pay only in case he shall thereafter accumulate a certain amount of property, otherwise not. The mere admission of the debt is sufficient to establish an absolute legal liability, lacking only the element of maturity to make it available as a cause of action. It is entirely inconsistent with the spirit and purpose of ³⁷¹ the engagement to suppose for a moment that the parties contemplated that the avowed obligation should never be capable of enforcement, even to the extent of the obligor's ability to pay, unless he should become financially able to meet the entire obligation at once.

The trial court held that the petition stated facts sufficient to constitute a cause of action, and sustained a demurrer to a count of the answer which set out in detail the transaction out of which the instrument originated and alleged that it was given without consideration. The answer would seem to be good as a plea of want of consideration, unless the detailed facts showed affirmatively the existence of a good consideration. The facts so pleaded were substantially as follows: A.

H. Benton (a son of the defendant) died testate in February, 1898, leaving a widow, the plaintiff herein (to whom shortly thereafter a child was born), and a minor son, who is not yet of age. The will, which was duly probated, reads in part:

"I make the following disposition of my property ten thousand dollars held in the New York Life disposed of as follows:

"(1) Two thousand dollars to unborn child at its majority.

"(2) Eight thousand dollars to wife, all of which is to be held in trust by J. O. and H. H. Benton [another son of the defendant] without bond—they to pay heirs such rate of interest as shall be agreed upon, until children become of age—and she remains unmarried—in such case money shall fall to my legal heirs."

The trust referred to was accepted by the trustees, the money was paid over to them, and an agreement was made fixing seven per cent as the rate of interest. The posthumous child lived but a short time. About four years before the beginning of the action the plaintiff was married to H. H. Benton. The sum named in the note sued on was the amount of the trust fund then in the hands of the defendant.

We do not at this time pass upon the interpretation ³⁷² or effect of the will, for no definite question with respect thereto has been argued. The purpose of the testator seems to have been that the trustees should hold the eight thousand dollars until the children became of age, in the meantime paying interest to them and their mother, and then turn the principal over to her unless she had remarried, in which case it should be divided among the three. At all events the children were intended to be beneficiaries of the trust to some extent, and the surviving child has apparently an interest in its continuance. In the brief of the plaintiff the situation presented by the pleadings is said to be: "That certain trust funds had been paid over to J. O. Benton, that a settlement of the trusteeship was afterward had, and as a result of that settlement J. O. Benton became 'personally indebted' to May Benton in the sum of five thousand nine hundred and ninety-three dollars and sixty-two cents, with interest. The wording of the instrument sued on clearly suggests this explanation of the transaction. Since J. O. Benton has himself declared the indebtedness to be a personal indebtedness of himself to May Benton, the court will not assume the existence of a contradictory state of facts, and, in the absence of an allegation of fraud or mistake, will not permit to be alleged or proven a state of facts which contradicts that written declaration of J.

O. Benton. In other words, the court will assume that the indebtedness sued on is, in fact, a personal indebtedness, as J. O. Benton has declared it to be, and, if necessary in construing the instrument, will also assume that there had been a valid settlement of a previously existing trusteeship, resulting in the kind of an obligation which J. O. Benton declares it to be—a personal indebtedness.”

The difficulty in accepting this reasoning is that the answer not only sets out the facts with regard to the will and the proceedings thereunder, but goes further and alleges that apart therefrom there was no consideration for the instrument sued upon, thereby in effect pleading that no valid settlement of the trust had been had. Possibly the mere giving of the note and the bringing of an action upon it might be construed ³⁷³ as a termination of the trust, as between the plaintiff and defendant, who were competent to act for themselves. But the surviving son is still a minor and could not be bound by mere consent to a transfer of the trust fund, even if such consent were shown. The recital in the note that the defendant is personally indebted to the plaintiff may be good evidence against him of a settlement of the trust, but it is not conclusive. The statement of consideration made in a written contract may ordinarily be contradicted: 9 Cyc. 368; 6 Am. & Eng. Ency. of Law, 767 et seq.; 11 Cent. Dig., c. 200; 4 Wigmore on Evidence, sec. 2433. There is nothing contractual about this feature of the present agreement; it is tantamount to a formal acknowledgment of value received.

The specific facts stated in the answer do not show an indebtedness of the defendant to the plaintiff, at least not to the extent of the amount named in the note; therefore the allegation that the note sued on was not supported by any consideration raised an issue.

The judgment is reversed and the cause remanded for further proceedings.

Certainty of the Time of Payment as an essential quality of negotiable paper is considered in the note to *Kimpton v. Studebaker Bros. Co.*, 125 Am. St. Rep. 199.

HOLLINGSWORTH v. COLTHURST.

[78 Kan. 455, 96 Pac. 851.]

CONTRACT Requiring Satisfaction of One of the Parties, Lawfulness of.—Parties to a contract may lawfully stipulate that performance by one of them shall be satisfactory to the other. The obligation of the contract is not destroyed by this stipulation. (By the editor.) (p. 383.)

VENDOR AND PURCHASER, Contract to Furnish Abstract Showing Satisfactory Title.—A contract for the sale of land provided that the vendor should furnish an abstract showing satisfactory title to the property. In an action against the vendee for damages for his failure to perform it was alleged that the vendor furnished an abstract showing a good and sufficient title. Held: (1) The vendee was the party to be satisfied. (2) It was immaterial that the title was good if the vendee in good faith was not satisfied with it. (3) In order to withstand a demurrer it was essential that the petition either allege that the title was satisfactory to the vendee or show that the vendee did not act in good faith. (pp. 383, 384.)

(Syllabi by the court except where stated to be by the editor.)

James McDermott and G. H. Buckman, for the plaintiff in error.

W. P. Hackney and J. T. Lafferty, for the defendant in error.

456 BURCH, J. The plaintiff sued for stipulated damages claimed to have been suffered on account of the defendant's refusal to carry out a contract for the purchase and sale of real estate. The transaction involved an exchange of land, and the contract contained the following provision: "It is further agreed and understood by the parties to this contract that each party shall furnish an abstract showing satisfactory title to the above-named properties."

The petition did not allege that the plaintiff furnished an abstract showing satisfactory title to his land, or that the defendant refused to receive an abstract of title or to investigate the title offered, or that the defendant arbitrarily or capriciously rejected such title or otherwise acted in bad faith in the matter. It was merely stated that the plaintiff furnished an abstract showing a good and sufficient title, and that the defendant refused to accept a warranty deed free of encumbrances. A demurrer to the petition was sustained, and the plaintiff prosecutes error.

The question involved is not a new one in the law, and this court has already indicated its views respecting the principles to be applied. Parties to a contract may lawfully stipulate

that performance by one of them shall be to the satisfaction of the other. The obligation of a contract is not destroyed because it contains such a provision, as Chancellor Kent seems to have believed: *Folliard v. Wallace*, 2 Johns. (N. Y.) 395. If such a contract be made, the party to be satisfied is the judge of his own satisfaction, subject to the limitation that he must act in good faith. He should fairly and candidly investigate and consider the matter, ⁴⁵⁷ reach a genuine conclusion, and express the true state of his mind. He cannot act arbitrarily or capriciously, or merely feign dissatisfaction. The application of these principles is not limited to transactions involving personal taste and preference. All this follows from the decision in the case of *Campbell P. Co. v. Holcomb*, 67 Kan. 48, 72 Pac. 552. In the following cases the principles upon which *Campbell v. Holcomb* was determined were applied to transactions involving the title to real estate: *Stotts v. Miller*, 128 Iowa, 633, 105 N. W. 127; *Liberman v. Beckwith*, 79 Conn. 317, 65 Atl. 153; *Averett v. Lipscombe*, 76 Va. 404; *Church v. Shanklin*, 95 Cal. 626, 30 Pac. 789, 17 L. R. A. 207. Very respectable courts hold contrary views, but this court is not disposed to follow them, believing that the better reasoning as well as the weight of authority supports the conclusions announced.

In this case, no third person having been named as umpire, it was left to the defendant to determine whether or not he was satisfied. He was bound to meet the responsibility in the same upright and straightforward manner as if he had been a stranger to whom the title was to be satisfactory. Having done this, his satisfaction or dissatisfaction fixed the rights of the parties. It is of no consequence that a court or jury might believe that he ought to have been satisfied or that a reasonably prudent purchaser would have been satisfied. In every city there is likely to be some attorney who is regarded as much more technical than his fellow-members of the bar in his requirements respecting abstracts and land titles. Suppose the matter in controversy had been left to such an attorney, and that in all probity he had expressed dissatisfaction: the defendant would have been absolved. Evidence that the attorney entertained unreasonable views would only be relevant in connection with proof of dishonesty or want of good faith. The same is true here.

The plaintiff argues that a land title is either good ⁴⁵⁸ or bad, that an abstract will show a title either good or bad, and that there cannot be, in common sense or reason,

dissatisfaction with a good title. The experience of every lawyer teaches that it is frequently a very difficult and perplexing question whether a land title is good, and although he may not be able to give clear reasons why it is bad he may be incapable of bringing himself to the point of approving it.

The argument is answered by the supreme court of Connecticut, in *Liberman v. Beckwith*, 79 Conn. 317, 65 Atl. 153, as follows: "Titles sold and transferred may be good, bad, or doubtful, absolute or limited. The same title may be satisfactory to one purchaser and not to another. One might be quite willing to buy a doubtful title, while another would not be satisfied with a marketable title so limited as to involve a special risk of litigation in his use of the property purchased": Page 321.

There is no more difficulty in proving the good faith of a party to a contract who determines for himself whether he is satisfied than there is when a third person is the umpire, or than there is in many other instances where only the good faith of the inquiry and not the grounds of the conclusion is open to question.

The judgment of the district court is affirmed.

When a Contract is Made to Perform Work for or render services to another to his satisfaction, the word "satisfaction" refers to his mental condition, and he can reject the work performed or the article produced if not satisfactory to him: See *Sax v. Detroit etc. Ry. Co.*, 125 Mich. 252, 84 Am. St. Rep. 572; *Pennington v. Howland*, 21 R. I. 65, 79 Am. St. Rep. 774; *Porman v. Walsh*, 97 Wis. 356, 65 Am. St. Rep. 125; *Adams Radiator etc. Works v. Schnader*, 155 Pa. 394, 35 Am. St. Rep. 893. He cannot, however, evade his liability under the contract by arbitrarily and unreasonably insisting that he is not satisfied: *Doll v. Noble*, 116 N. Y. 230, 15 Am. St. Rep. 398; *Hawkins v. Graham*, 149 Mass. 284, 14 Am. St. Rep. 422. However, it is held in *Barrett v. Coal Co.*, 51 W. Va. 416, 90 Am. St. Rep. 802, that if a person contracts to manufacture articles or do work "to the satisfaction" of another, such other is the sole judge of the quality of the work done, and his right to accept or reject it is absolute, conclusive, and binding upon the parties, without investigation of his reasons, unless he acts fraudulently.

If a Contract for the Sale of hops to be grown in the future provides if they are, or shall in any case be, of lesser quality than choice, or not delivered in the condition agreed upon, the purchaser or his agents, after first determining that they are not choice or in good condition, shall be released from all further obligation on such contract, this does not entitle him to reject the hops capriciously or without sufficient reason: *Livesley v. Johnston*, 45 Or. 30, 106 Am. St. Rep. 647.

STATE v. WILCOX.

[78 Kan. 597, 97 Pac. 372.]

OFFICE AND OFFICER—Removal for Negligence of Duty.—

A judgment of ouster was rendered against a mayor who neglected to notify the county attorney of known violations of the prohibitory liquor law or make a bona fide attempt to enforce the law, and who sanctioned the imposing of fines upon the joint keepers at regular intervals as a means of raising revenue for the city. (p. 386.)

(Syllabus by the court.)

Fred S. Jackson, attorney general, John S. Dawson and Charles D. Shukers, assistant attorneys general, for the state.

Joseph P. Rossiter, for the defendant.

597 Per CURIAM. This action was brought by the attorney general in the name of the state to oust J. H. Wilcox from the office of mayor of Coffeyville for failure **598** and neglect of official duty in the enforcement of the law relating to the sale of intoxicating liquors and the keeping of gambling-houses. It was alleged that defendant had failed and neglected to notify the county attorney of violations of the prohibitory liquor law or to furnish the names of witnesses by whom such violations could be proved, and that, in co-operation with other officers of the city, he had purposely assisted in imposing and collecting license taxes on the business of illegally selling and keeping for sale intoxicating liquors within the city under the pretense of imposing fines. In his answer the defendant denied all of the charges made by the attorney general.

Much testimony has been taken in the case which shows that during the term of Mayor Wilcox, and until about the time this proceeding was brought, saloons and joints where intoxicating liquors were unlawfully sold were in open operation in the city. There is some conflict in the testimony, but after a careful reading and consideration of the same we are satisfied that the unlawful traffic in intoxicating liquors was carried on with the knowledge and consent of the mayor and other officers of the city, and with the understanding that upon the payment of pretended monthly fines of fixed amounts the joint-keepers would be permitted to operate free from interference by the city officers. These fines were regularly collected by the officers of the city and paid into the city treasury and until shortly before the commencement of this action the joint-keepers were given the immunity and protection

which the payments were intended to secure to them. The mayor appears to have proceeded on the theory that he was justified in following this course so long as the wide-open policy was in vogue in the county.

It is the finding of the court that the defendant did not give the county attorney notice of known violations of the law prohibiting the sale of intoxicating liquors, nor make a bona fide attempt to enforce the law, as his duty and the obligations of the law required; that the ⁵⁹⁹ system of imposing fines was adopted as a means of obtaining public revenue for the city from the traffic, and further, that it was carried on with the sanction and concurrence of the defendant. The finding and decision is that he has forfeited the office of mayor of Coffeyville, and a judgment of ouster is rendered in accordance with the prayer of the plaintiff's petition.

Forfeiture of Title to Office is the subject of a note to *State v. Allen*, 83 Am. Dec. 372. That quo warranto lies to oust a city from exercising unwarranted powers by licensing violations of the law, see *State v. Coffeyville*, 78 Kan. 599, post, p. 386.

STATE v. CITY OF COFFEYVILLE.

[78 Kan. 599, 97 Pac. 372.]

QUO WARRANTO Against Municipal Corporation for Licensing Violations of the Law.—A judgment was rendered ousting a city from exercising unwarranted corporate powers by indirectly licensing violations of the intoxicating liquor and gambling laws, the violators paying at regular intervals stipulated sums as fines and having immunity from prosecution and punishment. (p. 387.)

(Syllabus by the court.)

Fred S. Jackson, attorney general, and John S. Dawson, assistant attorney general, for the state.

⁵⁹⁹ Per CURIAM. This action of quo warranto was brought by the state on the relation of the attorney general to oust the city of Coffeyville from the exercise of the assumed and unwarranted corporate powers, privileges and franchises of indirectly levying and collecting license taxes on those engaged in the unlawful sale of intoxicating liquors within the city, and also authorizing and licensing the keeping of gambling-houses in the city. It is alleged that for certain sums of money, paid from time to time in stipulated sums in ⁶⁰⁰ the form of simulated fines and forfeitures, these persons were

permitted to carry on the unlawful business and practices and to have immunity from prosecution and punishment. An answer containing a general denial was filed by counsel for the city. The case was finally submitted upon testimony taken to be used in this and the case of *State v. Wilcox*, 78 Kan. 597, ante, p. 385, 97 Pac. 372, 19 L. R. A., N. S., 224, which abundantly sustains the allegations and claims of the state. No one appeared at the final hearing to contend that the charges made by the state were not sustained by the proof nor to justify the illegal practices of the city authorities.

A judgment of ouster is awarded against the city, in accordance with the prayer of plaintiff's petition.

In the Prior Case of *State v. Wilcox*, 78 Kan. 597, ante, p. 385, a judgment of ouster was rendered against a mayor for misfeasance in the matter of violations of the prohibitory liquor law.

STATE v. PIGG.

[78 Kan. 618, 97 Pac. 859.]

EVIDENCE.—Certified Copies of the Records of the Collector of Internal Revenue are admissible in prosecutions for unlawful sales of intoxicating liquors. (By the editor.) (p. 388.)

INTOXICATING LIQUORS, Prosecutions for Sales of by Agent.—In prosecutions for unlawfully selling intoxicating liquors the defendant may be found guilty though he did not himself perform the physical act of handing out the liquor to the customer. (By the editor.) (p. 388.)

EVIDENCE—Judicial Notice.—A "Manhattan cocktail" is generally and popularly known as an intoxicating liquor, and no proof of its intoxicating character is necessary in prosecutions under the prohibitory law. (p. 389.)

(Syllabi by the court except where stated to be by the editor.)

Fred S. Jackson, attorney general, John S. Dawson, assistant attorney general, and John J. Schenck, county attorney, for the state.

J. R. McNary, F. J. Lynch, George Hayden, R. F. Hayden, E. D. Woodburn, F. T. Woodburn and A. E. Crane, for the appellant.

619 PORTER, J. The information in this case charged the defendant with a number of unlawful sales of intoxicating liquor, and also with keeping and maintaining a common nuisance under the prohibitory law. The jury returned a

verdict finding defendant guilty of three sales, as charged in the eighth, ninth and tenth counts of the information, and of maintaining a nuisance, as charged in the eighteenth count, and not guilty on the other counts.

There is nothing substantial in the claim of error in the admission of testimony. In prosecutions of this kind certified copies of the records of the collector of internal revenue are admissible: *State v. Nippert*, 74 Kan. 371, 86 Pac. 478; *State v. Schaeffer*, 74 Kan. 390, 86 Pac. 477; *State v. Shook*, 75 Kan. 807, 90 Pac. 234.

The objection to the question asked of Leona Larson was properly overruled. The question was asked in rebuttal of something first brought out by the cross-examination, and, besides, could not have prejudiced the defendant.

We find no error in the refusal to give the instructions asked. The abstract contains no reference to any evidence tending to show that Grant Richards was a "spotter." In *State v. Blackman*, 32 Kan. 615, 5 Pac. 173, it was held that a judgment of conviction in a criminal case cannot be reversed for any supposed error in the instructions with respect to the evidence of informers, where it does not appear that the conviction ⁶²⁰ might have been founded upon the evidence of an informer.

In the instructions given the jury were charged that every material fact and allegation necessary to constitute the crime must be proved to their satisfaction beyond a reasonable doubt, and were also instructed that if they found that the defendant was the proprietor of the place where intoxicating liquor was sold, and that such liquor was in his possession and control as proprietor and was sold with his knowledge and consent, he would be guilty of a sale, although he might not have performed the physical act of handing out the liquor to the customer himself. This instruction, taken in connection with the evidence, was sufficient. Sheriff Wilkerson testified as to this particular sale, and said that at the moment it was made he was standing with the defendant in a doorway leading into another room. The jury found that the defendant was the proprietor of the place, upon evidence sufficient to support such a finding, and the testimony was that this sale was made by someone, not while the proprietor was absent, but while he was present and when he might have seen all that the sheriff saw. Being the proprietor of the place, the sale was made by someone presumably in his employ.

On the tenth count the state elected to rely upon a sale of two Manhattan cocktails to Leona Larson and Kittie Edie. The precise question raised is that there was no evidence to show that a Manhattan cocktail is intoxicating, and the evidence can hardly be said to have established this fact. The Century Dictionary defines a cocktail as "an American drink, strong, stimulating, and cold, made of spirits, bitters, and a little sugar, with various aromatic and stimulating additions." The particular kind of cocktail under discussion is popularly understood to have taken its name from the island whose inhabitants first became addicted to its use. While its characteristics are not so widely ⁶²¹ known as those of whisky, brandy or gin, it is our understanding that a Manhattan cocktail is generally and popularly known to be intoxicating. Apparently the jury held the same view. It has been said by this court: "Whatever is generally and popularly known as intoxicating liquor, such as whisky, brandy, gin, etc., is within the prohibitions and regulations of the statute, and may be so declared as matter of law by the courts": *Intoxicating Liquor Cases*, 25 Kan. 751 (syllabus), 37 Am. Rep. 284.

A further contention is that the verdict is insufficient and indefinite, and not in the form required by law. The verdict, omitting the caption, is as follows:

"We, the jury impaneled and sworn in the above-entitled case, do, upon our oaths, find the defendant, Robert Pigg, guilty on the eighth, ninth, tenth and eighteenth counts, as charged in the information; and not guilty on the first, second, third, fourth, fifth, sixth, seventh and eleventh counts, as charged in the information.

"GEORGE A. ANDERSON,

"Foreman."

It is insisted that the verdict should contain a separate finding on each count of the information, and that the court in construing it has no power to add thereto anything which the jury has omitted. But it is unnecessary to add anything to this verdict in order to understand definitely the jury's finding. It is plain from the language that the jury found the defendant guilty on four of the counts and not guilty on all the others.

The judgment is affirmed.

Judicial Knowledge of the Intoxicating Character of Beverages is discussed in the note to *Green v. Lineville Drug Co.*, 124 Am. St. Rep. 28. It has been held that the testimony of a witness that he bought from the accused a beverage called "lager beer" is not sufficient to sustain a conviction under the local option law; it must be

shown that the beverage was of such alcoholic body as to produce intoxication if drunk in reasonable quantities: *Potts v. State*, 50 Tex. Cr. 368, 123 Am. St. Rep. 847.

On a Prosecution for the Violation of a Local Option Law, the Texas statute makes admissible an examined copy of the internal revenue collector's books, but there is no statutory authority for the introduction of his certificate: *Reed v. State*, 53 Tex. Cr. 4, 126 Am. St. Rep. 765.

COLEMAN v. MACLENNAN.

[78 Kan. 711, 98 Pac. 281.]

CONSTITUTIONAL LAW—Freedom of the Press—Publications Respecting Candidates for Office.—There must be freedom to canvass in good faith the worth of character and qualifications of candidates for office, whether elective or appointed, and by becoming a candidate, a man tenders as an issue, to be tried out publicly before the people or the appointing power, his honesty, integrity and fitness for the office to be filled. (By the editor.) (p. 400.)

LIBEL BY NEWSPAPER of Candidate for Public Office, When Privileged, Though False.—If the publisher of a newspaper circulated throughout the state publish an article reciting facts and making comment relating to the official conduct and character of a state officer, who is a candidate for re-election, for the sole purpose of giving to the people of the state what he honestly believes to be true information, and for the sole purpose of enabling the voters to cast their ballots more intelligently, and the whole thing is done in good faith, the publication is privileged, although the matters contained in the article may be untrue in fact and derogatory to the character of the candidate. (p. 415.)

LIBEL BY NEWSPAPER of Candidate for Public Office Through Its Circulation in Another State.—Generally, publication should be no wider than the moral or social duty to publish. If it be designedly or unnecessarily or negligently excessive, privilege is lost. But if a state newspaper published primarily for a state constituency have a small circulation elsewhere, it is not deprived of its privilege in the discussion of subjects of state-wide concern because of that fact. (p. 416.)

APPEAL AND ERROR—Presumption that a Special Finding was Induced by Erroneous Instruction.—If on the trial of a suit for libel the jury should find specially from the evidence that the plaintiff suffered no damages from the publication complained of, it will not be presumed that the finding was induced by instructions regarding particular questions in the case not related to that of damages; and the question whether such instructions misstate the law becomes immaterial, because they could not affect the plaintiff's substantial rights. (p. 418.)

(Syllabi by the court except where stated to be by the editor.)

Frank L. Williams, Charles Blood Smith and John E. Heslin, for the plaintiff in error.

W. P. Hackney, Waters & Waters and B. P. Waggener, for the defendant in error.

712 BURCH, J. In August, 1904, the plaintiff held the office of attorney general of the state, and was a candidate for re-election at the general election which occurred in the following November. By virtue of his office he was a member of the commission charged with the management and control of the state school fund. The defendant was the owner and publisher of the "Topeka State Journal," a newspaper published at Topeka and circulated both within and without the state. In the issue of August 20, 1904, appeared an article purporting to state facts relating to the plaintiff's official conduct in connection with a school fund transaction, making comment upon them and drawing inferences from them. Deeming the article to be libelous, the plaintiff brought an action for damages against the defendant, alleging that the matter published concerning him was false and defamatory and that its publication was the fruit of malice. Among other defenses the defendant pleaded facts which he claimed rendered the article and its publication privileged.

At the trial instructions presenting the plaintiff's view of the law of privilege were refused, and the following instruction was given to the jury instead: "As you have already observed from the statement of the case, defendant claims, as his first defense, that the publication is what is known in law as 'privileged.' A communication made in good faith, upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, public or private, either legal, moral or social, if made to a person having a corresponding interest or duty, is privileged. And where an article is published and circulated among voters for the sole purpose of giving what the defendant believes to be truthful information concerning a candidate for public office and for the purpose of enabling such voters to cast their ballot more intelligently, and the whole thing is done in good faith and without malice, the article is privileged, although the principal matters contained in the article may be untrue in fact and derogatory to the character of the plaintiff; and in 713 such a case the burden is on the plaintiff to show actual malice in the publication of the article. If you believe, then, from the evidence in this case that on August 20, 1904, plaintiff was a candidate for re-election to the office of attorney general, and that defendant published said article for the sole purpose of giving to the voters of Kansas what he believed to be truthful information concerning the acts of the attorney general, and only for the purpose of enabling such voters

to cast their ballots more intelligently, and that the defendant made all reasonable effort to ascertain the facts before publishing the same, and that the whole thing was done in good faith and without malice toward plaintiff, and if you believe that the bulk of the circulation of the said paper was within the state of Kansas and that its circulation outside of the state of Kansas was only incidental, then I instruct you that your verdict must be for the defendant, although you may believe the principal matters contained in said article untrue in fact and derogatory to the character of the plaintiff. But, on the contrary, if you should find from the evidence that said article was published with a malicious intent to willfully wrong and injure plaintiff, then the fact that the article is a privileged one would constitute no defense to this action, and the plaintiff would be entitled to recover such damages as the evidence shows him to have sustained by reason of said publication."

In the course of the trial it became material whether the purchasable quality of county bonds offered to the school fund may be predicated upon the equalized valuation of property instead of its assessed valuation, and whether certain manipulations of the public funds in the state treasury were contrary to law. It likewise became necessary for the court to give the jury a definition of a conspiracy, and to apply the definition to the facts of the case. Instructions tendered by the plaintiff upon these subjects were refused, and exceptions were saved to those given. The following instruction asked by the plaintiff was refused and an exception noted: "The court instructs you that even though you should believe from all the evidence in this case, if you do so believe it, that the publication of the article as alleged ⁷¹⁴ in plaintiff's petition was privileged and justifiable within the limits of the state of Kansas, yet I instruct you that under the evidence and the pleadings in this case the publication of such article outside of, and beyond the limits of, the state of Kansas is neither privileged nor justifiable; and, if you believe from the evidence that publication of said article was made outside of, and beyond the limits of, the state of Kansas by the circulation of any number of copies of the 'Topeka State Journal' containing said article, the plaintiff in this action is entitled to recover damages for such publication beyond the boundaries and limits of the state of Kansas."

No exception was taken to the following instruction relating to the subject of damages: "In case you find for the

plaintiff, the next question for you to determine is the amount of recovery. In this there is no mathematical rule that the court can give you as a guide. You will assess his damages in such sum as will compensate him for all damages he has sustained as a necessary and natural result of the publication of the article charged, and in arriving at this you should consider the injury, if any, to his feelings and his reputation, and the humiliation, if any, caused by such publication, and the injury, if any, to his business and profession. If you find that the article was published maliciously, as hereinbefore defined, you may then, if you see fit, assess damages, called 'punitive damages,' in addition by way of smart-money or punishment to the defendant for having published the article in question, and for the purpose of setting a wholesome example to others. I further instruct you that punitive damages may not be recovered by the plaintiff, nor allowed by you in your verdict, unless you shall first find that the plaintiff is entitled to recover actual damages in some amount."

Many special questions were submitted to the jury, among which were the following, the answers returned being appended:

"(1) Q. Does the testimony show that the plaintiff sustained any actual damage by the publication of this article mentioned in his petition? A. It does not.

715 "(2) Q. If you answer the foregoing question in the affirmative, then state in detail of what such actual damage consists. A. ———."

"(52) Q. On the twentieth day of August, 1904, when said article complained of was published, did said defendant, or any of his employes, have any actual malice of or against the said plaintiff? A. No."

The jury found generally for the defendant. A motion for a new trial was denied, and the plaintiff prosecutes error.

The plaintiff claims that the court committed grievous error in its instructions to the jury and by refusing to instruct according to the plaintiff's requests, the instruction upon the subject of privilege being attacked with especial fervency. To this claim the defendant makes two answers: First, that the instructions given state the law, and, second, that even if error was committed in giving and refusing instructions it has become inconsequential in view of the special finding that the plaintiff suffered no damage from the publication of the article which occasioned the suit. The plaintiff replies that the finding referred to was induced by the instructions as-

sailed, although they relate to other branches of the controversy.

Beyond their importance to the immediate parties the questions raised are of the utmost concern to all the people of the state. What are the limitations upon the right of a newspaper to discuss the official character and conduct of a public official who is a candidate for re-election by popular vote to the office which he holds? What are the limitations upon the authority of this court to overturn a verdict and judgment and to remand a case for retrial upon a claim that an error of the district court respecting a particular feature of the litigation has tainted the whole result? The constitution contains a provision which reads as follows: "The liberty of the press shall be inviolate; and all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of ⁷¹⁶ such right; and in all civil or criminal actions for libel the truth may be given in evidence to the jury, and if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted": Bill of Rights, sec. 11.

The constitution supplies no definition of the term "liberty of the press." A right existing at the time the constitution was adopted is guaranteed, the nature and extent of which must be ascertained by looking elsewhere. Frequently it is said that the expression was used in the sense it bears in the common law. If so, the question arises: The common law at what stage of its development? Certainly not the common law of England as it existed when first transplanted to this country by our forefathers in the fourth year of the reign of King James I (1607). All printing was then subservient to royal proclamations and prohibitions, charters of privilege, license and monopoly, and decrees of the court of star chamber. The newspaper proper did not appear until 1622, and the beginnings of the modern law of libel find their source in the star chamber decision *De Libellis Famosus*, rendered in 1609.

Nothing like a definition could be framed from the law of England at any subsequent period. When the court of star chamber was abolished (in 1641) parliament assumed the prerogative respecting the licensing of publications which it had held, and the press did not become free from this restraint until 1694. Its liberty was then more theoretical than actual on account of the harshness of the law of libel and the manner in which that law was administered in the courts.

The long struggle against the courts, culminating in the passage of the libel law in 1792, with which the names of Fox, Erskine and Camden are so honorably and brilliantly associated, is familiar history. The statutes *De Scandalis Mag-natum* were not formally repealed until 1887, although prosecutions under them ceased long before. A species of censorship survives in the act of 1843 requiring ⁷¹⁷ new plays to be submitted to the lord chamberlain for examination and approval, and the present state of the law of England on the subject of defamation is described in an essay, "The History and Theory of the Law of Defamation," in volume 3 of the *Columbia Law Review*, as follows:

"Unfortunately the English law of defamation is not the deliberate product of any period. It is a mass which has grown by aggregation, with very little intervention from legislation, and special and peculiar circumstances have from time to time shaped its varying course. The result is that perhaps no other branch of the law is as open to criticism for its doubts and difficulties, its meaningless and grotesque anomalies. It is, as a whole, absurd in theory, and very often mischievous in its practical operation": Page 546.

Little aid is supplied by a consideration of our own colonial history and the early history of our separate national existence. The colonies followed closely the practice of the mother country. Even the publication of general laws was forbidden by the magistrates, who yielded only after long and bitter struggles. Royal governors were instructed to prohibit printing, books were burned as offenders against the public welfare, and the school histories all tell about Governor Berkeley's boast that free schools and printing-presses were not allowed in Virginia. The proceedings of the convention which framed the constitution of the United States were conducted in secret. The provision forbidding Congress to pass any law abridging the freedom of speech or of the press came into the constitution by way of an amendment. The debates of the Senate did not become open to the public until 1793, and the incident of the ill-starred sedition law in our constitutional history shows how far ideas relating to the protection of personal character and governmental institutions were then unreconciled in legal theory with freedom of thought and expression upon public questions.

⁷¹⁸ At the time the constitution of this state was adopted some progress had been made and some clarification had taken place. But statutory improvement had been halting and in-

efficient, judicial decisions had often been narrow, illiberal and confusing, and the main principles of the law of libel remained substantially the same as they were when Blackstone wrote. The result is that "liberty of the press" is still an undefined term, and like some other familiar phrases of constitutional law must remain undefined. Certain boundaries are fairly discernible within which the liberty must be displayed, but precise rules cannot be formulated in advance to govern its exercise on particular occasions. In the decision of controversies the character, the organization, the needs and the will of society at the present time must be given due consideration. The press as we know it to-day is almost as modern as the telephone and the phonograph. The functions which it performs at the present stage of our social development, if not substantially different in kind from what they have been, are magnified many fold, and the opportunities for its influence are multiplied many times. Judicial interpretation must take cognizance of these facts. As Mr. Chief Justice Cockburn said in deciding a famous libel suit: "Whatever disadvantages attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generations to which it is immediately applied": *Wason v. Walter*, [1868] L. R. 4 Q. B. 73, 92.

The constitutional guaranty clearly means that the press shall be free from previous government license, and the decisions are quite uniform, but not unanimous, that it shall be free from court censorship through injunctions ⁷¹⁹ against publication. Early writers on constitutional law and early cases say that it means no more, but later commentators and later decisions maintain that it does mean more. Thus Judge Cooley has said: "But while we concede that liberty of speech and of the press does not imply complete exemption from responsibility for everything a citizen may say or publish, and complete immunity to ruin the reputation or business of others so far as falsehood and detraction may be able to accomplish that end, it is nevertheless believed that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions, inasmuch as of words to be uttered orally there can be no previous censorship, and the liberty of

the press might be rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications. . . . The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens. The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation or pecuniary interests of individuals": Cooley's Constitutional Limitations, 7th ed., 603, 604.

This doctrine was recently authoritatively stated by the supreme court of North Carolina, as follows: "In its broadest sense, freedom of the press includes not only exemption from censorship, but security against laws enacted by the legislative department of the government or measures resorted to by either of the other branches for the purpose of stifling just criticism or muzzling public opinion": *Cowan v. Fairbrother*, 720 118 N. C. 406, 54 Am. St. Rep. 733, 24 S. E. 212, 32 L. R. A. 829.

Such also is the opinion of the supreme court of Texas.

Whatever more than freedom from previous license the constitutional guaranty may include, it is clear that it does not grant immunity for the publication of articles which imperil the public peace by advocating the murder of governmental officers and the destruction of organized society. Constitutional government may at least protect its own life, and Johann Most was properly convicted under a statute designed to secure the public peace, because of an article appearing in his newspaper, the "Freiheit," instigating revolution and murder, suggesting the persons to be murdered through the positions occupied and the duties performed by them, advising all persons to discharge their duty to the human race by murdering those who enforce law, denouncing those who would spare ministers of justice as guilty of a crime against humanity, and naming poison and dynamite as agencies to be employed in murder and destruction: *People v. Most*, 171 N. Y. 423, 64 N. E. 175, 58 L. R. A. 509.

Constitutional government may also under its police power take reasonable steps to protect the morals of the people for whom and by whom it is instituted, and to this end may suppress the circulation of newspapers which, like the "Kansas City Sunday Sun," of infamous memory, are devoted largely to the publication of scandals, lechery, assignations, intrigues of men and women, and other immoral conduct: In re Banks, 56 Kan. 242, 42 Pac. 693; State v. Van Wye, 136 Mo. 227, 58 Am. St. Rep. 627, 37 S. W. 938; Strohm v. People, 160 Ill. 582, 43 N. E. 622. Likewise newspapers may be suppressed which are made up principally of criminal news, police reports, and pictures and stories of bloodshed, lust and crime: State v. McKee, 73 Conn. 18, 84 Am. St. Rep. 124, 46 Atl. 409, 49 L. R. A. 542. ⁷²¹ Newspapers like those just described display the licentiousness, and not the liberty, of the press. Here, as elsewhere in our political system, just rules and regulations are not badges of oppression, but are the necessary conditions of true liberty, and the constitutional guaranty under discussion is not opposed to penal and remedial laws upon the subject of libel and the regulation of procedure in the conduct of libel cases.

Even in these days, when the amassing of wealth absorbs so much of the energy of the race, it may still be said that a good name is rather to be chosen than great riches. Among sovereign states that "decent respect to the opinions of mankind" which prompted the appeal to public opinion made in our own Declaration of Independence is the chief sanction for the great body of rules known and observed as international law. The terror of social reprobation and public disgrace induces observance of the criminal law more than fear of fine and imprisonment. The desire to meet social standards of virtue contributes to business integrity. While the approval of conscience is a strong force, and may righteously isolate the martyr and the reformer for a time, the love of deserved social esteem—the innate craving for the social crown of "well done"—is a most powerful motive to good conduct with the great mass of mankind. Without doubt it is responsible for a large share of our mental, moral and material progress. A good reputation honestly earned is not only one of the most satisfying sources of a man's own contentment, but from a commercial standpoint it is one of the most productive kinds of capital he can possess. Therefore it ought to find guaranties of protection in the fundamental law along with those which guard the liberty of the press, and such is indeed the case. The provision of the bill of rights quoted takes for

granted a law of libel, and section 18 of that document places ⁷²² injury to reputation on the same plane with injury to person and property. It reads as follows: "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay."

It is very clear that these words cannot, however, be given unlimited signification and force in all cases. Where the public welfare is concerned, the individual must frequently endure injury to his reputation without remedy. In some situations an overmastering duty obliges a person to speak, although his words bring another into disrepute. Such is the case of a witness testifying to relevant facts in court. Reasons of public policy forbid that the question of malice in his mind should be investigated, and the communication he makes, although damaging in the extreme, is absolutely privileged. He may be prosecuted for perjury, but a civil action based upon his statements is not permitted.

"A man may be defamed by an unjust removal from office on unfounded charges; by injurious testimony given in courts of justice; by the unwarranted deductions of counsel in presenting his case adversely to the jury, and in many other ways where, notwithstanding, the agent in the injury was wholly free from legal fault. Thus, a great public character may, perhaps, suffer in reputation all his lifetime from an impeachment for an offense never in fact committed; yet if the impeachment was instituted in good faith, and on grounds apparently sufficient, those concerned in it only performed a public duty. We unhesitatingly recognize the fact that in many cases, however damaging it may be to individuals, there should and must be legal immunity for free speaking, and that justice and the cause of good government would suffer if it were otherwise. With duty often comes a responsibility to speak openly and act fearlessly, let the consequences be what they may; and the party upon whom the duty was imposed must be left accountable to conscience alone, or perhaps to a supervising public sentiment, but not to the courts": Cooley on Torts, 2d ed., 246.

⁷²³ In other situations there may be an obligation to speak which, although not so imperative, will under certain conditions prevent the recovery of damages by a party suffering injury from the statements made. There are social and moral duties of less perfect obligation than legal duties which may require an interested person to make a communication to an-

other having a corresponding interest. In such a case the occasion gives rise to a privilege, qualified to this extent: anyone claiming to be defamed by the communication must show actual malice or go remediless. This privilege extends to a great variety of subjects, and includes matters of public concern, public men, and candidates for office.

Under a form of government like our own there must be freedom to canvass in good faith the worth of character and qualifications of candidates for office, whether elective or appointive, and by becoming a candidate, or allowing himself to be the candidate of others, a man tenders as an issue to be tried out publicly before the people or the appointing power his honesty, integrity, and fitness for the office to be filled.

In the case of *Wason v. Walter*, L. R. 4 Q. B. 73, already cited, the question for decision was whether a report of a debate in parliament containing matter disparaging to the character of an individual, spoken in the course of debate, furnished ground for an action of libel by the party whose character was called in question. The court held that it did not, and in the opinion of Mr. Chief Justice Cockburn it was said: "The other and the broader principle on which this exception to the general law of libel is founded is, that the advantage to the community from publicity being given to the proceedings of courts of justice is so great that the occasional inconvenience to individuals arising from it must yield to the general good. It is true that, with a view to distinguish the publication of proceedings in parliament from that of proceedings in courts of justice, it has been said that the immunity accorded ⁷²⁴ to the reports of the proceedings of courts of justice is grounded on the fact of the courts being open to the public, while the houses of parliament are not; as also that by the publication of the proceedings of the courts the people obtain a knowledge of the law by which their dealings and conduct are to be regulated. But in our opinion the true ground is that given by Lawrence, J., in *Rex v. Wright*, 8 Term Rep. 298, namely, that 'though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconvenience to the private persons whose conduct may be the subject of such proceedings.' In *Davidson v. Duncan*, 7 El. & B. 231, 26 L. J. Q. B. 106, Lord Campbell says: 'A fair account of what takes place in a court of justice is privileged.

The reason is that the balance of public benefit from publicity is great. It is of great consequence that the public should know what takes place in court; and the proceedings are under the control of the judges. The inconvenience, therefore, arising from the chance of injury to private character is 'infinitesimally small as compared to the convenience of publicity.' And Wightman, J., says: 'The only foundation for the exception is the superior benefit of the publicity of judicial proceedings which counterbalances the injury to individuals, though that at times may be great'": Page 87.

Paraphrasing this language, it is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great, that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great, and the chance of injury to private character so small, that such discussion must be privileged.

⁷²⁵ The law of libel which the constitution takes for granted gives expression to, and room for the operation of, these fundamental principles of public policy, and the Bill of Rights must be interpreted accordingly. Section 11 of the Bill of Rights sets off the inviolability of the liberty of the press from the right of all persons freely to speak, write or publish their sentiments on all subjects, and this fact has given rise to claims on the part of newspaper publishers of special privileges not enjoyed in common by all. Whether such claims are just need not be decided in order to determine the rights of the parties to this litigation. So far they have been rejected by the courts, and the present consensus of judicial opinion is that the press has the same rights as an individual, and no more. The basis of the contention for a more liberal indulgence lies in the modern conditions which govern the collection of news items, and the insistent popular expectation that newspapers will expose, and the popular demand that they shall expose, actual and suspected fraud, graft, greed, malfeasance and corruption in public affairs and questionable conduct on the part of public men and candidates for office without stint, leaving to the people themselves the final verdict as to whether charges made or opinions expressed were justified.

Nor is it necessary in this case to define the word "sentiments," used in section 11 of the Bill of Rights. If that word means no more than thoughts, judgments, opinions or notions, and the section does not protect freedom to make assertions of fact, still a more liberal libel law would not violate it. The constitution guarantees to the individual a minimum of liberty. Other law is not forbidden to secure a larger measure.

There is great diversity of opinion regarding the extent to which discussions of the fitness of candidates for office may go. In England and Canada the limit is fixed at criticism and comment, which, however, may be severe, if fair, and may include the inferring of ⁷²⁶ motives for conduct in fact exhibited if there be foundation for the inference. In some of our own states the rule is more liberal, while in others it is more narrow. According to the greater number of authorities the occasion giving rise to conditional privilege does not justify statements which are untrue in fact, although made in good faith, without malice and under the honest belief that they are true. A minority allows the privilege under such circumstances. The district court instructed the jury according to the latter view, and the instruction given has the sanction of previous decisions of this court.

In the case of *Kirkpatrick v. Eagle Lodge*, 26 Kan. 384, 40 Am. Rep. 316, a report was made to a grand lodge of Odd Fellows, by a special committee to which was referred a petition respecting the expulsion of a member of the order, stating that the officers of a subordinate lodge to which the petition had been presented were of the opinion that the sworn statements of the petition were infamously untrue. This report was received, adopted, published in the grand lodge journal, and distributed among the members of the order, for whom it was intended. The court held that the occasion for the publication prevented the inference of malice and afforded a qualified defense depending upon the absence of actual malice. The opinion distinguished between absolute and qualified privilege, and said: "Under this classification, which is fully sustained by the authorities, the publication complained of is only conditionally privileged, and as the averments in the petition are that the injurious publication is false and malicious, and that the defendants, well knowing its falsity, maliciously published it for the purpose of bringing the plaintiff into public scandal, infamy and disgrace, the petition states a cause of action; but no recovery can be had thereon without proof of express malice on the part of the defendants,

though the charge imputed in the publication be without foundation": Page 391.

⁷²⁷ In the case of *Redgate v. Roush*, 61 Kan. 480, 54 Pac. 1050, 48 L. R. A. 236, two paragraphs of the syllabus read as follows:

"Where the officers of a church, upon inquiry, find that their pastor is unworthy and unfit for his office, and thereupon, in the performance of what they honestly believe to be their duty toward other members and churches of the same denomination, publish, in good faith, in the church papers the result of their inquiry, and there is a reasonable occasion for such publication, it will be deemed to be privileged, and protected under the law.

"In such case, and where the plaintiff seeks damage, it devolves on him to establish actual malice, and where his own testimony disproves malice the court is justified in taking the case from the jury upon a demurrer to the evidence."

In the course of the argument of the opinion it was said: "The publication is defamatory in character, and naturally would largely deprive the plaintiff of the confidence of the members of his church organization throughout the country. If it was false in fact and maliciously made, the plaintiff is entitled to recover to the extent of the injury suffered, unless the relations of the parties and the circumstances of the case justified the publication and brought the defendants within the privilege and protection of the law. The defamatory statement was not absolutely privileged, as words spoken or written by judges, jurors or witnesses in the course of judicial proceedings, or as in legislative debates, but it was at most a case of qualified privilege. Whether it was so privileged must be determined by the position occupied by the defendants, their relations to the plaintiff and to other members of the same denomination, and the circumstances under which the publication was made. If the statements were published in good faith and in the performance of what was honestly deemed to be an official or moral duty toward other church members, and for the benefit and protection of the church organization at large, and there was a reasonable occasion for the publication, it was privileged and protected. . . . If the plaintiff was unworthy or unfit to discharge the sacred functions of his ⁷²⁸ high calling, the defendants, interested in the welfare of the denomination throughout the land, would appear to have been justified in warning other members and congregations of that organization to whom the plaintiff might offer his services as pastor. If the publication was prima

facie privileged, it devolved on the plaintiff to allege and prove that it was both false in fact and malicious in purpose": Pages 482, 483.

The moral and social duty of members of a great fraternity or of a great church organization to inform their brothers of the scandalous conduct of a fellow member or one of their leaders is no higher or stronger than that of electors to keep the public administration pure by warnings respecting the character and conduct of a candidate for office; and if false words are not actionable in one case unless published with actual malice, they are privileged to the same extent in the other. Such is the clear declaration of the court in the case of *State v. Balch*, 31 Kan. 465, 2 Pac. 609. True, that was a criminal case, but the rule of privilege is the same in both civil and criminal actions. It is the occasion which gives rise to privilege, and this is unaffected by the character of subsequent proceedings in which it may be pleaded.

In *Balch's* case a printed article making grave charges against the character of a candidate for county attorney was circulated among the voters of the county previous to the election. In the opinion holding the occasion to be privileged the court said: "If the supposed libelous article was circulated only among the voters of Chase county, and only for the purpose of giving what the defendants believed to be truthful information, and only for the purpose of enabling such voters to cast their ballots more intelligently, and the whole thing was done in good faith, we think the article was privileged and the defendants should have been acquitted, although the principal matters contained in the article were untrue in fact and derogatory to the character of the prosecuting witness. . . . Generally, we think a person may in good faith publish whatever he may honestly believe to be ⁷²⁹ true, and essential to the protection of his own interests or the interests of the person or persons to whom he makes the publication, without committing any public offense, although what he publishes may in fact not be true and may be injurious to the character of others. And we further think that every voter is interested in electing to office none but persons of good moral character, and such only as are reasonably qualified to perform the duties of the office. This applies with great force to the election of county attorneys": Page 472.

Substantially the same doctrine is the basis of the following decisions: *Mott v. Dawson*, 46 Iowa, 533; *Bays v. Hunt*, 60 Iowa, 251. 14 N. W. 785; *Marks v. Baker*, 28 Minn. 162, 9

N. W. 678; *State v. Burnham*, 9 N. H. 34, 31 Am. Dec. 217; *Palmer v. Concord*, 48 N. H. 211, 97 Am. Dec. 605; *Carpenter v. Bailey*, 53 N. H. 590; *Briggs v. Garrett*, 111 Pa. 404, 2 Atl. 513, 56 Am. Rep. 274; *Press Co. v. Stewart*, 119 Pa. 584, 14 Atl. 51; *Jackson v. Pittsburgh Times*, 152 Pa. 406, 34 Am. St. Rep. 659, 25 Atl. 613; *Myers v. Longstaff*, 14 S. D. 98, 84 N. W. 233; *Express Printing Co. v. Copeland*, 64 Tex. 354; *Shurtleff v. Stevens*, 51 Vt. 501, 31 Am. Rep. 698; *Posnett v. Marble*, 62 Vt. 481, 22 Am. St. Rep. 126, 20 Atl. 813, 11 L. R. A. 162; *O'Rourke v. Lewiston D. S. Publishing Co.*, 89 Me. 310, 36 Atl. 398; *Crane v. Waters (C. C.)*, 10 Fed. 619.

The plaintiff asks that the decisions of this court quoted above be overruled, and that they be supplanted by one which shall express the narrow conception of the law of privilege held by the majority of the courts. *Kirkpatrick's* case was decided in 1881, and *Balch's* case in 1884. The *Redgate* decision is almost ten years old. A quarter of a century has elapsed since the doctrine of those cases was promulgated, and the legislature, coming directly from the people year after year, has not seen fit to make any modification of it. Surely in that length of time, and in view of the repetition of the error, if any were committed, some legislative action ⁷³⁰ would have been taken to safeguard the reputations of our citizens if they were unduly imperiled by those decisions. The fact that so many courts of this country, all of high character, of great learning and ability, and all equally interested in correctly solving the problems of free government, differ from us, makes us pause; but a reversal of policy and the overturning of what has been so long accepted as settled law would be tantamount, under the circumstances, to legislation. Such a step ought not to be urged upon the court except for conclusive reasons. What are the reasons supporting the majority rule? The decision most freely quoted since it was rendered, in 1893, and chiefly relied upon by the plaintiff here, is that of the United States circuit court of appeals for the sixth circuit in the case of *Post Publishing Co. v. Hallam*, 16 U. S. App. 613, 59 Fed. 530, 8 C. C. A. 201. Counsel in the case had argued from the duty of newspapers to keep the public informed concerning those who are seeking their suffrages and confidence, and had asked if it were possible that the privilege allowed in discussing the character of public servants should be less than that which protects defamatory statements made concerning a private servant. The opinion states this argument, and then proceeds as follows:

“The existence and extent of privilege in communications is determined by balancing the needs and good of society with the right of an individual to enjoy a good reputation when he has done nothing which ought to injure his reputation. The privilege should always cease where the sacrifice of the individual right becomes so great that the public good to be derived from it is outweighed. Where conditional privilege is extended to cover statements of disgraceful facts to a master concerning a servant, or one applying for service, the privilege covers a bona fide statement on reasonable grounds to the master only, and the injury done to the servant’s reputation is with the master only. This is the extent of the sacrifice which the rule compels the servant to suffer in what was thought to be, when the rule became law, a most important interest ⁷³¹ of society. But if the privilege is to extend to cases like that at bar, then a man who offers himself as a candidate must submit uncomplainingly to the loss of his reputation, not with one person only, or a small class of persons, but with every member of the public whenever an untrue charge of disgraceful conduct is made against him, if only his accuser honestly believes the charge upon reasonable grounds. We think that not only is such a sacrifice not required of every one who consents to become a candidate for office, but that to sanction such a doctrine would do the public more harm than good.

“We are aware that public officers and candidates for public office are often corrupt when it is impossible to make legal proof thereof, and of course it would be well if the public could be informed in such case of what lies hidden by concealment and perjury from judicial investigation. But the danger that honorable and worthy men may be driven from politics and public service by allowing too great latitude in attacks upon their character outweighs any benefit that might occasionally accrue to the public from charges of corruption that are true in fact but are incapable of legal proof. The freedom of the press is not in danger from the enforcement of the rule we uphold. No one reading the newspapers of the present day can be impressed with the idea that statements of fact concerning public men and charges against them are unduly guarded or restricted, and yet the rule complained of is the law in many of the states of the Union and in England”: Page 652.

Here the rule by which privilege is to be measured is correctly stated, as in *Wason v. Walter*, L. R. 4 Q. B. 73—the

balance of public good against private hurt. The argument of counsel is then answered, and the statement is made that a candidate ought not suffer a loss in reputation with the whole public for the public good. That is the question to be decided, and not a reason why it should be so decided. Then the sole reason for the decision is stated—that honorable and worthy men will be driven from politics. Then the consequences of the decision are commented upon: Freedom of the press will not be endangered—an assertion, ⁷³² as shown by the manner in which public men are handled by the press at the present time—an appeal to experience for proof.

The single reason upon which the Hallam decision is based is also in the nature of a prediction, and is not new. It was advanced in this country in 1808 by Mr. Chief Justice Parsons (*Commonwealth v. Clap*, 4 Mass. 163, 3 Am. Dec. 212), and by Chancellor Walworth in 1829, in the case of *King v. Root*, 4 Wend. (N. Y.) 113, 21 Am. Dec. 102. Speaking in opposition to the liberal doctrine the chancellor said: "It is, however, insisted that this libel was a privileged communication. If so, the defendants were under no obligation to prove the truth of the charge; and the party libeled had no right to recover unless he established malice in fact, or showed that the editors knew the charge to be false. The effect of such a doctrine would be deplorable. Instead of protecting it would destroy the freedom of the press, if it were understood that an editor could publish what he pleased against candidates for office without being answerable for the truth of such publications. No honest man could afford to be an editor, and no man who had any character to lose would be a candidate for office, under such a construction of the law of libel. The only safe rule to adopt in such cases is to permit editors to publish what they please in relation to the character and qualifications of candidates for office, but holding them responsible for the truth of what they publish": Page 139.

These predictions call to mind that of Lord Thurlow, who, when protesting against the passage of the Fox libel act, said it would result in "the confusion and destruction of the law of England": 2 May's Constitutional History of England, 122. The actual results of the struggle ending in the enactment of that law are stated by the author cited as follows: "The press was brought into closer relations with the state. Its functions were elevated, and its responsibilities increased. Statesmen now had audience of the people. They could justify their own acts to the world. The falsehoods and mis-

representations of the press ⁷³³ were exposed. Rulers and their critics were brought face to face, before the tribunal of public opinion. The sphere of the press was widely extended. Not writers only, but the first minds of the age—men ablest in council and debate—were daily contributing to the instruction of their countrymen. Newspapers promptly met the new requirements of their position. Several were established during this period whose high reputation and influence have survived to our own time; and by fullness and rapidity of intelligence, frequency of publication, and literary ability, proved themselves worthy of their honorable mission to instruct the people”: 2 May’s Constitutional History of England, 123.

In opposition to the high authority of *King v. Root*, 4 Wend. 113, 21 Am. Dec. 102, and the Hallam case (16 U. S. App. 613, 59 Fed. 530, 8 C. C. A. 201), may be placed Thomas M. Cooley, who must be reckoned with in the discussion of any question upon which he has deliberately expressed himself. Commenting on the foregoing quotation from *King v. Root*, he says: “Notwithstanding the deplorable consequences here predicted from too great license to the press, it is matter of daily observation that the press, in its comments upon public events and public men, proceeds in all respects as though it were privileged; public opinion would not sanction prosecutions by candidates for office for publications amounting to technical libels, but which were nevertheless published without malice in fact; and the man who has a ‘character to lose’ presents himself for the suffrages of his fellow-citizens in the full reliance that detraction by the public press will be corrected through the same instrumentality, and that unmerited abuse will react on the public opinion in his favor. Meantime the press is gradually becoming more just, liberal and dignified in its dealings with political opponents, and vituperation is much less common, reckless and bitter now than it was at the beginning of the century, when repression was more often resorted to as a remedy”: Cooley’s Constitutional Limitations, 7th ed., 644, note.

This statement of the results of Judge Cooley’s observation is in full accord with our own local experience. Without speaking for other states in which the liberal rule applied in Balch’s case prevails, it may be ⁷³⁴ said that here at least men of unimpeachable character from all political parties continually present themselves as candidates in sufficient num-

bers to fill the public offices and manage the public institutions, and the conduct of the press is as honest, clean and free from abuse as it is in the states where the narrow view of privilege obtains.

The fact that the public welfare has been promoted in England by liberalizing the law of libel is freely acknowledged in *Wason v. Walker*, L. R. 4 Q. B. 73: "Our view of libel has, in many respects, only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognized. Comments on government, on ministers and officers of state, on members of both houses of parliament, on judges and other public functionaries, are now made every day, which half a century ago would have been the subject of actions or ex officio informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that, though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties?" Page 93.

Since the only reason given for the rejection of the liberal rule fails, it is pertinent to inquire if the consequences of the narrow rule are so innocuous as the Hallam case asserts; and in doing so it must be borne in mind that the correct rule, whatever it is, must govern in cases other than those involving candidates for office. It must apply to all officers and agents of government—municipal, state and national; to the management of all public institutions—educational, charitable and penal; to the conduct of all corporate enterprises ⁷³⁵ affected with a public interest—transportation, banking, insurance, and to innumerable other subjects involving the public welfare. Will the liberty of the press be endangered if the discussion of such matters must be confined to statements of demonstrable truth, and to what a jury may, ex post facto, say is "fair" criticism and comment? Will free discussion of the subjects indicated be smothered if the newspapers understand that they must respond in damages for deducing and stating a wrong conclusion of fact from strong circumstantial evidence indicating fraud, corruption or other conduct injurious to the public welfare?

The case of *Atkinson v. Detroit Free Press*, 46 Mich. 341, 9 N. W. 501, was decided upon a question of pleading and a

question of evidence. The opinion of the court did not treat the subject of privilege. Mr. Justice Cooley, however, took occasion to express himself upon the point now under consideration as follows:

“The beneficial ends to be subserved by public discussion would in large measure be defeated if dishonesty must be handled with delicacy and fraud spoken of with such circumspection and careful and deferential choice of words as to make it appear in the discussion a matter of indifference. . . . If such a discussion of a matter of public interest were *prima facie* an unlawful act, and the author were obliged to justify every statement by evidence of its literal truth, the liberty of public discussion would be unworthy of being named as a privilege of value. It would be better to restore the censorship of a despotism than to assume to give a liberty which can only be accepted under a responsibility that is always threatening and may at any time be ruinous. A caution in advance after despotic methods would be less objectionable than a caution in damages after in good faith the privilege had been exercised. No public discussion of important matters involving the conduct and motives of individuals could possibly be at the same time valuable and safe under the rules for which the plaintiff contends. It is ⁷³⁶ a plausible suggestion that strict rules of responsibility are essential to the protection of reputation; but it is most deceptive, for every man of common discernment who observes what is taking place around him, and what influences control public opinion, cannot fail to know that reputation is best protected when the press is free. Impose shackles upon it and the protection fails when the need is greatest. Who would venture to expose a swindler or a blackmailer, or to give in detail the facts of a bank failure or other corporate defalcation, if every word and sentence must be uttered with judicial calmness and impartiality as between the swindler and his victims, and every fact and every inference be justified by unquestionable legal evidence? The undoubted truth is that honesty reaps the chief advantages of free discussion; and fortunately it is honesty also that is least liable to suffer serious injury when the discussion incidentally affects it unjustly. . . . In what I say in this case I advance no new doctrines, but justify every statement of principle on approved authorities. It will be freely admitted that there are decided cases from which a different argument may be constructed, but it is affirmed that they are no longer deserving of credit if they ever were. The gradual and beneficial modification of the law of libel is shown in *Wason v.*

Walker, L. R. 4 Q. B. 73, and in so far as it has been modified it has been made more consistent with just reason. While it is admitted that the public press is often corrupt and often reckless in dealing with private reputations, it is at the same time affirmed that the duty of its conductors to abstain from such misconduct is no plainer than is the obligation of the authorities to refuse to impose penalties when in the exercise of a just independence they make use of their columns for the exposure of public wrongdoers to public condemnation. The law, justly interpreted, is not chargeable with the inconsistency of tempting conductors of the press with a deceptive pretense of liberty, and then punishing them in damages if they act upon the assumption that the liberty is genuine": Pages 382-384.

If it be said that this argument contains an element of prophecy, it may be replied that it will support the ⁷³⁷ liberal rule as well as the same kind of prophecy in the Hallam case supports the narrow rule. The Hallam case quotes the following discrimination of the two rules made by Lord Chancellor Herschel, in *Davis v. Shepstone*, 11 App. Cas. 187: "There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or approved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct": Page 190.

This statement is one of elucidation merely, and furnishes no reason for a choice between the rules. It may be observed, however, that the decisions in England are in great conflict upon the question whether fair comment is a branch of the law of privilege. Only last year a writer in the *Law Quarterly Review* (vol. 23, p. 97) called attention to this fact, and expressed the hope that the case of *Thomas v. Bradbury, Agnew & Co., Limited*, [1906] 2 K. B. 627, might be taken to the house of lords, so that the defense of fair comment might be reviewed and placed upon some logical basis. It may be observed further that the distinction between comment and statements of fact cannot always be clear to the mind. Expression of opinion and judgment frequently have all the force of statements of fact, and pass by insensible gradations into

declarations of fact. In England fair comment includes the inference of motives, if there be foundation for the inference: *Hunter v. Sharpe*, 4 Fost. & F. 983; *Campbell v. Spottiswoode*, 3 Best & S. 738 769. In the latter case Mr. Chief Justice Cockburn said: "I think the fair position in which the law may be settled is this: that where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations on his motives which arise fairly and legitimately out of his conduct, so that a jury shall say that the criticism was not only honest, but also well founded, an action is not maintainable": Page 775.

This doctrine is repudiated in *Hamilton v. Eno*, 81 N. Y. 116, and *Negley v. Farrow*, 60 Md. 158, 45 Am. Rep. 715, both cited in support of the Hallam decision. What is a charge of intoxication—an inference from conduct and appearances, and therefore fair comment, of the statement of a fact? What is the difference between a charge of intoxication and the following: "Having appearances which were certainly consistent with the belief that they had imbibed rather freely of the cup that inebriates. Their condition in the chapel also led one to such a conclusion": *Davis v. Duncan*, L. R. 9 C. P. 396.

In England this statement is fair comment. In New York no matter how strongly appearances and conduct may justify the inference, a charge of intoxication made against a public officer must be fully proved: *King v. Root*, 4 Wend. (N. Y.) 113, 21 Am. Dec. 102. In keeping plain the distinction between comment and statements of fact the courts of some of the states leave the law very much in the attitude of saying to the newspaper: "You have full liberty of free discussion, provided, however, you say nothing that counts."

The Hallam case (16 U. S. App. 613, 59 Fed. 530, 8 C. C. A. 201) quotes the supreme court of Ohio in opposition to the liberal doctrine, as follows:

"We do not think the doctrine either sound or wholesome. In our opinion, a person who enters upon a public office, or becomes a candidate for one, no more surrenders to the public his private character than he does his private property. Remedy by due course of 739 law, for injury to each, is secured by the same constitutional guaranty, and the one is no less inviolate than the other. To hold otherwise would, in our judgment, drive reputable men from public positions, and fill their places with others having no regard for their reputation, and thus defeat the object of the rule contended for and over-

turn the reason upon which it is sought to sustain it": Post Pub. Co. v. Moloney, 50 Ohio St. 71, 33 N. E. 921.

Manifestly a candidate must surrender to public scrutiny and discussion so much of his private character as affects his fitness for office, and the liberal rule requires no more. But in measuring the extent of a candidate's profert of character it should always be remembered that the people have good authority for believing that grapes do not grow on thorns nor figs on thistles. The other arguments furnished by the Ohio quotation have already been considered. The Hallam case contains nothing further worthy of note. Another decision much approved, frequently quoted, and confidently proposed for consideration by the plaintiff here, is that in the case of Upton v. Hume, 24 Or. 420, 41 Am. St. Rep. 863, 33 Pac. 810, 21 L. R. A. 493. The narrow rule is stated clearly, and authorities for it are cited. The only reasons urged against the rival rule are the old one—sensitive and honorable men would eschew politics, yellow journalism would run riot, candidates would be exposed to the malignity of party strife—and this new one: "The only safe evidence of a man's intentions are his acts, and if he accuses another of a crime he must conclusively be presumed to have intended to injure him": Page 432.

The doctrines of the common law relating to malice seem to the Delaware court, also, to be of the utmost importance in finding out what the true rule of privilege ought to be: Star Pub. Co. v. Donahoe (Del.), 58 Atl. 513, 65 L. R. A. 980.

⁷⁴⁰ With all due deference to Upton v. Hume, 24 Or. 420, 41 Am. St. Rep. 863, 33 Pac. 810, 21 L. R. A. 493, the remarks quoted read as if they had been written in the midst of the fog of fictions, inferences and presumptions which enshroud the law of libel. Facts and the truth never have been much in favor in that branch of the law. Its early use as a weapon and shield of caste and arbitrary power would have been impaired. Suppose a serious charge to be made: By a fiction it is presumed to be false. By a fiction malice is inferred from the fiction of falsity. By a fiction damages are assumed as the consequence of the fictions of malice and falsity. Publication only is not presumed, and until recent times the offer to show the truth of the charge as having some bearing upon liability was a sacrilegious insult to this beautiful and symmetrical fabric of fiction. Then a defendant was made to suffer additional smart for venturing to obtrude the truth as a defense if, although his proof were abundant, he barely

failed, in the opinion of the jury, to make out a preponderance. It is, however, in the field of malice, where the rule stated in the quotation lies, that truth and fact are most superfluous. In the first place it is said that malice is the gist of the action for libel. This is pure fiction. It is not true. The plaintiff makes a complete case when he shows the publication of matter from which damage may be inferred. The actual fact may be that no malice exists or could be proved. Frequently libels are published with the best of motives, or perhaps mistakenly or inadvertently but with an utter absence of malice. The plaintiff recovers just the same. Therefore "the gist of the action" must be taken out of the case. This is done by another fiction. It is said that of course malice does not mean the one thing known to fact or experience to which the term may apply, but it is just a legal expression to denote want of legal excuse. In this state a statutory definition of libel making malice an essential ingredient as at the common law compels this court to say that the intentional ⁷⁴¹ publication of libelous matter implies malice, whatever the motive may be: *State v. Clyne*, 53 Kan. 8, 35 Pac. 789. So, a fiction was invented to meet an unnecessary fiction which became troublesome, and the courts go on gravely ascending the hill for the purpose of descending, meanwhile filling the books with scholastic disquisitions, verbal subtleties and refined distinctions about malice in law, malice in fact, express malice, implied malice, etc., etc.

Now, what is the fact? Instead of malice being the gist of the action, it may come into a libel case and be of importance in two events only: to affect damages, and to overcome a defense of privilege. If the occasion be absolutely privileged, there can be no recovery. If it be conditionally privileged, the plaintiff must prove malice—actual evil-mindedness—or fail. When it comes to this proof there is no presumption, absolute or otherwise, attaching to a charge of crime. The proof is made from an interpretation of the writing, its malignity or intemperance, by showing recklessness in making the charge, pernicious activity in circulating or repeating it, its falsity, the situation and relations of the parties, the facts and circumstances surrounding the publication, and by other evidence appropriate to a charge of bad motives, as in other cases.

Nothing else in *Upton v. Hume*, 24 Or. 420, 41 Am. St. Rep. 863, 33 Pac. 810, 21 L. R. A. 493, requires comment, and no decisions more persuasive than those discussed have been cited or have fallen under the observation of the court. Speaking

generally, it may be said that the narrow rule leaves no greater freedom for the discussion of matters of the gravest public concern than it does for the discussion of the character of a private individual. It is a matter of common experience that, whatever the instructions to juries may be, they do not, and the people do not, hold a newspaper publisher guilty and brand him a calumniator if, in an effort in good faith to discharge his moral duty to the public, he oversteps that rule. In a political libel suit, if a nonpolitical ⁷⁴² jury be secured, the newspaper usually gets a verdict if, in the language of Balch's case, "the whole thing was done in good faith": *State v. Balch*, 31 Kan. 465, 2 Pac. 609. Otherwise damages are assessed. Although he adhered to the narrow rule, Sir Frederick Pollock, when chief baron of the exchequer, came near stating its rival when he said: "I think it quite right that all matters that are entirely of a public nature—conduct of ministers, conduct of judges—the proceedings of all persons who are responsible to the public at large, are deemed to be public property; and that all bona fide and honest remarks upon such persons, and their conduct, may be made with perfect freedom, and without being questioned too nicely for either truth or justice": *Gathercole v. Miall*, 15 Mees. & W. 318, 331.

The liberal rule offers no protection to the unscrupulous defamer and traducer of private character. The fulminations in many of the decisions about a Telamonian shield of privilege from beneath which scurrilous newspapers may hurl the javelins of false and malicious slander against private character with impunity are beside the question. Good faith and bad faith are as easily proved in a libel case as in other branches of the law, and it is an every-day issue in all of them. The history of all liberty—religious, political, and economic—teaches that undue restrictions merely excite and inflame, and that social progress is best facilitated, the social welfare is best preserved and social justice is best promoted in presence of the least necessary restraint.

Aside from other reasons for adhering to it, the court is of the opinion that the rule in Balch's case accords with the best practical results obtainable through the law of libel under existing conditions, that it holds the balance fair between public need and private right, and that it is well adapted to subserve all the high interests at stake—those of the individual, the press, and the public.

743 The plaintiff argues that the defense of privilege was destroyed by the fact that copies of the defendant's newspaper circulated in other states, complains of the instructions given upon the subject, and insists that the instruction offered by him should have been given. The instruction given was correct, and follows the rule announced by this court in *Redgate v. Roush*, 61 Kan. 480, 59 Pac. 1050, 48 L. R. A. 236. There a matter of interest to communicants of a church was published in the church papers in Indiana, Ohio, Texas, and Nebraska. It was inevitable that they should be read by people of other denominations. The syllabus reads: "Where the publication appears to have been made in good faith and for the members of the denomination alone, the fact that it incidentally may have been brought to the attention of others than members of the church will not take away its privileged character."

This accords with the general rule stated in volume 25 of the *Cyclopedia of Law and Procedure*, at page 387: See, also, *Hatch v. Lane*, 105 Mass. 394; *Mertens v. Bee Publishing Co.*, 5 Neb. [Unoff.] 592, 99 N. W. 847. In the cases of *State v. Haskins*, 109 Iowa, 656, 77 Am. St. Rep. 560, 80 N. W. 1063, 47 L. R. A. 223, *Buckstaff v. Hicks*, 94 Wis. 34, 59 Am. St. Rep. 853, 68 N. W. 403, and *Sheftall v. Central Ry. Co.*, 123 Ga. 589, 51 S. E. 646, language is used from which it might be inferred that privilege will be destroyed if the communication should reach the eyes of others than persons interested. This would be the end of privilege for all newspapers having circulation and influence. Generally, the publication must be no wider than will meet the requirements of the moral or social duty to publish. If it be designedly or unnecessarily or negligently excessive, privilege is lost. But if a state newspaper published primarily for a state constituency have a small circulation elsewhere, it is not deprived **744** of its privilege in the discussion of matters of state-wide concern because of that fact.

The second subject propounded for consideration at the beginning of this opinion is one of practice which goes to the efficiency of the administration of the law as a means of justice. Did the special finding of the jury that the evidence does not show that the plaintiff suffered any damage from the article in the defendant's newspaper render errors regarding instructions upon other matters immaterial? Under the constitution the appellate jurisdiction of this court is limited to the review of errors committed by the trial court from

which the record comes. It cannot consider cases de novo and decide them according to its own notions of the law and evidence. It cannot take new evidence or pronounce any judgment except that the trial court did right or wrong in whole or in part. It cannot direct what judgment the trial court shall enter unless the facts be found or agreed to. It does not have the constitutional power to do generally what ought to have been done by judge and jury at the trial, and so end the litigation, and the legislature cannot, under the constitution, confer such power upon it: *In re Burnette*, 73 Kan. 609, 85 Pac. 575. However, before the territory of Kansas became a state the territorial legislature enacted the following statute: "The court, in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect": Civ. Code, sec. 140; Laws 1859, c. 25, sec. 148.

Before the territory became a state the territorial supreme court adopted the rule that error will not be presumed, but must be affirmatively shown: *Otis v. Jenkins, McCahon* (Kan.), 87. That statute and that rule have been in force ever since. They are still in force and have been ⁷⁴⁵ applied in multitudes of decisions. It would be too much to say that the spirit of the statute and of the rule has always been observed. It has been lost sight of often enough. Sometimes technicality may have been utilized in an effort to right palpable wrong. Very often it is most perplexing to determine what is substantial. But it is the constant purpose and endeavor of the court to obey the statute and to observe the rule. It must do so in this case precisely the same as if it were one small enough to have originated before a justice of the peace. "If it be conceded that the rules of procedure have been violated in this case the judgment cannot, for that reason alone, be overturned. The legislature has enjoined upon this court the duty of looking beyond defects and errors in pleadings and proceedings to ascertain if they did in fact affect the substantial rights of the party complaining of them. Fixed rules are to be observed and enforced, but not merely for the purpose of vindicating them. Harm must result from a wrong decision or it cannot be reversed": *Hopkinson v. Conley*, 75 Kan. 65, 88 Pac. 549.

For obvious reasons the instruction relating to privilege required consideration on its merits. It would be pure specu-

lation to say that other instructions given which do not relate to damages led the jury to make the special finding. The subject of damages was treated independently of all other issues, and stood out as a separate and distinct branch of the case; and the court would be obliged to enter upon a "quest for error" indeed to be able to discover that the jury did not understand the question and by their answer merely meant to say that under the instructions the plaintiff had no cause of action for damages. Error must be made to appear in some affirmative way. It cannot be presumed. If the plaintiff suffered no damage, manifestly it is of no consequence whatever what valuation should be used in the purchase of bonds for the school fund, what treasury transactions are illegal, or what the law ⁷⁴⁶ of conspiracy may be. The substantial rights of the plaintiff could not be affected by erroneous statements of the law upon those questions.

The judgment of the district court is affirmed.

Libelous Statements Concerning Candidates for Office are discussed in the notes to *Holmes v. Clisby*, 104 Am. St. Rep. 133; *Aldrich v. Press Printing Co.*, 86 Am. Dec. 88. The fact that one is a candidate for office affords in many instances a legal excuse for publishing language concerning him as such, for which publication there could be no legal excuse if he did not occupy that position: *Nichols v. Daily Reporter Co.*, 30 Utah, 74, 116 Am. St. Rep. 796. But it is said that libelous statements of facts respecting candidates for office can be justified only by proving their truth. Libel is no more justifiable when published about a candidate for public office than if published about him on any other occasion: *Dauphiny v. Buhne*, 153 Cal. 757, 126 Am. St. Rep. 136.

As to What Words are Libelous Per Se, see the note to *Nichols v. Daily Reporter Co.*, 116 Am. St. Rep. 802.

Newspaper Libel is the subject of a note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 333.

Justification in Actions for Libel and Slander is the subject of a note to *Rutherford v. Paddock*, 180 Mass. 289, 91 Am. St. Rep. 285.

CASES

IN THE

COURT OF APPEALS

OF

KENTUCKY.

SCOTT v. O'BRIEN.

[129 Ky. 1, 110 S. W. 260.]

ALIENATION OF AFFECTIONS—Absence of Wrong on Part of Defendant.—There is no ground for an action where a spouse voluntarily gives his or her affections to another, the latter doing nothing wrongfully to win them. To support an action for alienating a husband's or wife's affections, it must be established that the defendant is the enticer. Mere proof of abandonment, and that the husband or wife maintains improper relations with the defendant, is not sufficient. (p. 422.)

ALIENATION OF AFFECTIONS—Voluntary Act of Husband. It is proper for a woman to show, in an action against her by another woman for alienating the affections of the latter's husband, that the alienation was his voluntary act, and not due to any wrongful or intentional act on her part. (pp. 422, 423.)

ALIENATION OF AFFECTIONS—Grounds for Action.—In an action by a wife against another woman for alienating her husband's affections, it is necessary, not only to show the alienation, but that it has been due to the intentional conduct of the defendant. (p. 423.)

ALIENATION OF AFFECTIONS—Evidence Admissible Under General Denial.—In an action by a wife for the alienation of her husband's affections, the defendant may show under a general denial that the alienation was not due to any wrongful or intentional act on her part, but was the voluntary act of the husband. (p. 423.)

ALIENATION OF AFFECTIONS—Admissibility of Declarations.—In an action by a wife for the alienation of her husband's affections, the defendant may introduce in evidence, as part of the *res gestae*, conversations between her and him, prior to the time of the abandonment, to show that he first sought her and made love to her, that he was himself a seducer, that she endeavored to get him to leave her alone and return to his wife and children, and that he really sought her for the purpose of getting her money, and not because of any affection for her. (pp. 423, 424.)

ALIENATION OF AFFECTIONS—Admissibility of Declarations.—In an action by a wife for the alienation of her husband's affections, evidence is admissible that he remarked shortly after the death of the defendant's husband, "That the little widow with her money would be a good catch." Evidence is also admissible of conversations and letters showing his constant demands on her for money. (p. 425.)

ALIENATION OF AFFECTIONS—Evidence of Wealth as Showing Motive.—In an action by a wife for the alienation of her husband's affections, the defendant may prove her financial condition, not for the purpose of increasing or diminishing the damages, but for the purpose of showing the motive of the husband in seeking her society. (p. 425.)

ALIENATION OF AFFECTIONS—Right of Wife to Bring Action.—An action may be maintained by a wife against another woman who intentionally alienates her husband's affections, and such damages may be recovered as will compensate her for injury to her feelings and loss of his society and support. (p. 425.)

ALIENATION OF AFFECTIONS—Exemplary Damages.—A Wife may Recover exemplary damages against a woman who alienates her husband's affections, if the wrongful conduct has been wanton and malicious, with the design of humiliating the wife. (p. 425.)

Sims, Du Bose & Rhodes, for the appellant.

L. P. Tanner, for the appellee.

5 CLAY, C. Appellee, Virgin O'Brien, instituted this action against Florence Scott to recover damages for the alienation by the latter of her husband's affections, and for the loss of his society and support resulting therefrom. The petition charges that the defendant by various "acts, devices, blandishments and seductions alienated the love and affections of plaintiff's husband, and destroyed the happiness of her home." Appellant's defense was a general denial. Upon trial of the case the jury awarded appellee damages in the sum of five thousand five hundred dollars. Defendant's motion and grounds for a new trial were overruled, and she appeals.

The principal grounds relied upon for reversal are (1) the exclusion of relevant and competent testimony offered by appellant; and (2) errors in giving and refusing instructions.

From the evidence in the case it appears that the appellant's husband, Brownie Scott, died in September, 1905. At that time she had two little girls, four and nine years of age, respectively. Scott left to appellant and his two children insurance amounting to about four thousand dollars. With this money she paid some five hundred dollars of his indebtedness, and bought the home where she lived at the time of the trial, paying the sum of fourteen hundred dollars. At the time of Brownie Scott's death, he lived adjoining his tobacco factory in Bowling Green, Kentucky. Appellee's husband was then in his employ. Some little time after Scott's death, O'Brien, the husband of appellee, began to pay attentions to the **6** appellant. She was frequently seen at the factory where he was still employed, although she claims that she went there for the purpose of getting mail, which she had been accustomed to do prior to her husband's death. Appellant

was also frequently seen out riding with O'Brien, and she wrote at least one letter to O'Brien which is couched in endearing terms. The theory of appellant's defense was that appellee's husband voluntarily left his wife and sought appellant without any intentional or wrongful acts on her part, that his real purpose in seeking her society was to obtain the insurance money which her husband had left her; that she protested against his attentions and advised him to return to his wife; that he resorted to all sorts of threats and attempts to overawe her; that he carried a pistol upon his person, and would make violent protestations of love for her, and threaten to kill himself and her. With the view of presenting this defense, appellant offered to introduce letters which she received from O'Brien, and to testify to his acts, conduct and conversations with her, as well as her conversations with him, upon occasions prior to the time he abandoned his wife. She also offered to testify to the amount of money she had, and to the amount which she, by reason of O'Brien's threats and persuasion, had given to him. The trial court excluded all such testimony, and proper avowals were made by appellant. Counsel for appellant contend that this testimony was properly admissible under a general denial, or, if not admissible under the pleadings in that form, the trial court should have permitted appellant to file the amendment which was offered immediately after the ruling of the court excluding the testimony. For the purpose of determining the question involved, we shall consider (1) whether such evidence is admissible or not under the circumstances, and (2) whether it is admissible under a general denial.

The ruling of the trial court seems to have been based upon the case of *Hart v. Knapp*, 76 Conn. 135, 100 Am. St. Rep. 989, 55 Atl. 1021. That was an action for criminal conversation, and not an action for alienation of affections. In an action for criminal conversation adultery must be shown. In that case the court held that it was no defense that the husband was the active and aggressive party, and that the defendant listened to his persuasions, and lived in adulterous intercourse with him. It is manifest that that case is somewhat different from the one under consideration. Here no adultery is shown. There the action was based on adultery, and the court held that it was no defense to show that the husband was a seducer. The mere fact that the defendant lived in adultery with plaintiff's husband showed, to some extent at least, wrongful and intentional conduct on her part. But whatever may have been the reason for reaching the con-

clusion at which the court arrived in that case, we are of opinion that the view therein expressed is contrary to the weight of authority. The general rule is that there is no ground for an action where a spouse voluntarily gives his or her affections to another, the latter doing nothing wrongfully to win such affections. To support an action for alienating a husband's or wife's affections, it must be established that the defendant is the enticer. Mere proof of abandonment, and that the husband or wife maintains improper relations with the defendant, is not sufficient: 21 Cyc. 1621; *Buchanan v. Foster*, 23 App. Div. 542, 48 N. Y. Supp. 732; *Churchill v. Lewis*, 17 Abb. N. C. (N. Y.) 226; ⁸ *Warner v. Miller*, 17 Abb. N. C. 221. In 15 American and English Encyclopedia of Law, page 895, the rule is thus stated: "In order to sustain an action for the alienation of the husband's affections, it must appear, in addition to the fact of alienation or the fact of the husband's infatuation for the defendant, that there had been a direct interference on the defendant's part, sufficient to satisfy the jury that the alienation was caused by the defendant, and the burden of proof is on the plaintiff to show such interference." Again, on page 866, it is said: "But to maintain this action it must be established that the husband was induced to abandon the wife by some active interference on the part of the defendant." In 3 Elliott on Evidence, section 1643, it is said: "To entitle the plaintiff to recover in an action for alienating affections, the burden of proof is upon the plaintiff, and the defendant must show that there was a direct interference upon the part of the defendant, and that not only was there infatuation of the husband or wife for the defendant, but that the defendant by wrongful act was the cause of it." In the case of *Waldron v. Waldron* (C. C.), 45 Fed. 315, the court in an elaborate discussion of the question said: "Defendant should not be held to answer on damages because plaintiff's husband left her, though without good cause, and afterward fell in love with, and finally married, defendant. If the husband alienated his own affections from his wife, or if alienated by the plaintiff's own conduct, or both, without the interference of defendant, or if they were alienated by any other cause known or unknown, over which defendant had no control or exercised no intentional direction or influence, then the plaintiff, howsoever unfortunate or wronged, cannot recover damages from the defendant." We therefore conclude that by the weight of ⁹ authority it was proper for appellant to show that the alienation of O'Brien's affections from appellee was a voluntary act of O'Brien, and

was not due to any wrongful or intentional act on the part of appellant.

The next question is whether or not such evidence is admissible under a general denial. Manifestly appellant was confined to two defenses—either to deny the allegations of the petition, or to set forth new matter avoiding the facts therein contained; but the latter is in effect simply a confession and avoidance. We do not think appellant should be compelled to confess the fact that appellee's husband had transferred his affections to her, and seek to avoid the effect of such confession by showing that the alienation was due to his voluntary act. We think she should be entitled to place in issue both the fact of alienation and the cause thereof. For appellee to recover, it was necessary not only to show alienation of her husband's affections, but that such alienation was due to the intentional conduct of appellant. These were, then, the two facts in issue. Appellant could introduce any evidence that would tend to rebut either one of these facts, and such evidence would be relevant to the issue. We therefore conclude that the evidence of appellant's defense was properly admissible under a general denial.

It appears that the court excluded evidence of conversations between appellant and appellee's husband prior to the time of the abandonment, wherein appellant sought to show that appellee's husband first sought her and made love to her, and was himself a seducer; that she endeavored to get him to leave her alone and return to his wife and children, and that he really sought her for the purpose of getting her ¹⁰ money, and not because of any affection for her. All this evidence was excluded by the court upon the idea that it consisted of self-serving declarations, and occurred at a time when appellee was not present. In the case of *Bailey v. Bailey*, decided by the supreme court of Iowa, and reported in 94 Iowa, 598, 63 N. W. 341, the very question before us was under discussion. In that case the wife had brought an action against the parent of her husband for the alienation of her husband's affections. The defendant offered to show that, instead of alienating the affections of her husband, she had tried to get him to live with his wife, and had offered him inducements to do so; that she had offered to give the husband a farm if he would take his wife there and live with her; and that the husband responded that he did not love her, and would not live with her on the farm or anywhere else. The court said: "The court sustained objections to the proffered testimony, on the ground that it called for self-serving declarations made at a time when plain-

tiff was not present. He did admit testimony as to what was done by defendant toward providing a home for plaintiff and her husband, but held that offers of the use of a farm to the husband by defendant and the husband's reply thereto, giving the reason why he would not accept them, were not admissible. In this we think he was in error. The fact that the statements were not made in the presence of plaintiff was wholly immaterial, for they were not offered as bearing upon her knowledge of defendant's treatment of his son. The purpose of the testimony was to show that defendant had, as a matter of fact, tried to induce his son to do the very thing plaintiff was insisting upon, and to show the condition of her husband's mind and the state of his affections ¹¹ toward her. Such testimony would have a tendency to negative the idea that defendant was trying to induce his son to abandon the plaintiff. It was substantive testimony of verbal acts tending to show that he was trying to induce his son to live with plaintiff, and that the son's refusal to do so was not brought about by his conduct. The expression of the son, made long before the commencement of the suit, that he would not live with the plaintiff on the land offered by defendant, or anywhere else, was certainly competent as bearing upon his feelings toward her. The court permitted defendant to show what he did to induce his son to live with plaintiff. What he said to accomplish the same purpose was a part of the *res gestae*, and was, it seems to us, equally admissible." We think the evidence offered by appellant was within the rule above laid down. It was a part of the *res gestae*. The question was, Did the appellant, by her intentional conduct, alienate the affections of appellee's husband, or did the husband voluntarily leave his wife, or transfer his affections to appellant, or seek appellant, not because he loved her, but for the purpose of obtaining her money? The real facts in issue can only be determined from the acts and conduct of appellant and appellee's husband, and from the conversations and communications which passed between them. The only way the jury could properly determine the issue involved was to have all these facts properly before them. It is true the admission of such testimony may give opportunity for perjury; but the fact that a witness might lie in reference to matters about which he has a right to testify is not a good reason for excluding such testimony. The jury, who are the judges of the weight to ¹² be given the testimony, will consider such alleged conversations in the light of appellant's conduct as shown by other witnesses, and in

the light of all the circumstances of the case, and they will be able to determine what credit should be given to such evidence.

For the reasons given, we also think that the testimony to the effect that appellee's husband remarked shortly after the death of appellant's husband "that the little widow with her money would be a good catch," as well as his conversations and letters showing constant demands on his part for money, were admissible. Such evidence tends to show his motive and purpose in seeking the companionship of appellant, and goes to rebut the idea that she was the enticer. We further think it was competent for appellant to prove in this case her financial condition, not, however, for the purpose of increasing or diminishing the amount of damages, but for the sole purpose of showing the motive of appellee's husband in seeking appellant's society. On admitting such testimony, the court will admonish the jury accordingly.

It will be unnecessary to set out in full the instructions given by the court. Suffice it to say that they do not properly present appellant's defense. Upon the next trial, the court will instruct the jury as follows:

"No. 1. If you believe from the evidence that the defendant, Florence Scott, by her acts, wiles, or blandishments, intentionally alienated or took away from plaintiff her husband's affections, you will find for plaintiff, and award her such damages as you believe will fairly compensate her for the injury, if any, resulting to her feelings, for the loss of her husband's comfort and society, if there was such loss, ¹³ and for the loss of her husband's support, if there was such loss, except to the extent that he has contributed, or may by law be compelled to contribute to her support, not exceeding the sum of ten thousand dollars, the amount asked for. Unless you so believe, you will find for the defendant.

"No. 2. If you believe that the defendant alienated from plaintiff her husband's affections in the manner set forth in instruction No. 1, and further believe that defendant's conduct in causing such alienation was wanton and malicious toward, and with the design to humiliate, plaintiff, then, in addition to compensatory damages, you may, in your discretion, award plaintiff punitive damages, not exceeding in all, however, the sum of ten thousand dollars.

"No. 3. Although you may believe from the evidence that plaintiff's husband transferred his affections from plaintiff to defendant, yet if you further believe plaintiff's husband alienated his own affections from plaintiff, without any intentional

misconduct on the part of defendant, or that such alienation was occasioned by some other cause over which defendant had no control, or exercised no intentional direction or influence, then you will find for the defendant."

Judgment reversed and cause remanded, with directions for a new trial consistent with this opinion.

Petition for rehearing by appellee overruled.

Actions by a Wife for the Alienation of Her Husband's Affections are discussed in the note to *Clow v. Chapman*, 46 Am. St. Rep. 472-478. There are many authorities recognizing the right of a married woman to sue a third person for alienating her husband's affections: See *Betser v. Betser*, 186 Ill. 537, 78 Am. St. Rep. 303; *Reed v. Reed*, 6 Ind. App. 317, 51 Am. St. Rep. 310; *Price v. Price*, 91 Iowa, 693, 51 Am. St. Rep. 360; *Deitzman v. Mullin*, 108 Ky. 610, 94 Am. St. Rep. 390. In an action by a wife against another woman for alienating the affections of her husband by living in adultery with him and causing him to abandon her, it is no defense that he was the active and aggressive party and that the defendant yielded to his persuasions and afterward lived in adulterous intercourse with him: *Hart v. Knapp*, 76 Conn. 135, 100 Am. St. Rep. 989.

One Who Wantonly and Maliciously Alienates the Affections of another's wife, and causes him to lose her society, companionship and assistance, is liable to him not only for compensatory damages, but, in addition thereto, exemplary or punitive damages as a punishment: *Callis v. Merrieweather*, 98 Md. 361, 103 Am. St. Rep. 404.

SMITH v. SIMMONS.

[129 Ky. 93, 110 S. W. 336.]

CONSTITUTION—Effect on Prior Special Legislation.—The Kentucky constitution does not repeal or make inoperative special laws passed before its adoption. (p. 427.)

TAXES—Imposition by Special Statute.—A Constitutional Provision that taxes must be levied by general laws does not render inoperative special tax laws enacted before its adoption. (p. 428.)

SCHOOLS—Uniform System.—A Statute Providing a Local Tax for the support of a common school to provide a better school than the common school fund alone would afford does not change the character of the school or infringe the constitutional provision requiring a uniform system of common schools. (p. 429.)

S. R. Crewdson, for the appellants.

J. B. Grubbs and S. Y. Trimble, for the appellees.

⁹⁴ HOBSON, J. By an act approved March 4, 1888 (2 Laws 1887-88, p. 376, c. 637), the territory within the limits of common school district 49, Logan county, including

the town of Adairville, was incorporated as a school district and placed under the management of a board of trustees, who were authorized to levy an ad valorem tax not exceeding seventy-five cents on each one hundred dollars' worth of property, and a poll tax not to exceed two dollars, in aid of the common school. The trustees made a levy for the year 1907 of seventy-five cents on each one hundred dollars' worth of property, and also levied a poll tax of one dollar and fifty cents. The appellants then brought this suit against the trustees to enjoin the collection of the tax on the ground that the act of 1888 is no longer in force. The circuit court dismissed their petition, and they appeal.

The petition does not state any facts sufficient to show the invalidity of the action of the trustees if the act of 1888 is in force, and so that is the only question that it is necessary for us to consider. It is insisted that the act cannot be in force under the present constitution of the state, because under it special legislation is forbidden, taxes must be levied by general laws, and the legislature must provide a uniform system of common schools throughout the state. That our constitution has not the effect to repeal or make inoperative special laws passed before its adoption has been often decided by this court. In *Long v. Louisville*, 97 Ky. 364, 17 Ky. Law Rep. 253, 30 S. W. 987, it was held that the provisions of the constitution that all taxes shall be levied and collected by general laws refers to the future, and does not affect powers conferred in the pre-existing laws. In *O'Mahoney v. Bullock*, 95 Ky. 774, 17 Ky. Law Rep. 523, 31 S. W. 878, it was held that the local act of 1890 for the purchase of turnpikes in Fayette county, the issuing of bonds, and the levying of taxes to pay for them was not affected by the adoption of the constitution. In *Pearce v. Mason County*, 99 Ky. 357, 18 Ky. Law Rep. 266, 35 S. W. 1122, a similar act as to Mason county was held in force, and taxes levied under it were sustained. The same principles were applied in *City of Covington Dist. of Highlands*, 113 Ky. 612, 24 Ky. Law Rep. 433, 63 S. W. 669, a similar act as to Mason county, the legislature authorizing the District of Highlands to levy taxes was held still in force. The same rule has been uniformly applied to local acts creating school districts and authorizing taxes to be levied in them in aid of the common schools. In *Roberts v. Clay City*, 102 Ky. 88, 19 Ky. Law Rep. 1046, 42 S. W. 999 there was an action similar to the one now before us. Bonds had been issued and a schoolhouse built. A part of the bonds were unpaid. The trustees were levying a tax to pay the bonds.

and carry on the school. It was held that the local act was still in force and the levies were valid. In *Board of Education of Hawesville v. Louisville etc. R. R. Co.*, 110 Ky. 932, 62 S. W. 1125, it was insisted that a levy of taxes by the trustees in the Hawesville district under an act approved February 27, 1880 (1 Laws 1879-80, p. 260, c. 294), was invalid. In that case also the trustees had issued bonds and had made a levy to meet the bonds and run the school. The act was held in force, and the levy was sustained. While in both these cases the district had issued bonds, the court did not rest its opinion upon the ground that the levy was necessary to pay the bonds; for, if it had done this, only so much of the levy as was necessary ⁹⁶ to meet the bonds could have been sustained. The court sustained the levy not only for the purpose of meeting the bonds, but also for the purpose of maintaining the school. In *Louisville & Nashville R. R. Co. v. Trustees of Elizabethtown*, 23 Ky. Law Rep. 1169, 64 S. W. 974, a levy by the trustees of the school district under an act approved March 29, 1878 (2 Laws 1877-78, p. 193, c. 662), was sustained upon the authority of the two cases above cited; and in that case there were no bonds, the levy being made simply to maintain the school. The cases of *Hickman College v. Trustees Colored District*, 111 Ky. 944, 23 Ky. Law Rep. 1271, 65 S. W. 20, and *Board of Trustees v. Morris*, 24 Ky. Law Rep. 1420, 71 S. W. 654, in no way conflict with those above cited. In each of these cases the question presented was whether the railroad tax should be divided between the white and colored schools, and this was the only question in the case. The statute under which the tax on the railroad was levied provided that the money should be divided between the white and colored schools. There is nothing in the opinion in these cases in conflict with the former opinions. The court held that the statute requiring the tax to be divided between the white and colored schools applied to all the schools in the state, whether the levy was made under the general law or a special act. The soundness of the former opinions holding the special acts still in force is expressly recognized, for otherwise the levies there in controversy were void.

The makers of the constitution intended to prohibit special legislation, but they contemplated that existing special legislation should continue until changed by the legislature, unless in conflict with some of its provisions. To have blotted out at once all special ⁹⁷ legislation in the state would have been to throw the business of the state into chaos. There was the

same reason for continuing schools established under special acts as for allowing other business established under special acts to continue. Debts had been created, buildings had been erected, and the education of pupils had been begun. It was important not to interrupt the course of education, or to make a new system which might make unsuitable a large part of the property which had been thus acquired. The interest of the people required that these schools which they had thus established should not be disturbed, and so the legislature, when it came to revise the school laws, continued them in force as before. There is nothing in the constitution to indicate that taxes may not be levied after its adoption pursuant to a local law in force when it was adopted, so long as the legislature allows the local law to remain in force and the public needs require the levying of taxes. It is true the legislature must provide a uniform system of common schools; but when the legislature has so provided, there is nothing to inhibit a local tax in aid of the common school to improve and perfect it. The Adairville school is a part of the common school system, and the fact that there is a local tax to give the people a better school than the common school fund alone would give them makes it none the less a common school, and in nowise infringes the constitutional provision requiring a uniform system of common schools.

Judgment affirmed.

Constitutional Provisions Operate Prospectively only, unless a contrary intention clearly appears from the words employed: Strickler v. City of Colorado Springs, 16 Colo. 61, 25 Am. St. Rep. 245. And decisions and laws existing and in effect previous to the adoption of a new state constitution, not directly or by necessary implication denied therein, survive with full force and effect: Maudlin v. City Council of Greenville, 42 S. C. 293, 46 Am. St. Rep. 723.

STILES v. LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

[129 Ky. 175, 110 S. W. 820.]

CARRIER OF FREIGHT—Common-law Liability.—The Common-law Rule that a common carrier of inanimate freight is an insurer of its safe delivery, except where the loss results from the act of God or the public enemy, or from the inherent infirmity of the goods, prevails in Kentucky. (p. 430.)

CARRIER OF LIVESTOCK—Extent of Liability.—Railroad Companies are common carriers of livestock, with substantially the same duties and responsibilities that exist at common law with respect to the carriage of goods, except that they are not insurers

against loss or injury resulting from the inherent nature or propensities of the animals themselves. (p. 431.)

CARRIER OF LIVESTOCK—Destruction of Animals by Fire.—A common carrier is liable as an insurer for the destruction by fire of animals it is transporting, which is not caused by the act of God or the public enemy. (pp. 431, 432.)

G. S. and J. A. Fulton, for the appellants.

John S. Kelly and R. C. Cherry, for the appellee.

177 BARKER, J. This action was instituted for the purpose of recovering the value of thirty head of horses shipped from East St. Louis, Illinois, to New Haven, Kentucky, over the railroad of defendant, and which were destroyed by fire in Louisville, Kentucky. There is no allegation in the petition of any negligence on the part of the carrier, and a general demurrer to the petition was sustained by the court. The plaintiffs declining to amend their petition, it was dismissed, from which judgment this appeal is prosecuted.

The sole question arising on the record is whether or not, in Kentucky, the common-law rule as to the liability of a common carrier for inanimate freight delivered to it prevails as to livestock, it being conceded that if this rule does prevail the petition states a cause of action, and if it does not the judgment of the trial court is correct. It is not denied that at common law the common carrier of inanimate freight was an insurer of its safe delivery except where the ¹⁷⁸ loss was from the act of God or the public enemy, or resulted from the inherent infirmity of the goods. That this rule prevails in Kentucky is quite beyond question. The question for adjudication is: Does the same rule apply as to consignments of livestock? In the case of *Hall v. Renfro*, 3 Met. 51, there was involved the loss of a jack by a public ferryman while it was being transported across a river. After stating that the keeper of the ferry was a common carrier, his responsibility for the loss of the jack was thus stated: "Did he thereby subject himself to the obligations and liabilities of a common carrier? The authorities are conclusive of this question. . . . The general rule is that common carriers are responsible for the goods which they undertake to carry, unless the loss or damage is the result of inevitable accident, as lightning, tempests, and the like (which are usually termed the acts of God), or is occasioned by the public enemies: See the authorities cited. This rule, however, must be understood with certain qualifications. For instance, it is said that the liability of the carrier would not cover losses arising from the ordinary deterioration of goods in quantity or quality in the

course of transportation, or from their inherent infirmity or tendency to decay. So, although a carrier is liable for the safety of animals delivered to him for transportation, yet, if an animal is injured by the peculiar risks to which it is exposed, the carrier is clearly excusable. He would not be liable for any accident arising from the animal's own viciousness of temper: Angell on Carriers, secs. 210, 214, and the cases there cited. 'Such a case,' says the author, 'would seem to be analogous to the case of the loss of merchandise owing to some inherent defect which caused the destruction of it while in transit.' " ¹⁷⁹ The court then goes on to clearly recognize the exception to the general rule as above stated that the carrier was not liable for the loss of the jack if it, without negligence on the part of the carrier, fell out of the boat, or was thrown out of it in consequence of its own restiveness or viciousness of temper, or the restiveness or viciousness of the other animals on board with it at the time. In the case of Cincinnati etc. Ry. Co. v. Sanders, 118 Ky. 115, 25 Ky. Law Rep. 2333, 80 S. W. 488, the following rule is quoted with approval as being the law in Kentucky: "And the rule now established by the great weight of modern authority is that railroad companies are common carriers of livestock, with substantially the same duties and responsibilities that existed at common law with respect to the carriage of goods, except that they are not liable as insurers against loss and injury resulting from the inherent nature, propensities, or proper vices of the animals themselves." And in Cleveland etc. Ry. Co. v. Druen, 118 Ky. 237, 26 Ky. Law Rep. 103, 80 S. W. 778, 66 L. R. A. 275, in discussing the loss of livestock by fire, we said: "At the common law which obtains in Illinois, as well as in this state, a common carrier is liable for loss of freight in its charge occurring by fire, whether or not caused by its own negligence; its liability being that of an insurer."

The cases cited by the appellee in support of the judgment of the court are not apposite to the question before us. They are cases where the stock was killed or injured by reason of its inherent propensity, and the loss may be said to have resulted from the infirmity or vice of the animals; and while the court, perhaps, used general language in regard to the negligence or non-negligence of the carrier, which, if dissociated ¹⁸⁰ from the particular loss that was being discussed, might seem to modify the general rule, yet it was clearly not the intention of the court so to do. Undoubtedly, where the result may have arisen from the natural infirmity

or vice of the animal, then the question of the negligence or care of the carrier arises; but that principle has no application here. Appellants' horses were burned in a conflagration in Louisville, Kentucky, while in charge of the carrier. This was a loss in no wise connected with or growing out of the infirmity of the animals themselves, but falls under the common-law rule which makes the carrier an insurer of the safe delivery of the goods committed to it for transportation.

It results, therefore, that the court erred in sustaining a demurrer to appellant's petition, and the judgment is reversed for proceedings consistent with this opinion.

LIABILITY OF CARRIER FOR LOSS OR INJURY TO LIVE-STOCK.*

- I. References to Other Notes, 433.
- II. Whether a Carrier of Livestock is Liable as a Common Carrier, 433.
- III. Whether Same Liability Attaches to Carrier of Livestock as to Carrier of Inanimate Freight.
 - a. Various Rules Announced by the Courts.
 1. Rule Where Carrier is not Regarded as a Common Carrier, 435.
 2. Rule Applying Law Applicable to Carriage of Inanimate Freight, 435.
 3. Rule Relieving Liability for Injuries or Losses from Natural Propensities of the Livestock, 438.
 - b. Reasons for Application of Different Rule than to Inanimate Freight, 439.
- IV. Upon Whom the Burden Lies to Prove Loss or Injury Within Exemption from Liability as an Insurer, 442.
- V. Right of Carriers to Limit Liability by Special Contracts, 445.
- VI. For What Acts the Carrier is Liable.
 - a. Losses or Injuries Arising from the Kind or Quality of Transportation Facilities.
 1. Necessity to Furnish Safe and Suitable Cars, 446.
 2. Necessity to Furnish Proper Loading and Unloading Facilities, 448.
 - b. Losses or Injuries Arising from the Mode or Manner of the Transportation.
 1. General Care in Transit, 450.
 2. Necessity to Furnish Food and Water, 452.
 - c. Losses or Injuries Arising from Delay in Transportation, 455.
 - d. Losses or Damages Arising from an Improper Delivery, 460.
- VII. Assumption of Risk and Contributory Negligence on Part of the Shipper.
 - a. In General, 461.
 - b. Acts Relative to the Transportation Facilities, 461.
 - c. Acts Relative to the Mode of Transportation or Delivery, 462.

*REFERENCES TO MONOGRAPHIC NOTES.

Liability of carriers of live animals: 67 Am. Dec. 208; 12 Am. Rep. 500; 13 Am. Rep. 53.

Respective duties of carriers and shippers of livestock: 63 Am. St. Rep. 548.

I. References to Other Notes.

The earlier cases on the subject of this note have been considered in the notes to *Clarke v. Rochester etc. R. Co.*, 67 Am. Dec. 208, and *Heller v. Chicago etc. Ry. Co.*, 63 Am. St. Rep. 548. The following notes may also be profitably consulted: Who are liable as common carriers, attached to *Chevallier v. Straham*, 47 Am. Dec. 648. Power of common carriers to limit their liability by contract, attached to the following cases: *Cole v. Goodwin*, 32 Am. Dec. 495; *Kansas City etc. R. Co. v. Rodebaugh*, 5 Am. St. Rep. 720; *Chicago etc. Ry. Co. v. Chapman*, 23 Am. St. Rep. 593; *Chicago etc. Ry. Co. v. Calumet etc. Farm*, 88 Am. St. Rep. 74. Burden of proof as between connecting carriers to show who is at fault for loss or injury, attached to *Beede v. Wisconsin Central Ry. Co.*, 101 Am. St. Rep. 392. Liability of an initial carrier for the torts or negligence of connecting lines, attached to *Pennsylvania Co. v. Loftis*, 106 Am. St. Rep. 604. And the liability of a railway company for injuries or losses arising from the operation of cars not owned by it, attached to *Louisville etc. R. Co. v. Church*, ante, p. 29.

II. Whether a Carrier of Livestock is Liable as a Common Carrier.

"Under the common law, a common carrier was liable absolutely and at all events to deliver the property which it had undertaken to carry safely to the consignee or owner, and was excused from liability only when the loss or injury was caused by an act of God or the public enemy, or the shipper's negligence": 6 Am. & Eng. Ency. of Law, 2d ed., p. 263; *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393; *Cooper v. Berry*, 21 Ga. 526, 68 Am. Dec. 468. The statute of this state is to the same effect: Civ. Code, sec. 2264. The transportation of livestock overland was, however, unknown to the common law, and consequently the liability of carriers of livestock is not to be determined by the strict common-law rule: *Georgia R. R. Co. v. Spears*, 66 Ga. 485, 42 Am. Rep. 81; *Pardington v. Railway Co.*, 38 Eng. Law & Eq. 432; 2 Rorer on Railways, pp. 1301, 1302. By statute (17 and 18 Vict., c. 31, sec. 7), carriers of livestock were, in England, made liable as common carriers. While there has been some doubt as to whether carriers of livestock were common carriers, it seems to be well settled now that they are: *Hutchinson on Carriers*, secs. 217, 218; 5 Am. & Eng. Ency. of Law, 2d ed., 428, and cases cited in each.

"While carriers of livestock are common carriers, certain exceptions have grown up in their favor, arising from the nature of the property transported. Among these exceptions are the natural death of the animals, the vicious and uncontrollable nature of the stock, and similar exceptions. Such causes are within the principle which excuses common carriers from loss or damage resulting from the act of God. They are causes which arise from the nature and propensity of the animals, and which could not be prevented by foresight, vigilance and care: *Hutchinson on Carriers*, sec. 216a; 5 Am. & Eng. Ency. of Law, 2d ed., p. 443. Such exceptions as these were clearly recognized

in the case of *Georgia R. R. Co. v. Spears*, 66 Ga. 485, 42 Am. Rep. 81, holding that carriers of livestock were common carriers": *Cooper v. Raleigh etc. R. Co.*, 110 Ga. 659, 36 S. E. 240.

The general rule is that where a common carrier receives livestock and undertakes to transport the same for hire, it thereby assumes the duties and liabilities incident to the relation of a common carrier in respect to such livestock: *Summerlin v. Seaboard Air Line Ry. Co.*, 56 Fla. 687, 47 South. 557, 19 L. R. A., N. S., 191; *Central etc. Ry. Co. v. Hall*, 124 Ga. 322, 110 Am. St. Rep. 170, 52 S. E. 679, 4 L. R. A., N. S., 898; *Hart v. Chicago etc. R. Co.*, 69 Iowa, 485, 29 N. W. 597; *Kansas Pac. R. Co. v. Nichols*, 9 Kan. 235, 12 Am. Rep. 494; *Cincinnati etc. R. Co. v. Sanders*, 118 Ky. 115, 80 S. W. 488; *Peters v. New Orleans etc. R. Co.*, 16 La. Ann. 222, 79 Am. Dec. 578; *Moulton v. St. Paul etc. Ry. Co.*, 31 Minn. 85, 47 Am. Rep. 781, 16 N. W. 497; *St. Louis etc. Ry. Co. v. Cleary*, 77 Mo. 634, 46 Am. Rep. 13; *Doan v. St. Louis etc. R. Co.*, 38 Mo. App. 408; *Hinkle v. Southern Ry. Co.*, 126 N. C. 932, 78 Am. St. Rep. 685, 36 S. E. 348; *Wilson v. Hamilton*, 4 Ohio St. 722; *Powell v. Pennsylvania R. Co.*, 32 Pa. 4, 75 Am. Dec. 564; *Eckert v. Pennsylvania R. Co.*, 211 Pa. 267, 107 Am. St. Rep. 571, 60 Atl. 781; *Kimball v. Rutland & B. R. Co.*, 26 Vt. 247, 62 Am. Dec. 567; note to *Heller v. Chicago etc. Ry. Co.*, 63 Am. St. Rep. 548.

In *North Pa. R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 8 Sup. Ct. Rep. 266, 31 L. ed. 287, the court said: "A railroad company, it is true, is not a carrier of livestock with the same responsibilities which attend it as a carrier of goods. The nature of the property, the inherent difficulties of its safe transportation, and the necessity of furnishing to the animals food and water, light and air, and protecting them from injuring each other, impose duties in many respects widely different from those developing upon a mere carrier of goods. The most scrupulous care in the performance of his duties will not always secure the carrier from loss. But notwithstanding this difference in duties and responsibilities, the railroad company, when it undertakes generally to carry such freight, becomes subject, under similar conditions, to the same obligations, so far as the delivery of the animals which are safely transported is concerned, as in the case of goods. They are to be delivered at the place of destination to the party designated to receive them if he presents himself, or can with reasonable efforts be found, or to his order. No obligation of the carrier, whether the freight consists of goods or of livestock, is more strictly enforced: *Forbes v. Boston & L. R. R. Co.*, 133 Mass. 154; *McEntee v. New Jersey S. B. Co.*, 45 N. Y. 34, 6 Am. Rep. 28."

The limitations which arise in respect to the duty of the carrier to carry livestock arise from the peculiar nature of the property to be transported: *Covington Stockyards Co. v. Keith*, 139 U. S. 128, 11 Sup. Ct. Rep. 461, 35 L. ed. 73.

In Michigan the courts have taken a decided stand against the doctrine that a carrier of livestock is under the duties and liabilities of a common carrier: *Michigan etc. R. Co. v. McDonough*, 21 Mich.

165, 4 Am. Rep. 466; *Heller v. Chicago etc. Ry. Co.*, 109 Mich. 53, 63 Am. St. Rep. 541, 66 N. W. 667. The supreme court of Oregon expressed itself as strongly impressed with the Michigan rule in *Honeyman v. Oregon etc. R. Co.*, 13 Or. 352, 57 Am. Rep. 20, 10 Pac. 628.

The courts, in sustaining the validity of contracts exempting railway companies for injuries to wild animals while being transported in cars owned by circus proprietors but conveyed under special contracts providing for the hauling thereof, have based their decisions on the principle that the railway company in hauling such animals is acting as a private, and not a common, carrier: Monographic note to *Louisville etc. R. Co. v. Church*, ante, p. 29.

III. Whether Same Liability Attaches to Carrier of Livestock as to Carrier of Inanimate Freight.

a. Various Rules Announced by the Courts.

1. **Rule Where Carrier is not Regarded as a Common Carrier.**—In Michigan, where the carrier of livestock is not regarded as a common carrier, the court, in laying down the rule of liability of the carrier in such cases, said: "Plaintiff assumed all the ordinary risks of transportation, and all injury which resulted from the cramped and crowded condition of the cattle, from their restiveness, viciousness, exhaustion, hunger and thirst during their transportation, and also from the jars and concussions incident to starting and stopping the train.

"The defendant owed the duty to transport the car and its contents with ordinary prudence, skill and care, and with reasonable dispatch. It was understood, and was a part of the contract, that the car was to be transported within the usual time of from twenty-four to thirty-two hours, and that the defendant was under no obligation to unload, water and feed the cattle if transported within that time. Upon ascertaining that plaintiff had no one in charge of the cattle, it would undoubtedly have been the duty of the defendant to unload and water and feed them, when, from any cause, it was unable to transport and deliver them within the usual time": *Heller v. Chicago etc. Ry. Co.*, 109 Mich. 53, 63 Am. St. Rep. 541, 66 N. W. 667.

A carrier transporting livestock is bound only to transport it with reasonable dispatch, and the shipper assumes the risk of unavoidable accidents and delays: *McKenzie v. Michigan Cent. R. Co.*, 137 Mich. 112, 100 N. W. 260.

2. **Rule Applying Law Applicable to Carriage of Inanimate Freight.**—In the principal case (*Stiles v. Louisville etc. R. Co.*, 129 Ky. 175, ante, p. 429, 110 S. W. 820, 18 L. R. A., N. S., 86) the sole question was whether the common-law rule as to the liability of a common carrier for inanimate freight prevailed in respect to livestock. The court declared in favor of the rule prevailing as to inanimate freight, but expressly stated that that rule should be followed with certain qualifications in respect to losses arising from the inherent propensities of the animals transported. In the principal case the livestock were destroyed by a conflagration which destroyed the

cars in which they were being transported. The court, in holding the carrier to be an insurer under the circumstances, observed, however, that where the injury arises from the natural infirmity or vice of the animals, the question of negligence or care on the part of the carrier arises.

Although the principal case declared that a carrier is an insurer of livestock transported by it, the rule of liability for loss or injury does not appear to have been changed from that announced in previous cases in Kentucky. The exceptions to the rule of insurer announced in the principal case leaves the rule in the same condition as it was as a matter of fact: *Louisville etc. R. Co. v. Hedger*, 9 Bush, 645, 15 Am. Rep. 740; *Rhodes v. Louisville & N. R. Co.*, 9 Bush, 688; *Louisville & N. R. Co. v. Harned*, 23 Ky. Law Rep. 1651, 66 S. W. 25; *Louisville & N. R. Co. v. Wuthen*, 23 Ky. Law Rep. 2128, 66 S. W. 714; *Louisville & N. R. Co. v. Warfield*, 30 Ky. Law Rep. 352, 98 S. W. 313; *Cincinnati etc. R. Co. v. Greening*, 30 Ky. Law Rep. 1180, 100 S. W. 825.

A common carrier is an insurer for the safe delivery of livestock, and is liable for every loss which cannot be attributed to the act of God, the public enemy, the act of the owner or the vicious propensities or inherent character of the animals themselves: *St. Louis & S. E. R. Co. v. Dorman*, 72 Ill. 504; *Burke v. United States Express Co.*, 87 Ill. App. 505; *Chicago etc. Ry. Co. v. Slattery*, 76 Neb. 721, 124 Am. St. Rep. 825, 107 N. W. 1045; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574; *Gulf etc. R. Co. v. Trawick*, 68 Tex. 314, 2 Am. St. Rep. 494, 4 S. W. 567; *International & G. N. R. Co. v. Parish*, 18 Tex. Civ. App. 130, 43 S. W. 1066. In *Hart v. Chicago etc. Ry. Co.*, 69 Iowa, 485, 29 N. W. 597, the court said: "The carrier is held to be an insurer of the safety of the property while he has it in his possession as a carrier. His undertaking for the care and safety of the property arises by implication of law out of the contract for its carriage. The rule which holds him to be an insurer of the property is founded upon considerations of public policy. The reason of the rule is that as the carrier ordinarily has the absolute possession and control of the property while it is in course of shipment, he has the most tempting opportunities for embezzlement or for fraudulent collusion with others. If it is lost or destroyed while in his custody, the policy of the law therefore imposes the loss upon him: *Cogg v. Bernard*, 2 Ld. Raym. 909; *Forward v. Pittard*, 1 Durn. & E. 27; *Riley v. Horne*, 5 Bing. 217; *Thomas v. Boston & P. Ry. Co.*, 10 Met. 472, 43 Am. Dec. 444; *Roberts v. Turner*, 12 Johns. 232, 7 Am. Dec. 317; *Moses v. Boston & M. Ry. Co.*, 24 N. H. 71, 55 Am. Dec. 222; *Rixford v. Smith*, 52 N. H. 355, 13 Am. Rep. 42. His undertaking for the safety of the property, however, is not absolute. He has never been held to be an insurer against injuries occasioned by the act of God or the public enemy, and there is no reason why he should be; and it is equally clear, we think, that there is no consideration of policy which demands that he should be held to account to the owner for an injury which is occasioned by the owner's own

act; and whether the act of the owner by which the injury was caused amounted to negligence is immaterial also. If the immediate cause of the loss was the act of the owner, as between the parties absolute justice demands that the loss should fall upon him, rather than upon the one who has been guilty of no wrong, and it can make no difference that the act cannot be said to be either wrongful or negligent. If, then, the fire which occasioned the loss in question was ignited by the lantern which plaintiff's servant, by his direction, took into the car, and which, at the time, was in the exclusive control and care of the servant, defendant is not liable, and the question whether the servant handled it carefully or otherwise is not material." In other words, the carrier is relieved from liability if it can show that it provided all suitable means of transportation and exercised that degree of care which the nature of the property required: *Indianapolis etc. R. Co. v. Jurey*, 8 Ill. App. 160.

The carrier is not liable for injury to livestock by reason of sickness contracted by reason of severe storms where it has done all that it could to prevent injury, since the proximate cause is an act of God: *Herring v. Chesapeake etc. R. Co.*, 101 Va. 778, 45 S. E. 322. So, also, where the death of an animal which is being transported is caused by an attack of meningitis, the carrier is not liable where it does all in its power to protect the animal after being so attacked: *Klair v. Wilmington S. Co.*, 4 Penne. (Del.) 51, 54 Atl. 694. In *St. Louis etc. R. Co. v. Brosius*, 47 Tex. Civ. App. 647, 105 S. W. 1131, the court said: "In this state a carrier assumes the same degree of liability in the carriage of livestock as it does in any other class of freight, subject to such exceptions, on account of the inherent nature of the property, as justice and common fairness would impose: *Missouri Pac. Ry. v. Harris*, 67 Tex. 166, 2 S. W. 574.

"We know of no established rule by which to determine with exactness in every case what injuries furnish, from their mere presence, prima facie evidence of negligence and those that do not. But we feel sure that the mere fact that an animal apparently sound when delivered for shipment arrives at its destination sick with a disorder, such as pneumonia, should not raise the presumption that the carrier had been guilty of negligence which caused it: *Weed v. International & G. N. Ry.*, 21 Tex. Civ. App. 689, 53 S. W. 356; *Louisville & N. Ry. Co. v. Wuthen* (Ky.), 49 S. W. 185, 66 S. W. 714; *Hussey v. Saragorsa*, 3 Woods C. C. (U. S.) 380, Fed. Cas. No. 6949; *New York L. E. & W. R. R. Co. v. Estill*, 147 U. S. 591, 13 Sup. Ct. Rep. 444, 37 L. ed. 292; *Long v. Pennsylvania Ry. Co.*, 147 Pa. 343, 30 Am. St. Rep. 732, 23 Atl. 459, 14 L. R. A. 741; *Schaeffer v. Philadelphia & R. R. R.*, 168 Pa. 209, 47 Am. St. Rep. 884, 31 Atl. 1088; *Pennsylvania Ry. Co. v. Raiordon*, 119 Pa. 577, 4 Am. St. Rep. 670, 13 Atl. 324. Pneumonia is a well-known and malignant disease, attacking both man and beast at times when least expected, and frequently under conditions which shroud its cause and beginning in mystery. Medical science has not yet reached that stage where it can, with any degree of certainty, predict or prevent its development in animated beings. Appellees

alleged in their petition the nature of this animal's disorder, and thereby assumed the burden of proving negligence on the part of appellant as the cause of the disease. If the appellees have failed to adduce evidence sufficient to justify a jury in finding that appellant's negligence caused this mule to contract and die of this disease, then the court committed reversible error in even submitting the issue."

3. Rule Relieving Liability for Injuries or Losses from Natural Propensities of the Livestock.—The general rule of absolute liability of a common carrier for the safe delivery of property committed to it for transportation is qualified when applied to livestock, and made subject to the exception that it is not an insurer against injury or loss resulting from the inherent nature, propensities, habits or vices of the animals transported: *Central R. & Bkg. Co. v. Smitha*, 85 Ala. 47, 4 South. 708; *Western Ry. of Ala. v. Harwell*, 91 Ala. 340, 8 South. 649; *Louisville etc. R. Co. v. Smitha*, 145 Ala. 686, 40 South. 117; *St. Louis etc. R. Co. v. Lesser*, 46 Ark. 236; *St. Louis etc. R. Co. v. Kilberry*, 83 Ark. 87, 102 S. W. 894; *Agnew v. The Contra Costa*, 27 Cal. 425, 87 Am. Dec. 87; *Union Pac. R. Co. v. Rainey*, 19 Colo. 225, 34 Pac. 986; *Coupland v. Housatonic R. Co.*, 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534; *Summerlin v. Seaboard Air Line Ry.*, 56 Fla. 687, 47 South. 557, 19 L. R. A., N. S., 191; *Georgia R. Co. v. Spears*, 66 Ga. 485, 42 Am. Rep. 81; *Cooper v. Raleigh & G. R. Co.*, 110 Ga. 659, 36 S. E. 240; *Georgia etc. R. Co. v. Greer*, 2 Ga. App. 516, 58 S. E. 782; *Wabash etc. R. Co. v. McCasland*, 11 Ill. App. 491; *Burke v. United States Express Co.*, 87 Ill. App. 505; *Kinnick v. Chicago etc. R. Co.*, 69 Iowa, 665, 29 N. W. 772; *Betts v. Chicago etc. Ry. Co.*, 92 Iowa, 343, 54 Am. St. Rep. 558, 60 N. W. 623, 26 L. R. A. 248; *Stiles v. Louisville etc. R. Co.*, 129 Ky. 175, ante, p. 429, 110 S. W. 820, 18 L. R. A., N. S., 86; *Dow v. Portland Steam Packet Co.*, 84 Me. 490, 24 Atl. 945; *Smith v. New Haven & N. R. Co.*, 12 Allen, 531, 90 Am. Dec. 166; *Evans v. Fitchburg R. Co.*, 111 Mass. 142, 15 Am. Rep. 19; *Heller v. Chicago & G. T. Ry. Co.*, 109 Mich. 53, 63 Am. St. Rep. 541, 66 N. W. 667; *Lindsley v. Chicago etc. Ry. Co.*, 36 Minn. 539, 1 Am. St. Rep. 692, 33 N. W. 7; *Illinois Cent. R. Co. v. Teams*, 75 Miss. 147, 21 South. 706; *Cash v. Wabash R. Co.*, 81 Mo. App. 109; *Lackland v. Chicago etc. R. Co.*, 101 Mo. App. 420, 74 S. W. 505; *McFall v. Wabash R. Co.*, 117 Mo. App. 477, 94 S. W. 570; *Black v. Chicago B. & Q. R. Co.*, 30 Neb. 197, 46 N. W. 428; *Cleve v. Chicago B. & Q. Ry. Co.*, 77 Neb. 166, 124 Am. St. Rep. 837, 108 N. W. 982; *Church v. Chicago B. & Q. R. Co.*, 81 Neb. 615, 116 N. W. 520; *Lewis v. Pennsylvania R. Co.*, 70 N. J. L. 132, 56 Atl. 128, affirmed in 71 N. J. L. 339, 59 Atl. 1117; *Mynard v. Syracuse etc. R. Co.*, 71 N. Y. 180, 27 Am. Rep. 28; *Giblin v. National Steamship Co.*, 8 Misc. Rep. 22, 28 N. Y. Supp. 69, affirmed in 152 N. Y. 633, 46 N. E. 1147; *Waldron v. Fargo*, 170 N. Y. 130, 62 N. E. 1077; *Selby v. Wilmington & W. R. Co.*, 113 N. C. 588, 37 Am. St. Rep. 635, 18 S. E. 88; *Louisville etc. R. Co. v. Wynn*, 88 Tenn. 320, 14 S. W. 311; *International etc. R. Co. v. Young (Tex. Civ. App.)*, 72 S. W. 68;

Texas etc. Ry. Co. v. Snyder (Tex. Civ. App.), 86 S. W. 1041; International etc. R. Co. v. Nowaski (Tex. Civ. App.), 106 S. W. 437; Ayres v. Chicago & N. W. Ry. Co., 71 Wis. 372, 5 Am. St. Rep. 226, 37 N. W. 432; Abrams v. Milwaukee etc. R. Co., 87 Wis. 485, 41 Am. St. Rep. 55, 58 N. W. 780; John Schroeder Lumber Co. v. Chicago etc. Ry. Co., 135 Wis. 575, 128 Am. St. Rep. 1039, 116 N. W. 179; Chicago B. & Q. R. Co. v. Morris, 16 Wyo. 308, 93 Pac. 664; note to Clarke v. Rochester etc. R. Co., 67 Am. Dec. 210.

The above statement of the rule is the one most frequently announced by the courts. It is generally regarded as an additional exception attached to the rule that a common carrier is an insurer. The various reasons assigned by the courts for this rule will be discussed in the following subdivision.

b. Reasons for Application of Different Rule than to Inanimate Freight.—In the majority of cases the courts content themselves with merely stating the rule which they hold in respect to livestock shipments without commenting upon the reasons for the rule.

In a general way the courts declare that the same rule of responsibility does not attend the transportation of livestock which attends the carriage of inanimate freight because of the injuries likely to follow in consequence of their own vitality and inherent propensities: Lewis v. Pennsylvania R. Co., 70 N. J. L. 132, 56 Atl. 128; Missouri etc. Ry. Co. v. Lewellen (Tex. Civ. App.), 111 S. W. 773; North Pa. etc. R. Co. v. Commercial Nat. Bank, 123 U. S. 727, 8 Sup. Ct. Rep. 266, 31 L. ed. 287.

In Boehl v. Chicago etc. Ry. Co., 44 Minn. 191, 46 N. W. 333, the court said: "Carriers of livestock are liable as common carriers for damages or injuries thereto arising during the transportation, except such as, without the fault or negligence of the carrier, result from the vitality of the freight; that is to say, the nature and propensity of animals to injure themselves or each other, their unruliness, restiveness, fright, viciousness, kicking or goring, etc. The carrier is relieved from liability for injuries from such causes if he has provided suitable means of transportation, and exercised that degree of care which the nature of the property requires, or has not otherwise contributed to the injury. Of course, the carrier is relieved from special care and oversight of the animals, where the owner or agent accompanies them for that purpose: Angell on Carriers, sec. 214 et seq.; Hutchinson on Carriers, sec. 217; Clarke v. Railroad Co., 67 Am. Dec. 210; Evans v. Fitchburg R. R. Co., 111 Mass. 142, 15 Am. Rep. 19; 3 Am. & Eng. Ency. of Law, 6; Moulton v. St. Paul M. & M. Ry. Co., 31 Minn. 85, 47 Am. Rep. 781, 16 N. W. 497; 2 Wait on Actions and Defenses, 32. But if the injury or loss arise in whole or in part from the carrier's negligence, without the fault or concurring negligence of the owner or his agent, or from extrinsic causes other than inevitable accident, the carrier is liable as in other cases."

In Evans v. Fitchburg R. Co., 111 Mass. 142, 15 Am. Rep. 19, the court, in laying down the rule applicable to shipments of this char-

acter, said: "Upon receiving these horses for transportation, without any special contract limiting their liability, the defendants incurred the general obligation of common carriers. They thereby became responsible for the safe treatment of the animals from the moment they received them until the carriages in which they were conveyed were unloaded: *Moffat v. Great Western Ry. Co.*, 15 L. T., N. S., 630. They would be unconditionally liable for all injuries occasioned by the improper construction or unsafe condition of the carriage in which the horses were conveyed, or by its improper position in the train, or by the want of reasonable equipment, or by any mismanagement or want of due care, or by any other accident (not within the well known exception) affecting either the train generally or that particular carriage. But the transportation of horses and other domestic animals is not subject to precisely the same rules as that of packages and inanimate chattels. Living animals have excitable and volitions of their own which greatly increase the risks and difficulties of management. They are carried in a mode entirely opposed to their instincts and habits; they may be made uncontrollable by fright, or, notwithstanding every precaution, may destroy themselves in attempting to break loose, or may kill each other. If the injury in this case was produced by the fright, restiveness, or viciousness of the animals, and if the defendants exercised all proper care and foresight to prevent it, it would be unreasonable to hold them responsible for the loss."

The reason for the exemption of liability of the carrier for injuries to livestock caused by their inherent nature and propensities is based largely on the idea that the carrier has not such control over the animals during transportation as it has of inanimate freight. The latter may be so stowed or placed as to safeguard it, while livestock naturally cannot be transported without great danger of loss. In New York, it was declared by Chief Judge Denio that the reason stated by Chief Justice Marshall in *Boyce v. Anderson*, 2 Pet. 150, 7 L. ed. 359, in holding a carrier not an insurer of the safety of slaves which he was transporting, was quite applicable to the transportation of livestock. The rule in that case was based mainly upon the ground that he could not have the same absolute control over them as over inanimate matter: *Clarke v. Rochester & S. R. Co.*, 14 N. Y. 570, 67 Am. Dec. 205. This view of the basis of the rule was also adverted to in *Lewis v. Pennsylvania R. Co.*, 70 N. J. L. 132, 56 Atl. 128. The power of livestock to move and thereby increase the risk of transportation was the basis of the distinction between their carriage and that of inanimate freight, in *Lee v. Raleigh & G. R. Co.*, 72 N. C. 236.

But the exemption of liability for injuries arising from the propensities or vitality of the animals transported can equally as well be based on the exception to the liability as an insurer arising from the inherent qualities of the article transported. At the common law, the liability of the common carrier was dependent upon the nature of the thing to be transported and the extent of the carrier's control

and custody of it. The carrier was not liable for losses resulting from the perishable character of the freight, or from its ordinary deterioration or its inherent infirmity or tendency to decay. Hence the application of that principle has been very properly applied to the transportation of livestock: *South & N. A. R. Co. v. Henlein*, 52 Ala. 606, 23 Am. Rep. 578; *Chicago I. & L. Ry. Co. v. Woodward*, 164 Ind. 360, 72 N. E. 558, 73 N. E. 810; *Swiney v. Am. Express Co. (Iowa)*, 115 N. W. 212; *Hall v. Renfro*, 3 Met. (Ky.) 51; *Louisville etc. R. Co. v. Bigger*, 66 Miss. 319, 6 South. 234; *Bamberg v. South Carolina R. Co.*, 9 S. C. 61, 30 Am. Rep. 13; *Maslin v. Baltimore & O. R. Co.*, 14 W. Va. 180, 35 Am. Rep. 748.

"According to the well-established rule, a common carrier is liable for any loss or injury to property intrusted to him for transportation, unless he is able to show that the loss or injury was caused by the act of God or the public enemy, or that it resulted from the inherent nature of the thing itself, as by the natural decay of fruits, vegetables, ice, fresh meats, and other perishable property, and the like. And it is equally well established that railroad companies are common carriers of livestock, with the same imposed duties and responsibilities that exist at common law relative to the carriage of goods, except that they are not to be held liable for losses and injuries resulting from the natural disposition and exertions of the animals themselves. In short, it may be said generally that a carrier, when free from negligence, is liable for no loss or injury from causes over which he had no control": *Chicago I. & L. Ry. Co. v. Woodward*, 164 Ind. 360, 72 N. E. 558, 73 N. E. 810.

A clear statement of the law relative to this subject is found in the opinion of the court in *Louisville etc. Ry. Co. v. Bigger*, 66 Miss. 319, 6 South. 234. The court said: "It is true that upon receipt of the mule for transportation, leaving the special contract out of view, appellant incurred the general liability of a common carrier. But what is the liability of a common carrier at common law? The rule, as it is ordinarily stated, is that a common carrier is liable for all losses, except those occasioned by the act of God or the public enemy. The exception to this rule is broader than it is stated above, or, if not so, it has been extended by judicial opinion. The act of God or the public enemy is not the limit of the exemption from liability of the common carrier at common law. He was never liable, within the general rule, for losses or injuries produced by the nature and inherent character of the property, such as the ordinary and natural decay of fruit, vegetables, and other perishable articles, and the fermentation, evaporation, or unavoidable leakage of liquids. An injury inflicted upon a live animal by itself, without fault on the part of the carrier, or caused by other animals with which it is being shipped in the same car, comes within the reason and spirit of the exception to the rule of exemption from common-law liability, in its broader and true definition."

In a recent case in Iowa, the rule exempting carriers from injuries caused by the inherent nature of the livestock was declared to be

merely a modification of the general rule of an insurer in respect to perishable goods. The court, speaking through Mr. Justice Weaver, observed: "There is, however, a well-recognized modification of the carrier's liability, which, while applicable to the shipment of goods in general, finds its most frequent illustration in the shipment of live animals. This feature of the rule may be stated as follows: That while a carrier, whether negligent or otherwise, is generally liable as an insurer for loss and damage occurring to goods while in its hands for transportation, it is not liable in the absence of negligence on its part, for any loss or damage caused by or resulting from the perishability or inherent weakness or vice in the subject of shipment. For instance, if fruit which is carried with due speed and proper care decays, or if the shipment be of livestock, and it die of disease or inherent weakness, or become sick without fault, or receive injury through its own vicious propensities, in such case the law very properly places the loss upon the owner, and not upon the carrier: *Blower v. Railroad Co.*, L. R. 7 C. P. 662; *Kinnick v. Chicago etc. R. R. Co.*, 69 Iowa, 665, 29 N. W. 772; *Betts v. Chicago etc. R. R. Co.*, 92 Iowa, 343, 54 Am. St. Rep. 558, 60 N. W. 623, 26 L. R. A. 248. But this principle is not to be so extended as to relieve the carrier from the duty to take notice of the ordinary weakness, character, and propensities of domestic animals, and to make such provision against loss or injury therefrom as may reasonably be done in furnishing the means of transportation and providing for the protection of the property during transit: *Kinnick v. Chicago etc. R. R. Co.*, 69 Iowa, 665, 29 N. W. 772; *Betts v. Chicago etc. R. R. Co.*, 92 Iowa, 343, 54 Am. St. Rep. 558, 60 N. W. 623, 26 L. R. A. 248. It logically follows from these rules, and from the fact that ordinarily a carrier alone has knowledge of the manner in which the shipment has been forwarded and cared for, that where property, whether dead freight or livestock, is found to have suffered loss or damage in transportation, especially where the shipment is not accompanied by the shipper, or a caretaker in his service, the burden is upon such carrier to show facts which relieve it from liability. It is so held in several of the cases already cited": *Swiney v. Am. Express Co.* (Iowa), 115 N. W. 212.

IV. Upon Whom the Burden Lies to Prove Loss or Injury Within Exemption from Liability as an Insurer.

Where the carrier seeks to avoid liability for injuries or losses to livestock on the ground that the same was caused by the inherent character and natural propensities of the animals transported, or by some other exception to its liability as an insurer, the burden is upon it to show that the injuries or losses were proximately caused by such exceptional circumstances: *St. Louis etc. R. Co. v. Kilberry*, 83 Ark. 87, 102 S. W. 894; *Cooper v. Raleigh & G. R. Co.*, 110 Ga. 659, 36 S. E. 240; *Burke v. United States Express Co.*, 87 Ill. App. 505; *Baltimore etc. R. R. Co. v. Fox*, 113 Ill. App. 180; *Terre Haute etc. R. Co. v. Sherwood*, 132 Ind. 129, 32 Am. St. Rep. 239, 31 N. E.

781, 17 L. R. A. 339; McCoy v. Keokuk etc. R. Co., 44 Iowa, 424; Swiney v. Am. Express Co. (Iowa), 115 N. W. 212; Dow v. Portland Steam Packet Co., 84 Me. 490, 24 Atl. 945; Smith v. New Haven & N. R. Co., 12 Allen, 531, 90 Am. Dec. 166; Lindsley v. Chicago etc. Ry. Co., 36 Minn. 539, 1 Am. St. Rep. 692, 33 N. W. 7; Boehl v. Chicago etc. R. Co., 44 Minn. 191, 46 N. W. 333; Potts v. Wabash etc. Ry. Co., 17 Mo. App. 394; Hance v. Pacific Express Co., 48 Mo. App. 179; Black v. Chicago B. & Q. R. Co., 30 Neb. 197, 46 N. W. 428; Cleve v. Chicago B. & Q. Ry. Co., 77 Neb. 166, 124 Am. St. Rep. 837, 108 N. W. 982; Hinkle v. Southern R. Co., 126 N. C. 932, 78 Am. St. Rep. 685, 36 S. E. 348; Chicago B. & Q. R. Co. v. Morris, 16 Wyo. 308, 93 Pac. 664.

In *Chicago etc. Ry. Co. v. Woodward*, 164 Ind. 360, 72 N. E. 558, 73 N. E. 810, the court, after stating the rule exempting carriers from liability for injuries resulting from the natural dispositions and exertions of the animals themselves, said: "But the question is, since it is shown that the cattle were delivered at their destination reduced in number and in an injured condition, which party has the burden of establishing the cause of injury—the shipper or the carrier? It will be remembered that appellant received the cattle for transportation without any limitation of its common-law liability, and without the shipper assuming any of the hazards of shipment. Appellant thereby incurred the general obligation of the common carrier to safely carry. The loss and injuries suffered might have happened from the natural propensities of the animals, and without fault on the part of the carrier, or they might have happened from accident or from the negligence of the carrier. Under the shipping arrangement, neither the shipper nor his agent was required or permitted to accompany and care for the cattle. The shipper had not equal means of knowledge with the carrier as to the cause of injury. There is therefore in such a case strong reason and almost universal precedence for laying upon the carrier the onus of bringing the cause of injury within one of the excusatory exceptions recognized by law: *Lindsley v. Chicago etc. R. R. Co.*, 36 Minn. 539, 1 Am. St. Rep. 692, 33 N. W. 7; *McCoy v. Keokuk R. R. Co.*, 44 Iowa, 424; *Toledo, W. & W. R. R. Co. v. Durkin*, 76 Ill. 395; *Evans v. Fitchburg R. R. Co.*, 111 Mass. 142, 15 Am. Rep. 19; *Dow v. Portland S. Packet Co.*, 84 Me. 490, 24 Atl. 945; *Louisville etc. R. R. Co. v. Wynn*, 88 Tenn. 320, 14 S. W. 311; *Kinnick v. Chicago R. R. Co.*, 69 Iowa, 665, 29 S. W. 772; 5 Am. & Eng. Ency. of Law, 469; Cyc. 383. The cases cited by appellant are not authorities in a case like this. And in cases where special contracts are made limiting the carrier's liability, or stipulating that the shipper shall accompany the stock, and the like, a different rule generally prevails."

So, also, where the carrier desires to avail itself of the act of God as an excuse for the loss of livestock, the burden is upon it to establish not only that the act of God ultimately occasioned the loss, but that its own negligence did not contribute thereto: *Central etc. Ry. Co. v. Hall*, 124 Ga. 322, 110 Am. St. Rep. 170, 52 S. E. 679, 4 L. R.

A., N. S., 898. The carrier must, however, even in case of the happening of an act of God, use ordinary care to prevent injury: *Black v. Chicago B. & Q. R. Co.*, 30 Neb. 197, 46 N. W. 428.

But where the shipper accompanies the livestock on the transit, the burden is not on the carrier to prove that loss or injury was occasioned by the inherent or natural propensities of the animals themselves, since in that case the carrier has not the sole custody of the animals. In such a case no presumption of negligence arises merely from the loss or injury. Where the shipper is in charge of his own livestock in transit, he is presumed to know the cause of the loss or injury: *St. Louis etc. R. Co. v. Wells*, 81 Ark. 469, 99 S. W. 534; *Adams Express Co. v. Bratton*, 106 Ill. App. 563. In *Cincinnati etc. R. Co. v. Greening*, 30 Ky. Law Rep. 1180, 100 S. W. 825, the court said: "The evidence is uncontradicted that, when the stock were delivered to the carriers at Moreland, Kentucky, they were in first-class condition; when they were received by the shipper at Atlanta, Georgia, they were bruised, cut, starved, and otherwise greatly injured. Neither appellee nor any person representing him accompanied the stock. They were in the exclusive care and custody of the carrier from the time they were received until their delivery, and, under circumstances like these, the carrier will not be exonerated from liability merely by introducing its employes to show that it was not guilty of any negligence in the transportation. It is true that carriers of livestock are not insurers, as are carriers of goods and other inanimate freight, but, as said in *Louisville C. & St. L. R. Co. v. Hedger*, 9 Bush, 645, 15 Am. Rep. 740: 'The company, when it undertakes the exercise of this public employment, should be held to a greater degree of diligence than that required of a mere bailee. The liability of the carrier, it is true, is greatly lessened by relaxing the rule applicable to carrying ordinary goods and wares. Still this modification of the principle does not relieve him from that high degree of diligence that the nature of the employment requires. In affording means of transportation, the company should be held to that degree of care and diligence that a prudent and careful person would exercise in such matters, and, if the livestock should be lost or injured while in the custody and care of the company, or its agents, for transportation, this should be prima facie evidence of negligence, and the burden of proof is on the carrier to rebut this presumption.'

"Where, however, the shipper accompanies the stock, then a different rule as to the burden of proof obtains. Thus, in the case, *supra*, it is said: 'Where the owner contracts, however, to load and unload his stock and to take charge of them during transportation, as in this case, and does in fact do so, the burden of proof, where the company is charged with negligence for the loss or injury to the stock, is upon the owner, as the party who has the care of the stock is presumed to know how the injury occurred, and must himself suffer the loss, unless negligence is shown on the part of the carrier or his employes.' To the same effect is *Louisville & N. R. R. Co. v. Wathen*, 22 Ky.

Law Rep. 82, 49 S. W. 185; Louisville & N. R. R. Co. v. Harned, 23 Ky. Law Rep. 1651, 66 S. W. 25. In Hutchinson on Carriers, section 1357, the rule is thus stated: 'If livestock which is being transported is under the carrier's exclusive control, its delivery at destination in an injured condition will be prima facie evidence that the injury arose from some cause for which he was responsible, and he will be liable to the extent to which the shipper is damaged, unless he can show that the injury resulted from a cause for which he will be excused by the law or by the terms of his contract. But where, as is frequently the case, the shipper accompanies his livestock for the purpose of caring for it during the transportation, the same rule as to the burden of proof is held not to apply. The stock is not in the carrier's exclusive control or custody, nor are his means of information superior to those of the shipper, who is in a position to know as well as the carrier of the causes which produce the injury. In order, therefore, that the shipper who accompanies his livestock may recover for injuries received by him during the transportation, he must not only show that he himself was free from negligence, but that the injuries were caused by a breach of duty on the part of the carrier.'

"Therefore, the stock having been received by the carriers in good condition, and being in their exclusive custody, and not accompanied by the owner, the burden of proof was upon them to show how the injuries received by the stock occurred, and that they were not attributable to their negligence."

In Texas the rule is that a railway company is not absolutely bound to deliver cattle received by it for shipment "in good condition." Its duty in this respect is to use ordinary care and diligence to avoid injuries: Texas etc. Ry. Co. v. Trebble, 29 Tex. Civ. App. 104, 67 S. W. 890; Ft. Worth etc. Ry. Co. v. Lock, 30 Tex. Civ. App. 426, 70 S. W. 456; Texas etc. R. Co. v. Stewart (Tex. Civ. App.), 114 S. W. 413.

V. Right of Carriers to Limit Liability by Special Contracts.

While a carrier cannot contract for exemption for its own negligence in the transportation of livestock, it may by a special contract limit its common-law liabilities: Louisville etc. R. Co. v. Smitha, 145 Ala. 686, 40 South. 117; Cooper v. Raleigh & G. R. Co., 110 Ga. 659, 36 S. E. 240; Central etc. Ry. Co. v. Hall, 124 Ga. 322, 110 Am. St. Rep. 170, 52 S. E. 679, 4 L. R. A., N. S., 898; Chicago etc. Ry. Co. v. Calumet Stock Farm, 194 Ill. 9, 88 Am. St. Rep. 68, 61 N. E. 1095; Terre Haute & L. R. Co. v. Sherwood, 132 Ind. 129, 32 Am. St. Rep. 239, 31 N. E. 781, 17 L. R. A. 339; Hudson v. Northern Pac. Ry. Co., 92 Iowa, 231, 54 Am. St. Rep. 550; Kansas Pac. Ry. Co. v. Reynolds, 8 Kan. 623; McFadden v. Missouri Pac. Ry. Co., 92 Mo. 343, 1 Am. St. Rep. 721, 4 S. W. 689; Smith v. Chicago etc. Ry. Co., 112 Mo. App. 610, 87 S. W. 9; Chicago etc. R. Co. v. Witty, 32 Neb. 275, 29 Am. St. Rep. 436, 49 N. W. 183; Normile v Oregon Nav. Co., 41 Or. 177, 69 Pac. 928; Louisville & N. R. R. v. Dies, 91 Tenn. 177, 30 Am.

St. Rep. 871, 18 S. W. 266; Gulf etc. Ry. Co. v. Trawick, 68 Tex. 314, 2 Am. St. Rep. 494; Gulf etc. Ry. Co. v. Dunman (Tex. Civ. App.), 31 S. W. 789; Norfolk etc. R. Co. v. Harman, 91 Va. 601, 50 Am. St. Rep. 855, 22 S. E. 490, 44 L. R. A. 289; Abrams v. Milwaukee etc. Ry. Co., 87 Wis. 485, 41 Am. St. Rep. 55, 58 N. W. 780; notes to Clarke v. Rochester etc. R. Co., 67 Am. Dec. 213; Missouri Pac. R. Co. v. Fagan, 13 Am. St. Rep. 776; Heller v. Chicago etc. Ry. Co., 63 Am. St. Rep. 565; Chicago etc. Ry. Co. v. Calumet Stock Farm, 88 Am. St. Rep. 74.

Consequently, carriers almost invariably when transporting live-stock do so under a contract which limits their liability to negligence on their part.

VI. For What Acts the Carrier is Liable.

a. Losses or Injuries Arising from the Kind or Quality of Transportation Facilities.

1. **Necessity to Furnish Safe and Suitable Cars.**—A carrier undertaking to transfer livestock is bound to furnish the shipper with a reasonably safe and suitable car for that purpose: Coupland v. Housatonic R. Co., 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534; Chicago etc. R. Co. v. Williams, 61 Neb. 608, 85 N. W. 832, 55 L. R. A. 289; Eckert v. Pennsylvania R. Co., 211 Pa. 267, 107 Am. St. Rep. 571, 60 Atl. 781; International etc. R. Co. v. Pool, 24 Tex. Civ. App. 575, 59 S. W. 911; Nevins v. Chicago etc. Ry. Co., 124 Wis. 313, 109 Am. St. Rep. 935, 102 N. W. 489; John Schroeder Lumber Co. v. Chicago etc. Ry. Co., 135 Wis. 575, 128 Am. St. Rep. 1039, 16 N. W. 179; note to Heller v. Chicago etc. Ry. Co., 63 Am. St. Rep. 553.

Thus where the car furnished had a hole near the car door about three feet long and six or seven inches wide, and the shipper had no knowledge of it nor any opportunity to discover it, the carrier is liable for injuries to horses resulting from such defective car: Nevins v. Chicago etc. R. Co., 124 Wis. 313, 109 Am. St. Rep. 935, 102 N. W. 489.

In Allen v. Chicago etc. Ry. Co., 82 Neb. 726, 118 N. W. 655, a shipment of horses was injured by reason of the floor of the car being improperly bedded. The floor was new and very hard and smooth. The floor was bedded with manure, but the evidence showed that unless a car is bedded with sand, cinders, hay or straw, it is not safe for the transportation of horses. The court, in sustaining a recovery of damages, said: "It is patent, from an inspection of the bill of exceptions, that a considerable part of plaintiff's loss can be traced directly to a lack of bedding in the car. Defendant argues that, by reason of the contract, and independent of it, the duty rested in plaintiff to bed the car; that, especially in the matter of shipping horses, because of the opinions of different shippers, it is impossible to adopt any method of bedding that would be uniformly satisfactory, and that when defendant furnished the shipper a sound, properly constructed car for the transportation of his stock, its duty as a common carrier, so far as the car was concerned, was discharged.

We are of opinion, however, that it was the defendant's duty to furnish plaintiff a reasonably suitable and safe car for the transportation of his horses. That if the car furnished could only be made reasonably suitable and safe by bedding it with sand, cinders, hay, straw, or some like substance, it was defendant's duty to provide that bedding, and that it could not relieve itself of such liability by suggesting that plaintiff use some other and insufficient article for said purpose. The railway's obligation is implied from the nature of its business as a common carrier, and the fact that it undertook, in that capacity, to transport plaintiff's horses, and it was not essential that the bill of lading should recite that the company had agreed to bed the car so as to make it safe for the shipment of his horses: *Galveston H. & S. A. Ry. Co. v. Silegman* (Tex. Civ. App.), 23 S. W. 298. Nor was defendant relieved of that liability by the fact that plaintiff's agent accepted the car without proper bedding: *Peters v. New Orleans J. & G. R. Co.*, 16 La. Ann. 222, 79 Am. Dec. 578; *Hunt v. Nutt* (Tex. Civ. App.), 27 S. W. 1031; *St. Louis & F. R. Co. v. Brosius*, 47 Tex. Civ. App. 647, 105 S. W. 1131. Nor did the written contract exempt defendant from such liability. It nowhere purports to place the burden on the shipper of bedding or otherwise preparing the car, and we are not inclined to extend defendant's exemption beyond the strict letter of the agreement. Nor will the fact that captious shippers might prefer bedding other than that furnished by the carrier excuse it from discharging its obligation. If the car is bedded so as to be reasonably safe, the shipper can ask no more from the carrier, and if he indulges his whim or judgment to change conditions, he takes his own risk so far as the alteration may be concerned."

But in *Powell v. Pennsylvania R. Co.*, 32 Pa. 414, 75 Am. Dec. 564, it was declared negligence on the part of a railroad company to allow straw to be used in its cars for bedding. And the company was held liable for the loss of a horse which was burned, while being transported, by reason of such straw getting on fire by sparks from the engine.

Where a broken draw-bar causes a slack of eighteen inches between the car in which horses are being transported and the car ahead, which produces more jarring and unsteadiness of the car than if properly equipped in that respect, the shipper may recover for damages to the horses by reason of being thrown down and injured: *Chicago etc. R. Co. v. Morris*, 16 Wyo. 308, 93 Pac. 664. In *Leonard v. Whitecomb*, 95 Wis. 646, 70 N. W. 817, the floor of the car was defective, and the court said: "It is the duty of a railroad company, as a common carrier of livestock, to furnish suitable cars therefor, on reasonable notice so to do from a person desiring to transport such stock over its road; that this duty is absolute, and a contract exempting it from liability for damages arising from unsuitableness of cars so furnished, attributable to a failure on its part to exercise ordinary care, is void; that if a car be furnished having defects rendering it unsuitable, which defects are not obvious, or such as it

may be presumed that an inspection by an ordinary person will bring to his knowledge, and yet are such that a reasonably careful inspection by a person experienced in such business will lead to their discovery, an inspection and acceptance of the car by the shipper will not save the carrier harmless from damages caused by such defects, unless it be shown that they were actually pointed out to the shipper, and that he accepted the car with full knowledge of their existence."

A railway company shipping stock in a "Palace Horse Car," procured from another corporation at the request of the shipper, is nevertheless liable for any injury resulting to stock from a defect in such car: *Louisville & N. R. Co. v. Dies*, 91 Tenn. 177, 30 Am. St. Rep. 871, 18 S. W. 266. Where the cars furnished to the shipper for the transportation of cattle were infected with a contagious cattle disease, known as Texas fever, the carrier is liable for the loss of cattle which died from contracting the disease from such cars: *Illinois Cent. R. Co. v. Harris*, 184 Ill. 57, 56 N. E. 316, 48 L. R. A. 175. Likewise where a carrier erroneously placards a car as containing "Southern cattle," which term indicates to cattlemen that the cattle are infected with the splenetic or Texas fever, or have been exposed to it, it is liable to the shipper for the damages sustained by him in selling his cattle which were not, in fact, so diseased or exposed, at a loss: *Wabash R. Co. v. Campbell*, 219 Ill. 312, 76 N. E. 346.

2. Necessity to Furnish Proper Loading and Unloading Facilities.—It is the duty of a carrier of livestock to provide safe and proper facilities for loading and unloading the stock from its cars, and the carrier is liable for injuries sustained by the animals while being loaded or unloaded in consequence of insufficient facilities for such purposes: *Brannon v. Atlantic etc. R. Co.*, 4 Ga. App. 749, 62 S. E. 468; *Missouri etc. Ry. Co. v. Byrne*, 3 Ind. Ter. 740, 49 S. W. 41; *Louisville etc. Ry. Co. v. Godman*, 104 Ind. 490, 4 N. E. 163; *Letts v. Wabash R. Co.*, 131 Mo. App. 270, 111 S. W. 138; *Tracy v. Chicago & A. R. Co.*, 80 Mo. App. 389; *Galveston etc. Ry. Co. v. Jackson (Tex. Civ. App.)*, 37 S. W. 255; note to *Heller v. Chicago etc. Ry. Co.*, 63 Am. St. Rep. 551. Where a shipper surrenders the entire custody of his cattle to a carrier for immediate transportation, and the carrier so accepts them, the common-law liability of a common carrier arises. But where a railroad company constructs yards by the side of its tracks to facilitate the loading and unloading of stock, it is not responsible as a common carrier for stock placed in such yards for the convenience of the owner who intends to ship on a subsequent day, and who reserves the privilege of taking the stock from the pens for feeding before shipment. In such a case the liability is no greater than that of an ordinary depository or bailee: *Chicago B. & Q. R. Co. v. Powers*, 73 Neb. 816, 103 N. W. 678; *Missouri K. & T. Ry. Co. v. Byrne*, 100 Fed. 359, 40 C. C. A. 402. Under statutes requiring railroads to furnish all persons reasonable facilities for transportation of property over their roads and for the use of depots, buildings and grounds in connection with such transportation, it is

the duty of a railroad company to furnish cattle-yards to restrain cattle offered for transportation prior to their being loaded: *Flint v. Boston & M. R. R.*, 73 N. H. 141, 59 Atl. 938. It is the duty of a carrier of livestock to provide suitable pens for the delivery of such livestock whether delivery is made to the owner or to a connecting carrier, and for its failure in this respect it would be liable for all damages attributable thereto. It cannot shift liability to a stock-yards company by showing that the delivery was made in pens provided by that company: *Texas etc. Ry. Co. v. Felker* (Tex. Civ. App.), 99 S. W. 439.

"When animals are offered to a carrier of livestock to be transported, it is its duty to receive them; and that duty cannot be efficiently discharged, at least in a town or city, without the aid of yards in which the stock offered for shipment can be received and handled with safety and without inconvenience to the public while being loaded upon the cars in which they are to be transported. So, when livestock reach the place to which they are consigned, it is the duty of the carrier to deliver them to the consignee; and such delivery cannot be safely or effectively made except in or through inclosed yards or lots, convenient to the place of unloading. In other words, the duty to receive, transport and deliver livestock will not be fully discharged, unless the carrier makes such provision, at the place of loading, as will enable it to properly receive and load the stock, and such provision, at the place of unloading, as will enable it to properly deliver the stock to the consignee": *Covington Stockyards Co. v. Keith*, 139 U. S. 128, 11 Sup. Ct. Rep. 461, 35 L. ed. 73. But a carrier in providing pens for the reception and delivery of cattle at various points along its line is only required to have such number of pens as is sufficient for its ordinary and usual volume of business: *Texas etc. Ry. Co. v. Fambrough* (Tex. Civ. App.), 55 S. W. 188; *Casey v. St. Louis etc. Ry. Co.*, 37 Tex. Civ. App. 49, 82 S. W. 20.

The negligence of a carrier in permitting the gate of a stock-pen to remain out of repair is the proximate cause of injuries to cattle by reason of breaking through such gate on being frightened by a passing train: *Texas & P. R. Co. v. Bigham*, 90 Tex. 223, 38 S. W. 162. So, also, where a calf is injured in the racks of pens provided by the carrier because of the racks being so low that the calf could get into them by its own voluntary action, the carrier is liable: *Gulf etc. Ry. Co. v. Dunman* (Tex. Civ. App.), 81 S. W. 789. It is a question for the jury, however, whether yards are so sheltered and provided with shade and water as to be safe for the receipt of hogs during the hot summer months: *Lackland v. Chicago & A. Ry. Co.*, 101 Mo. App. 420, 74 S. W. 505. But a carrier is not liable for the loss of cattle through an unprecedented flood, even though the yards in which they were placed were near a river: *Empire State Cattle Co. v. Atchison etc. Ry. Co.*, 135 Fed. 135. A carrier of livestock who permits the pen in which a shipment of sheep must be placed for loading to have salt water accessible, the drinking of which creates such an

intense thirst as to produce sickness from which the sheep are liable to die, is answerable for the damages resulting therefrom: *Norfolk etc. R. Co. v. Harman*, 91 Va. 601, 50 Am. St. Rep. 855, 23 S. E. 490, 44 L. R. A. 289. A carrier is charged with notice that yards in which cattle infected with splenetic or Texas fever have been confined are liable to communicate that disease to cattle subsequently placed therein: *Dorr Cattle Co. v. Chicago G. W. Ry. Co.*, 129 Iowa, 359, 103 N. W. 1003.

A carrier is liable for its failure to place a car of livestock in a proper position to unload promptly on arrival at the place of destination: *Toledo etc. R. Co. v. Beery*, 31 Ind. App. 556, 68 N. E. 702. And where the carrier has assumed the duty of unloading cattle at the place of destination, it is liable for such damages as result from its failure to do so in a proper manner: *Mexican Nat. R. Co. v. Savage* (Tex. Civ. App.), 41 S. W. 663. Where a shipper is directed by the carrier's agent to load hogs in a wrong car, it is liable for the damages resulting from a removal therefrom, but if the shipper loads them in the car without inquiry, it is not liable: *Weisinger v. Southern Ry. Co.*, 33 Ky. Law Rep. 1038, 112 S. W. 660.

b. Losses or Injuries Arising from the Mode or Manner of the Transportation.

1. General Care in Transit.—A carrier accepting livestock for shipment is bound to use reasonable care and diligence in handling and caring for them during their transportation. The carrier should be reasonably careful to prevent the animals from injuring themselves or each other: *Illinois Cent. R. Co. v. Holt*, 29 Ky. Law Rep. 135, 92 S. W. 540; *Lachner v. Adams Express Co.*, 72 Mo. App. 13; *Olds v. New York Cent. etc. R. Co.*, 107 App. Div. 26, 94 N. Y. Supp. 924; *Ames v. Fargo*, 114 App. Div. 666, 99 N. Y. Supp. 994; *Texas etc. Ry. Co. v. Stewart* (Tex. Civ. App.), 114 S. W. 413; note to *Heller v. Chicago etc. Ry. Co.*, 63 Am. St. Rep. 541. Thus if the carrier assumes the responsibility of hitching a horse in a stall in a box-car, so that it cannot rear to the top of the car or throw its forefeet over the stall, it is liable if it ties it so loosely that it is injured from jumping and rearing in the manner mentioned: *Ames v. Fargo*, 114 App. Div. 666, 99 N. Y. Supp. 994. And where the carrier undertakes to bed the cars, it is liable for injuries resulting from its failure to do so properly: *Allen v. Chicago etc. Ry. Co.*, 82 Neb. 726, 118 N. W. 655; *Powell v. Pennsylvania R. Co.*, 32 Pa. 414, 75 Am. Dec. 564; *Houston etc. R. Co. v. Mayes*, 44 Tex. Civ. App. 31, 97 S. W. 318. And where livestock is injured by reason of the carrier making a "flying-switch," whereby the car containing the stock is "kicked" violently, it is liable for the resulting injuries: *Chicago & N. W. Ry. Co. v. Calumet Stock Farm*, 194 Ill. 9, 88 Am. St. Rep. 68, 61 N. E. 1095; *Illinois Cent. R. Co. v. Kerl*, 77 Miss. 736, 27 South. 993. Where by reason of negligent handling of cattle they are exposed to extreme cold weather and suffer injuries therefrom, the carrier is liable: *Atchison etc. Ry. Co. v. Nation* (Tex. Civ. App.), 92 S. W.

823. But a carrier is not responsible for injuries or losses arising solely from unprecedented climatic conditions: *Louisville etc. Ry. Co. v. Warfield*, 30 Ky. Law Rep. 352, 98 S. W. 313.

In the principal case (*Stiles v. Louisville etc. R. Co.*, 129 Ky. 175, ante, p. 429, 110 S. W. 820, 18 L. R. A., N. S., 86) the carrier was held liable for the burning of a shipment of horses en route, notwithstanding that the carrier was not guilty of any negligence. In *Louisville etc. R. Co. v. Stiles* (Ky.), 119 S. W. 786, which was a subsequent appeal of the same case, it was sought to relieve the carrier from liability on the ground that the horses were burned while in a stockyard, pursuant to the federal statute requiring livestock to be unloaded, fed and watered at certain intervals, and that by reason of such unloading the liability of the carrier was changed from that of an insurer to that of a warehouseman; but the court said: "We feel constrained, in the absence of such authority [no cases were cited to the point], to hold that such unloading is a mere accessory to the transportation, and while thus temporarily unloaded the stock should be under the protection of the rule which makes the carrier liable as an insurer from the time the owner transfers his possession to the carrier until the stock is delivered to him at the end of the route." Of course, where the animals are burned through the negligence of the carrier, the liability of the carrier cannot be exempted by a stipulation that the shipper assumes the risk of loss or injury by fire: *McFadden v. Missouri Pac. Ry. Co.*, 92 Mo. 343, 1 Am. St. Rep. 721, 4 S. W. 689.

The fact that a mare is with foal, and thereby predisposed to injury, is no excuse where the carrier subjected the animal to great delays and did not give her proper care during the transit: *Gulf etc. R. Co. v. Staton* (Tex. Civ. App.), 49 S. W. 277. And where it is shown that when cars are in motion the circulation of air in the car is sufficient to keep livestock confined therein in good condition, but when stopped at stations for an unnecessary length of time, the ventilation becomes in such condition as to suffocate the stock, the carrier will be liable for its failure to protect the stock: *Minter v. Chicago etc. Ry. Co.*, 82 Mo. App. 130. To relieve a carrier from liability for injury from inadequate ventilation, it must appear that the shipper contracted to accept the car with full knowledge that it was so imperfectly ventilated as to be likely to suffocate the stock: *John Schroeder Lumber Co. v. Chicago etc. Ry. Co.*, 135 Wis. 575, 128 Am. St. Rep. 1039, 116 N. W. 179. But a carrier is not responsible for the death of cattle in transit by reason of the heat unless such death was caused by some negligence or misfeasance of the carrier or its servants: *Maslin v. Baltimore & O. R. Co.*, 14 W. Va. 180, 35 Am. Rep. 748. Thus where the shipper of a live hog requests the agent of the express company, who is in charge of the shipment, to assist him in placing the hog where it could get more air, and the agent refusing to do so, the hog dies, the carrier is liable for the loss: *United States Express Co. v. Council*, 84 Ill. App. 491. Where a carrier undertakes to transport hogs during warm weather, and they

become overheated, it is its duty to shower them with water in order to prevent loss from suffocation: *Illinois Cent. R. Co. v. Adams*, 42 Ill. 474, 92 Am. Dec. 85; *Toledo etc. Ry. Co. v. Hamilton*, 76 Ill. 393; *Peck v. Chicago etc. Ry. Co.*, 138 Iowa, 187, 128 Am. St. Rep. 185, 115 N. W. 1113, 16 L. R. A., N. S., 883.

The carrier must protect a shipment of livestock while transporting it from exposure to contagious and infectious diseases: *Illinois Cent. R. Co. v. Harris*, 184 Ill. 57, 56 N. E. 316, 48 L. R. A. 175; *Dorr Cattle Co. v. Chicago G. W. Co.*, 128 Iowa, 359, 103 N. W. 1003. Hence where a carrier negligently exposes a shipment of hogs to hog cholera by switching them through a zone in which hogs are so infected, it is liable for losses occasioned by the hogs contracting that disease from such exposure: *Council v. St. Louis etc. R. Co.*, 123 Mo. App. 432, 100 S. W. 57. But a carrier is not liable for the loss of livestock through sickness where it does not appear that such sickness was caused by its negligence: *Schoenfeld v. Louisville & N. R. Co.*, 49 La. Ann. 907, 21 South. 592. Nor is a carrier liable for the death of a horse due to an attack of meningitis, where it did all in its power to care for the animal after it became aware that the animal was so affected: *Klair v. Wilmington Steamboat Co.*, 4 Penne. 51, 54 Atl. 694.

2. Necessity to Furnish Food and Water.—A carrier transporting livestock is under a general duty to furnish them food and water during the transit: *Louisville etc. R. Co. v. Smitha*, 145 Ala. 686, 40 South. 117; *Gilbert v. Chicago etc. Ry. Co.*, 132 Mo. App. 697, 112 S. W. 1002; *Gulf etc. Ry. Co. v. Cunningham* (Tex. Civ. App.), 113 S. W. 767; note to *Heller v. Chicago etc. Ry. Co.*, 63 Am. St. Rep. 554. The furnishing of proper facilities and opportunities for the feeding and watering of stock while in transit is as much a duty of the carrier as the furnishing of suitable cars: *Atchison etc. Ry. Co. v. Allen*, 75 Kan. 190, 88 Pac. 966, 10 L. R. A., N. S., 576; *Illinois Cent. R. Co. v. Curry*, 127 Ky. 643, 106 S. W. 294; *Texas etc. Ry. Co. v. Byers* (Tex. Civ. App.), 84 S. W. 1087; *Groot v. Oregon Short Line R. Co.*, 34 Utah, 152, 96 Pac. 1019. Although a carrier should afford proper facilities and reasonable opportunities for rest, feed and water, it is not required to supply these upon a mere request of the shipper without regard to the reasonableness or necessity of the demand: *Missouri etc. Ry. Co. v. Clark*, 35 Tex. Civ. App. 189, 79 S. W. 827. Where a shipper agrees to personally accompany and care for the watering of livestock transported by the carrier, and is given free transportation for that purpose, and is supplied with proper facilities, he cannot complain of an injury arising from lack of such care in the matter of watering arising out of his own fault: *Chicago etc. R. Co. v. Schuldt*, 66 Neb. 43, 92 N. W. 162; *Paul v. Pennsylvania R. Co.*, 70 N. J. L. 442, 57 Atl. 139. Where livestock is transported under a special contract limiting the carrier's liability, and wherein the shipper undertakes to go with and care for the stock during transportation, he cannot recover solely upon evidence of a failure to deliver; but he must also show that such failure was not due to his

own negligence, but to a breach of duty on the part of the carrier: *Terre Haute etc. R. Co. v. Sherwood*, 132 Ind. 129, 32 Am. St. Rep. 239, 31 N. E. 781, 17 L. R. A. 339. A contract for the shipment of livestock providing that the shipper or his agent in charge shall water, feed and care for the stock while in transit does not relieve the carrier from its general duty to take all such precautions for safe transportation as reasonable prudence at least dictates: *Peck v. Chicago etc. Ry. Co.*, 138 Iowa, 187, 128 Am. St. Rep. 185, 115 N. W. 1113, 16 L. R. A., N. S., 883. Nor will such a contract of shipment relieve the carrier from a duty to feed and water the stock where it does not afford the shipper an opportunity to do so: *Reynolds v. Great Northern Ry. Co.*, 40 Wash. 163, 111 Am. St. Rep. 883, 82 Pac. 161.

In *Lewis v. Pennsylvania R. Co.*, 70 N. J. L. 132, 56 Atl. 128, the court in discussing this subject said: "As was said by Justice Field in *North Pennsylvania R. Co. v. Commercial Nat. Bank of Chicago*, 123 U. S. 727, 8 Sup. Ct. Rep. 266, 31 L. ed. 287: 'A railroad company, it is true, is not a carrier of livestock with the same responsibilities which attend it as a carrier of goods. The nature of the property, the inherent difficulties of its safe transportation, and the necessity of furnishing to the animals food and water, light and air, and protecting them from injuring each other, impose duties in many respects widely different from those devolving upon a mere carrier of goods.' It has accordingly been held by an unbroken line of decisions that contracts limiting the liability of carriers of livestock and casting upon the shipper the obligation to feed and water en route are valid: *South & N. Alabama R. R. v. Henlein*, 52 Ala. 606, 23 Am. Rep. 578; *Georgia R. R. Co. v. Spears*, 66 Ga. 485, 42 Am. Rep. 81; *Central R. R. Co. v. Bryant*, 73 Ga. 722; *Cooper v. Raleigh & G. R. R. Co.*, 110 Ga. 659, 36 S. E. 240; *St. Louis etc. R. Co. v. Cleary*, 77 Mo. 634, 46 Am. Rep. 13; *Betts v. Farmers' L. & T. Co.*, 21 Wis. 80, 91 Am. Dec. 460; *Morrison v. Phillips etc. Construction Co.*, 44 Wis. 405, 28 Am. Rep. 599. And this even in states where there is a statute forbidding a carrier to relieve himself by contract from his common law liability: *Grieve v. Illinois Central R. R. Co.*, 104 Iowa, 659, 74 N. W. 192; *Burgher v. Chicago etc. R. Co.*, 105 Iowa, 335, 75 N. W. 192. The duty to feed and water his own cattle is naturally the duty of the shipper, and the federal statute already referred to treats it as such, and devolves it primarily upon him. Where such a contract is made, the carrier cannot be held for its failure to feed and water the cattle: *Georgia R. R. Co. v. Reid*, 91 Ga. 377, 17 S. E. 934; *Terre Haute & C. R. Co. v. Sherwood*, 132 Ind. 129, 32 Am. St. Rep. 239, 31 N. E. 781, 17 L. R. A. 339; *Faust v. Chicago etc. R. R. Co.*, 104 Iowa, 241, 65 Am. St. Rep. 454, 73 N. W. 623; *Union Pacific R. Co. v. Langan*, 52 Neb. 105, 71 N. W. 979; *Ft. Worth & D. C. R. Co. v. Daggett*, 87 Tex. 322, 28 S. W. 525. The plaintiff cannot recover where there is such a contract for a failure to feed and water, for the reason that the carrier owes him no duty to feed and water. The duty is by contract cast upon the shipper. To hold otherwise would make it possible for the shipper to recover damages caused by his own breach

of contract, and these damages would then be recoverable in turn by the carrier in a suit upon the contract. This case differs from *Brockway v. American Express Co.*, 168 Mass. 257, 47 N. E. 87. The special contract in that case seems not to have contained the provision requiring the shipper to feed and water the horses, and the contract was held invalid because it sought to exempt the carrier from liability for its own negligence. In that case, moreover, the shipper had made arrangements to water and feed the horses, and the carrier's agent did not comply with his request to unload the horses for that purpose. It has been held that, if the carrier knows that no one is accompanying the animals to care for them, that duty devolves upon the carrier: *Louisville etc. R. Co. v. Spalding*, 8 Ky. Law Rep. 355; *Chicago etc. R. Co. v. Williams*, 61 Neb. 608, 85 N. W. 832, 55 L. R. A. 289. This view does not commend itself to us. The shipper, under that view of the law, secures a right of action against the carrier for damages caused by his own breach of contract. In our judgment, the rights and obligations of the parties must be determined by the contract they have made."

A carrier accepting livestock for transportation under a contract providing that it "is to be loaded, unloaded, fed, watered and otherwise cared for, while in the cars, by the shipper or owner," thereby becomes a bailee for hire, and, having control of the cars in which the stock is shipped, is bound to furnish the shipper an opportunity to give the animals the care they may require in case the train is delayed: *Smith v. Michigan Central R. Co.*, 100 Mich. 148, 43 Am. St. Rep. 440, 58 N. W. 651. But the carrier will not be liable for a neglect to afford an opportunity to feed and water the stock which is being transported until it has been requested by the caretaker to do so and has refused: *McKenzie v. Michigan Cent. R. Co.*, 137 Mich. 112, 100 N. W. 260. A carrier will not be excused from furnishing a suitable place where cattle may be fed and watered because the weather is bad and the place furnished is unfit, because of recent rains making it muddy and otherwise unfit: *International etc. Ry. Co. v. McRae*, 82 Tex. 614, 27 Am. St. Rep. 926, 18 S. W. 672. It is negligent for a carrier to allow lambs to drink salt water during transportation: *Norfolk etc. R. Co. v. Harman*, 91 Va. 601, 50 Am. St. Rep. 855, 22 S. E. 490. It is likewise negligence for a carrier to furnish alkaline water to livestock which it must have known came from a district outside of the alkaline region, even though the only wholesome water to be had is such as is hauled to the place: *Chicago etc. Ry. Co. v. Mitchell* (Tex. Civ. App.), 85 S. W. 286.

Where a shipper places his cattle in pens for shipment hours before the time agreed upon for their departure, he cannot recover damages for their shrinkage in weight owing to a want of food and water: *International etc. R. Co. v. Earnest* (Tex. Civ. App.), 77 S. W. 29. But where he places them in pens to await the arrival of cars, relying upon the carrier's representations that cars would soon be available, he may recover the resulting damages from such want of food and water: *Gulf etc. Ry. Co. v. House*, 40 Tex. Civ. App. 105, 88 S. W.

1110. And a shipper has been allowed to recover for hogs which died from want of water while awaiting shipment in pens which were not provided with shade, shelter or water. The hogs were placed in the pens in the early morning hours, while the weather was cool, to await an evening train, the season of the year being very warm: *Lackland v. Chicago & A. Ry. Co.*, 101 Mo. App. 420, 74 S. W. 505. A cause for unavoidable delay, such as a flood, is not necessarily an excuse for a failure to feed and water stock en route: *Chicago etc. Ry. Co. v. Slattery*, 76 Neb. 721, 124 Am. St. Rep. 825, 107 N. W. 1045. A carrier is liable for damages from a failure to feed and water when the shipment was diverted from the route contemplated by the contract, which should have been completed in forty hours, to a route which took ninety hours for completion, even though the diversion was compelled by necessity: *Missouri etc. Ry. Co. v. Leibold* (Tex. Civ. App.), 55 S. W. 368. And a carrier is liable for failure to furnish horses with food and water where through the refusal of the initial carrier to attach the car to the train by which it was expected to go, it failed to connect with the connecting carrier: *Brockway v. Am. Express Co.*, 168 Mass. 257, 47 N. E. 87.

Where the shipment is an interstate one, a failure to comply with the federal statute making it the duty of a railway company carrying cattle to unload them after confinement for a period of twenty-eight consecutive hours for rest, feed and water, constitutes prima facie negligence rendering the carrier liable for the resulting injuries to the cattle: *Nashville etc. Ry. Co. v. Heggie*, 86 Ga. 210, 22 Am. St. Rep. 453, 12 S. E. 363; *Cincinnati etc. R. Co. v. Gregg* (Ky.), 80 S. W. 512; *Brockway v. Am. Express Co.*, 168 Mass. 257, 47 N. E. 87; *Chicago etc. Ry. Co. v. Slattery*, 76 Neb. 721, 124 Am. St. Rep. 825, 107 N. W. 1045; *Ft. Worth & D. C. R. Co. v. Daggett*, 87 Tex. 322, 28 S. W. 525; *Chesapeake etc. R. Co. v. Am. Exchange Bank*, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449; *Reynolds v. Great Northern Ry. Co.*, 40 Wash. 163, 111 Am. St. Rep. 883, 82 Pac. 161; *Burns v. Chicago etc. Ry. Co.*, 104 Wis. 646, 80 N. W. 927. But the carrier may exempt itself from liability by a special contract that the shipper shall feed and water the stock: *Missouri Pac. Ry. Co. v. Texas & P. Ry. Co.*, 41 Fed. 913. The carrier in transporting cattle has the right to unload, feed and water the stock in accordance with the federal statute, even against the protest of the shipper: *Nashville etc. Ry. Co. v. Parker*, 123 Ala. 683, 27 South. 323; *Eaton v. Chicago etc. Ry. Co.*, 125 Mo. App. 223, 102 S. W. 575. The carrier is obliged under the federal statute, just mentioned, to furnish the shipper reasonable facilities and opportunities to feed and water his cattle, regardless of whether the shipper has requested it to do so: *Southern Pacific Co. v. Arnett*, 126 Fed. 75, 61 C. C. A. 131.

c. **Losses or Injuries Arising from Delay in Transportation.**—Where a carrier holding itself out as a common carrier of livestock fails to furnish cars for the transportation of livestock within a reasonable time after demand by a prospective shipper, it is liable for the resulting damages: *Illinois Cent. R. Co. v. Bundy*, 97 Ill. App.

202; *Texas & P. Ry. Co. v. Smith*, 34 Tex. Civ. App. 571, 79 S. W. 614; *Moore v. Baltimore & O. R. Co.*, 103 Va. 189, 48 S. E. 887. A carrier is required to inform a shipper of necessary delay in its ability to furnish cars so that he may protect himself against loss: *St. Louis etc. Ry. Co. v. Vaughan* (Ark.), 113 S. W. 1035; *Pittsburgh etc. Ry. Co. v. Racer*, 5 Ind. App. 209, 31 N. E. 853. Where a carrier agrees to furnish cars for the transportation of livestock on a certain day, its liability for a failure to do so is determined in the same manner as in the case of any other contract: *Texas etc. Ry. Co. v. Scott* (Tex. Civ. App.), 86 S. W. 1065. Where the shipper relying on such an agreement causes his cattle to be delivered for shipment on the agreed day, he may recover the resulting losses: *Baltimore etc. R. Co. v. Tison*, 116 Ill. App. 48.

Where the contract for transportation of livestock does not fix any time within which the stock are to be shipped, the law supplies the omission, and requires that the carrier shall use reasonable diligence to transport them within a reasonable time: *St. Louis etc. Ry. Co. v. Tassey*, 122 Ill. App. 339; *Cincinnati etc. Ry. Co. v. Case*, 122 Ind. 310, 23 N. E. 797; *Missouri etc. R. Co. v. Truskett*, 2 Ind. Ter. 633, 53 S. W. 444; *Siemonsma v. Chicago etc. Ry. Co.*, 137 Iowa, 607, 115 N. W. 230; *Southern Ry. Co. v. Railey*, 26 Ky. Law Rep. 53, 80 S. W. 786; *Baltimore etc. R. Co. v. Whitehill*, 104 Md. 295, 64 Atl. 1033; *McKenzie v. Michigan Cent. R. Co.*, 137 Mich. 112, 100 N. W. 260; *McCrary v. Missouri etc. Ry. Co.*, 99 Mo. App. 518, 74 S. W. 2; *Ratliff v. Quincy etc. R. Co.*, 118 Mo. App. 644, 94 S. W. 1005; *Union Pac. Ry. Co. v. Nelson*, 76 Neb. 72, 106 N. W. 1036; *Cleve v. Chicago etc. Ry. Co.*, 77 Neb. 166, 124 Am. St. Rep. 837, 108 N. W. 982; *Gulf etc. Ry. Co. v. Baugh* (Tex. Civ. App.), 42 S. W. 245; *International etc. R. Co. v. Young* (Tex. Civ. App.), 72 S. W. 68; *Texas etc. Ry. Co. v. Dawson*, 34 Tex. Civ. App. 240, 78 S. W. 235; *Gulf etc. Ry. Co. v. Beattie* (Tex. Civ. App.), 88 S. W. 367; *Rogers v. Texas etc. Ry. Co.* (Tex. Civ. App.), 94 S. W. 158; *San Antonio etc. Ry. Co. v. Turner* (Tex. Civ. App.), 94 S. W. 214; *Groot v. Oregon Short Line R. Co.*, 34 Utah, 152, 96 Pac. 1019; *Chicago etc. R. Co. v. Morris*, 16 Wyo. 308, 93 Pac. 664. In the absence of a contract fixing the time of delivery, the carrier is only liable for damages proximately caused by delay due to its negligence: *Trout v. Gulf etc. Ry. Co.* (Tex. Civ.), 111 S. W. 220. In *Chicago etc. R. Co. v. Morris*, 16 Wyo. 308, 93 Pac. 664, the court said: "While it is not every delay that entitles a shipper to damages, yet if such delay was by reason of negligence of the company and contributed to the injury, it constituted a proximate cause, and an action for damages would lie. The overloading an engine, or a defective engine which causes a delay, is evidence of negligence (*Cleveland etc. R. Co. v. Heath*, 22 Ind. App. 47, 53 N. E. 198; *Michigan So. etc. Ry. Co. v. McDonough*, 21 Mich. 165, 4 Am. Rep. 466; *McCrary v. Chicago & A. R. Co.*, 109 Mo. App. 567, 83 S. W. 82), and, if such negligence contributed to the injury, there is no reason why damages should not be recoverable." And in *Nelson v. Chicago etc. Ry. Co.*, 78 Neb. 57, 110 N. W. 741, the court,

in discussing this question, said: "While we do not hold that a railroad company is an insurer of the arrival of its trains on schedule time in the transportation of livestock or other freight, yet where there is a material delay, the company must, to exonerate itself from liability, show that the delay arose from some cause other than its own negligence: *Denman v. Chicago B. & Q. Ry. Co.*, 52 Neb. 143, 71 N. W. 967; *Galena & C. H. Ry. Co. v. Rae*, 18 Ill. 488, 68 Am. Dec. 574; *Ayres v. Chicago & N. W. Ry. Co.*, 71 Wis. 372, 5 Am. St. Rep. 226, 37 N. W. 432; *Baltimore & O. R. Co. v. Morehead*, 5 W. Va. 293; *McCoy v. K. & D. M. Ry. Co.*, 44 Iowa, 424."

The distinction between the duty to deliver the freight and the duty to deliver it within a reasonable time was adverted to in *Nashville etc. R. Co. v. Jackson*, 6 Heisk. 271. The shipment in that case consisted of hogs; some of them died during transit, while others, through delay in the transportation, lost weight. The court said: "Several questions are presented in argument and urged for reversal of the judgment rendered in this case: 1. The court charged the jury that the defendant was bound to deliver the hogs at the point of destination within a reasonable time, unless prevented from such delivery by an act of God or the public enemy; the degree of responsibility that attaches to a common carrier being that of an insurer against all loss, except such as arises from the causes above named. It is insisted that the above rule is correct, when applied to an entire failure to deliver, or to a loss of the property, but does not apply to the question of mere delay in the delivery, when the property reaches its ultimate destination.

"There is a well-settled distinction in the two cases. In case of damages resulting from mere delay the rule is thus stated in note to Angell on the Law of Carriers, page 293: 'In respect to the time of delivery of the goods, a common carrier is responsible only for the exertion of due diligence, and he may excuse delay in delivery by accident or misfortune, although not inevitable. It is enough that he uses proper endeavors to prevent delay. In other words, the principle upon which the extraordinary responsibility of common carriers is founded does not require that that responsibility should be extended to the time occupied in the transportation; the danger of robbery or collusion and fraud has no application to such case'; for which he cites *Parsons v. Hardy*, 14 Wend. 215, 28 Am. Dec. 521. In the text, section 289, the rule is thus stated: 'But if by any accident or misfortune, not amounting to the act of God or the act of the public enemy, the transportation of the goods is obstructed and delayed, the carrier will not be answerable for the delay occasioned, if he has used a reasonable degree of exertion and diligence in the transportation.' And he adds: 'Suppose a canal boat has been retarded or obstructed in its voyage by reason of any accident, not amounting to an act of God, as by the disordered condition of some lock, in such case the carrier will not be liable for any damage occasioned to the shipper thereby, if the goods finally arrive in safety, unless he has been guilty of negligence.' These principles are unquestionably correct

and well sustained by authority, and we hold his honor erred in his charge on this question."

Unavoidable delay in shipment is no excuse for a failure to exercise that degree of care required of a carrier in the transportation of livestock: *Chicago etc. Ry. Co. v. Slattery*, 76 Neb. 721, 124 Am. St. Rep. 825, 107 N. W. 1045. The only causes that will excuse an unusual delay in forwarding a shipment of livestock are those that cannot be reasonably anticipated or controlled or avoided by the exercise of reasonable care: *Vencill v. Quincy etc. R. Co.*, 132 Mo. App. 722, 112 S. W. 1030. The carrier is usually only required to exercise ordinary care and diligence to avoid delay under all the circumstances: *Missouri etc. Ry. Co. v. Kyser* (Tex. Civ. App.), 95 S. W. 747. Where horses are transported under a contract exempting the carrier from liability for delay, the burden is on the shipper to show that the delay was unreasonable, and resulted from the carrier's negligence: *Gilbert v. Chicago etc. Ry. Co.*, 132 Mo. App. 697, 112 S. W. 1002. A carrier is not negligent because it refuses to delay its regular freight trains in order to handle a shipment of cattle: *San Antonio etc. Ry. Co. v. Turner* (Tex. Civ. App.), 94 S. W. 214. The delays caused by awaiting connection with connecting carriers as shown by the regular time-tables of the carriers are not such as constitute negligence, since the shipper is bound to take notice in advance of such delays: *Burns v. Chicago etc. Ry. Co.*, 104 Wis. 646, 80 N. W. 927. But the carrier is bound to transport the stock with reasonable diligence, taking in consideration the connections to be made and the usual time for the journey: *Illinois Cent. R. Co. v. Holt*, 29 Ky. Law Rep. 135, 92 S. W. 540; *Johnston v. Chicago etc. R. Co.*, 70 Neb. 364, 97 N. W. 479. The delays which are incident to the ordinary transportation are reasonable delays: *Southern Pac. Co. v. Arnett*, 126 Fed. 75, 61 C. C. A. 131. The time consumed in stopping to feed and water the cattle in compliance with the federal law, commonly known as the "Twenty-eight hour law," is not to be included in considering whether the delay constituted negligence: *St. Louis etc. Ry. Co. v. Carlisle*, 34 Tex. Civ. App. 268, 78 S. W. 553. A carrier is obliged to transport the stock over the shorter route unless it protects itself by a contract providing for the longer route: *Houston etc. R. Co. v. Buchanan*, 42 Tex. Civ. App. 620, 94 S. W. 199. Where the carrier contracts to transport stock within a specified time, it cannot excuse its failure on the ground that its train broke down, where it did not provide in the contract for such contingencies: *Gann v. Chicago etc. Ry. Co.*, 72 Mo. App. 34. In the case of a strike which prevents the running of trains, the carrier is only obliged to use reasonable care and diligence to overcome the obstacles interposed and to forward the stock as promptly as reasonable care and diligence will permit: *Sterling v. St. Louis etc. Ry. Co.*, 38 Tex. Civ. App. 451, 86 S. W. 655. A snowstorm of such violence as to prevent the movement of trains may serve as an excuse for delay in the transportation of livestock: *Pruitt v. Hannibal etc. R. Co.*, 62 Mo. 527; *Black v. Chicago B. & Q. R. Co.*, 30 Neb. 197, 46 N. W. 428;

Feinberg v. Delaware etc. R. Co., 52 N. J. L. 451, 20 Atl. 33. But if the shipment is exposed to such a storm during the month of December through the negligence of the carrier, a liability on the part of the carrier will arise: *Texas etc. Ry. Co. v. Smissen*, 31 Tex. Civ. App. 549, 73 S. W. 42.

A rush of business is no defense for a failure to transport livestock with reasonable care, diligence and dispatch: *Texas & P. Ry. Co. v. Felker*, 40 Tex. Civ. App. 604, 90 S. W. 530. Nor is a scarcity of freight a sufficient excuse to decline to run a morning train where the carrier had induced the shipper to load his cattle in expectation of them being transported on that train: *Kansas & A. V. Ry. Co. v. Ayres*, 63 Ark. 331, 38 S. W. 515. Nor can the carrier excuse a delay in transportation on the ground that its trains did not connect in time to avoid the delay: *Gulf etc. Ry. Co. v. Porter*, 25 Tex. Civ. App. 491, 61 S. W. 343. A statute allowing railway companies to regulate the time and manner in which passengers and property shall be transported does not authorize a carrier to fix an unreasonable length of time for the transportation of stock between two points: *Texas & P. Ry. Co. v. Currie*, 33 Tex. Civ. App. 277, 76 S. W. 810. A carrier is liable for unreasonable delays caused by overloading its train, since the exercise of reasonable care imposes the duty on it to provide a sufficient number of trains for the proper transaction of its ordinary business: *Ratliff v. Quincy etc. R. Co.*, 118 Mo. App. 644, 94 S. W. 1005. The facts that the engine was defective and the train was overloaded are properly considered in determining whether the carrier was guilty of negligence causing delays to the shipment: *Cleveland etc. Ry. Co. v. Heath*, 22 Ind. App. 47, 53 N. E. 198.

In *Missouri etc. Ry. Co. v. Truskett*, 104 Fed. 728, 44 C. C. A. 179 (affirmed in 186 U. S. 480, 22 Sup. Ct. Rep. 943, 46 L. ed. 1259), the carrier sought to excuse a delay caused by the track being rendered slippery by a heavy dew, but the court said: "We apprehend, however, that a common carrier of freight or passengers is bound to provide engines of sufficient weight and power to overcome the effects of a heavy dew, and that, if an unreasonable delay in the transportation of property or persons ensues from such an ordinary event as the fall of a heavy dew, it cannot shield itself from liability by the plea that its default was attributable to an act of God. A carrier must exercise enough diligence to overcome the effects of a dew falling upon its tracks, no matter how heavy the precipitation may be. It is only one of those ordinary manifestations of the power of nature against the effects of which human foresight may and should provide."

And where the delay is caused by a failure of water sufficient to operate the train, and the carrier knew there was a drought in the region when it undertook the transportation of the stock, it is liable for the resulting damages: *Cincinnati etc. Ry. Co. v. Webb*, 103 Ky. 705, 46 S. W. 11. Likewise where the delay is caused by an unexplainable breaking down of the engine, followed by a freezing up of the water in its tanks and water was procurable only nine miles

distant, the carrier is liable: *Rogers v. Texas etc. Ry. Co.* (Tex. Civ. App.), 94 S. W. 158. But where the delay is caused by sickness and death of one of the animals and the balance are shipped by the next train, the carrier is not liable for the delay: *Lewis v. Pennsylvania R. Co.*, 70 N. J. L. 132, 56 Atl. 128, affirmed in 71 N. J. L. 339, 59 Atl. 1117. What is an unreasonable delay is a mixed question of law and fact: *Louisville etc. R. Co. v. Smitha*, 145 Ala. 686, 40 South. 117.

d. Losses or Damages Arising from an Improper Delivery.—It is the duty of a carrier to deliver livestock to the consignee in inclosed yards convenient to the place of unloading: *Reynolds v. Great Northern Ry. Co.*, 40 Wash. 163, 111 Am. St. Rep. 883, 82 Pac. 161. Where the cattle reached their destination at midnight and were then offered to the shipper upon payment of the freight, but he not having the money with him refused to receive the stock at that time, whereupon they were unloaded into the carrier's pens, the carrier will be liable for losses occasioned by the cattle breaking through insecurely fastened gates: *Houston etc. Ry. Co. v. Trammell*, 28 Tex. Civ. App. 312, 68 S. W. 716. Where it was the custom to deliver shipments of livestock consigned to commission merchants at the unloading platforms of a stockyards company, the duty of the carrier to make a delivery was completed when it did so, and it will not be liable for delays on the part of the stockyards company in placing the stock in the selling pens of the consignee: *Ratliff v. Quincy etc. R. Co.*, 118 Mo. App. 644, 94 S. W. 1005. A carrier is liable for damages arising from negligently carrying livestock beyond their destination: *Missouri etc. Ry. Co. v. Hayes*, 74 Kan. 880, 88 Pac. 64. A shipper is not obliged to receive his livestock before arrival at their destination because some of the animals are sick: *Houston etc. R. Co. v. Burns*, 41 Tex. Civ. App. 83, 90 S. W. 688. And where the carrier contracts to deliver a consignment of cattle at the Kansas City stockyards, it cannot make a delivery at its Kansas City station. Its liability for the cattle continues until delivery at the stockyards: *Jones v. St. Louis etc. R. Co.*, 89 Mo. App. 653.

A shipper cannot recover damages for a delay in delivery of his stock where it was consigned to himself and he was not present to receive the consignment, and delivery was made to his employés as soon as their authority to receive it was ascertained by the carrier: *Moore v. Baltimore & O. R. Co.*, 103 Va. 189, 48 S. E. 887. A carrier must deliver livestock shipped over its line to the consignee designated in the contract of carriage, and the delivery of such stock to another person constitutes a conversion for which the carrier is answerable in any damages approximately resulting from the wrongful delivery: *Southern Ry. Co. v. Webb*, 143 Ala. 304, 111 Am. St. Rep. 45, 39 South. 262. But where the conditions of a valid chattel mortgage on cattle have been broken and the mortgagee is entitled to take possession of the cattle wherever found, a carrier is not liable to the mortgagor, who had consigned the cattle, for a diversion of the shipment and delivery to the mortgagee who demanded possession while

the cattle were still in its possession: *Johnston v. Chicago etc. R. Co.*, 70 Neb. 364, 97 N. W. 479.

VII. Assumption of Risk and Contributory Negligence on Part of the Shipper.

a. **In General.**—If the shipper of livestock or his agents contribute to the loss or injury of such stock by their negligent acts, the carrier is not liable for the resulting damages: *Southern Ry. Co. v. Bivings*, 3 Ga. App. 552, 60 S. E. 287; *Hart v. Chicago etc. R. Co.*, 69 Iowa, 485, 29 N. W. 597; note to *Clarke v. Rochester etc. R. Co.*, 67 Am. Dec. 212. A shipper of livestock, where it is the custom of shippers to send a caretaker, who fails to comply with this custom, assumes all the risk of injury resulting therefrom. He has no right to assume that the conductor or brakeman of the train will perform the duties of caretakers of his stock, and hence cannot recover for losses suffered through their failure to do so: *Heller v. Chicago etc. Ry. Co.*, 109 Mich. 53, 63 Am. St. Rep. 541, 66 N. W. 667. Shippers who have a contract for a certain freight rate on their cattle are not precluded from recovering damages for injuries to the cattle received while retained by the carrier pending the adjustment of the question whether the carrier could demand a higher rate: *Gulf etc. Ry. Co. v. Leatherwood*, 29 Tex. Civ. App. 507, 69 S. W. 119.

b. **Acts Relative to the Transportation Facilities.**—A shipper of livestock is not required to inspect cars furnished him in order to ascertain whether they are properly equipped: *Chicago etc. R. Co. v. Morris*, 16 Wyo. 308, 93 Pac. 664. It is the duty of a common carrier to provide suitable and safe machinery and appliances for the prosecution of its business, and a shipper who uses such appliances with reasonable care is not precluded from recovering damages from its defective condition even though he knew of such defects: *White v. Cincinnati etc. Ry. Co.*, 89 Ky. 478, 12 S. W. 936, 7 L. R. A. 44. In the case last cited the court said: "If one have notice of a defect in a highway making it dangerous for travel, this does not per se make a careful and usual use of it by him negligence. We do not, of course, mean to hold that one may, by recklessly rushing into danger, or by his own culpable negligence in use of the appliances provided by the railroad company, directly produce the injury, and then hold the company liable; but as he must of necessity use them, or forego travel, or the transportation of his property, he should not be remediless, although he may know of their defective condition, if he is injured when using them for their purposes in a prudent and the usual manner. Any other rule would leave the public at the mercy of the railroad companies. They, knowing the traveler or shipper, in this day of wonderful advance and improvement, is compelled to use their roads, or forego travel or the shipment of his property, could by their agents inform him of the defective condition of their appliances for travel, and then be exempt from liability for his injury by reason thereof, although still inviting him to use them, and although he has been injured when doing so in a prudent and the usual

manner. Public safety, and the proper management of this now almost universal mode of travel and shipment, forbid the adoption of a different rule from the one we have indicated."

The liability of the carrier for not furnishing a safe and suitable car is not excused by the fact that the shipper examined the car and did not object to its fitness: *Gulf etc. Ry. Co. v. Cunningham* (Tex. Civ. App.), 113 S. W. 767. Nor is it excused by the fact that the shipper by contract agreed that the cars furnished him are suitable and sufficient, since such an agreement would release the carrier from the consequences of its own negligence in furnishing an unsafe vehicle: *Louisville & N. R. R. Co. v. Dies*, 91 Tenn. 177, 30 Am. St. Rep. 871, 18 S. W. 266. But if the defect in a car merely relates to its commodiousness and the possible effect of larger and better accommodations upon the particular animal to be carried, and the carrier informs the shipper that a more commodious car will be furnished if the shipper is willing to pay a higher rate of freight, which rate is not unreasonable, and the shipper decides to take the cheaper car and attempt to guard against the want of room himself, it is for the jury to determine from the facts whether the shipper assumed the risks incident to the defects mentioned and whether a suitable car was furnished: *Coupland v. Housatonic R. Co.*, 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 134.

A shipper is not guilty of contributory negligence in placing his stock in pens furnished by the carrier prior to the loading for transportation unless they are so obviously unsafe as to indicate that injury must inevitably result from such a use: *Lackland v. Chicago etc. Ry. Co.*, 101 Mo. App. 420, 74 S. W. 505. Thus where the gate to a receiving pen was so sagged that it could not be fastened without raising it, and the shipper's agents left the cattle in the pen without notifying the carrier of the condition of the gate and without attempting to fasten it, the shipper cannot recover for the loss of such of his cattle as escaped by pushing the gate over: *St. Louis etc. Ry. Co. v. Law*, 68 Ark. 218, 57 S. W. 258. So, also, where a shipper used a defective cattle-chute in the night-time and without notifying the carrier that he was going to use it, he cannot recover for injuries to an animal which fell through the chute: *Caudee v. New York etc. R. Co.*, 73 Conn. 667, 49 Atl. 17. The failure of a shipper to tear off placards on cars reciting "Southern cattle," which notice indicated to cattlemen that the placarded cars were infected with Texas fever, which was a contagious cattle disease, is not such contributory negligence as will prevent the shipper from recovering damages for erroneously placarding the cars when the shipper would have been liable for a penalty for violating a government regulation had he removed the placards: *Wabash R. Co. v. Campbell*, 219 Ill. 312, 76 N. E. 346, 3 L. R. A., N. S., 1092.

c. Acts Relative to the Mode of Transportation or Delivery.—A shipper assumes the risk of injuries due to the ordinary jars and concussions from the starting and stopping of the train: *Heller v. Chicago etc. Ry. Co.*, 109 Mich. 53, 63 Am. St. Rep. 541, 66 N. W. 667.

Where the shipper was present when cars were bedded by the carrier's agents and expressed his satisfaction with the manner in which it was done, he cannot recover for injuries resulting from an insufficient bedding: *Texas etc. R. Co. v. O'Laughlin* (Tex. Civ. App.), 72 S. W. 610. And where the injury to a horse resulted from the manner in which it was tied in a stall in a box-car and the shipper directed the manner in which the horse was tied, the shipper cannot recover: *Ames v. Fargo*, 114 App. Div. 666, 99 N. Y. Supp. 994.

A carrier is not negligent in receiving an overpacked crate of fowls for shipment, since the shipper is chargeable with his own negligence in overpacking the crates: *Cohn v. Platt*, 48 Misc. Rep. 378, 95 N. Y. Supp. 535. And where an experienced shipper of live-stock places too many animals in the car for transportation, he cannot recover from the carrier for losses occasioned by such overcrowding: *Ficklin v. Wabash R. Co.*, 115 Mo. App. 633, 92 S. W. 347; *Missouri etc. Ry. Co. v. Belcher* (Tex. Civ.), 41 S. W. 706; *Texas etc. Ry. Co. v. Edins*, 36 Tex. Civ. 639, 83 S. W. 253. Where the shipper of a crate of Japanese house dogs trained to retain their urine while confined presents them crated for shipment on a certain train but the carrier ships them on an earlier train, and finding no one to receive them returns them to the place of shipment, whereupon the shipper orders them reshipped without attending to the dogs, he cannot recover for the loss of one of the dogs occasioned by its retaining its urine too long by reason of its training in that respect: *Harrison v. Weir*, 71 App. Div. 248, 75 N. Y. Supp. 909. The fact that a shipper has failed to notify the carrier to stop the train to feed and water the stock is not necessarily fatal to his right to recover for resulting damages: *Southern Pac. Co. v. Arnett*, 126 Fed. 75, 61 C. C. A. 131. And the refusal of a shipper to accompany the stock in compliance with his contract of shipment requiring someone to accompany the stock to care for them does not excuse the carrier from properly caring for the stock, where it knows that the shipper is not doing so: *Louisville etc. R. Co. v. Smitha*, 145 Ala. 686, 40 South. 117; *Spalding v. Chicago etc. R. Co.*, 101 Mo. App. 225, 73 S. W. 274; *Chicago etc. Ry. Co. v. Slattery*, 76 Neb. 721, 124 Am. St. Rep. 825, 107 N. W. 1045. A provision in a contract for the carrying of live-stock that the shipper will unload and load the stock at his own expense and risk at any place where the same may be unloaded for any purpose does not relieve the carrier from the duty of unloading after twenty-eight consecutive hours of confinement for resting, food and water, where the carrier does not give the shipper an opportunity to unload his cattle for such purposes: *Reynolds v. Great Northern Ry. Co.*, 40 Wash. 163, 111 Am. St. Rep. 883, 82 Pac. 161. But such contracts casting upon the shipper the obligation to feed and water en route are valid, and in *Lewis v. Pennsylvania R. Co.*, 70 N. J. L. 132, 56 Atl. 128 (affirmed in 71 N. J. L. 339, 59 Atl. 1117), the court, in referring to the effect of such a contract, said: "Where such a contract is made the carrier cannot be held for its failure to feed and water the cattle: *Georgia R. R. Co. v. Reid*, 91 Ga. 377, 17 S. E. 934;

Terre Haute & L. R. Co. v. Sherwood, 132 Ind. 129, 32 Am. St. Rep. 239, 31 N. E. 781, 17 L. R. A. 339; *Faust v. Chicago etc. R. R. Co.*, 104 Iowa, 241, 65 Am. St. Rep. 454, 73 N. W. 623; *Union Pacific R. Co. v. Langan*, 52 Neb. 105, 71 N. W. 979; *Ft. Worth etc. R. Co. v. Daggett*, 87 Tex. 322, 28 S. W. 525. The plaintiff cannot recover where there is such a contract for a failure to feed and water for the reason that the carrier owes him no duty to feed and water. The duty is by contract cast upon the shipper. To hold otherwise would make it possible for the shipper to recover damages caused by his own breach of contract, and those damages would then be recoverable in turn by the carrier in a suit upon the contract."

If a shipper loads his stock in the wrong car without inquiry as to which car was at his disposal, he assumes the risk: *Weisinger v. Southern Ry. Co.*, 33 Ky. Law Rep. 1038, 112 S. W. 660. But it is not contributory negligence for the shipper to place his stock in the carrier's pens to await the arrival of the cars upon which they are to be loaded where he is informed by the agent of the carrier that they are expected soon: *Missouri etc. Ry. Co. v. Kyser* (Tex. Civ. App.), 95 S. W. 747. A shipper cannot complain that a certain route was used to transport his stock where he was informed before the stock was loaded that there could be no transportation to the point of destination over any other route than the one selected by the carrier: *Houston etc. R. Co. v. Buchanan*, 42 Tex. Civ. App. 620, 44 S. W. 199. The shipper cannot recover for the expense of feeding his hogs while awaiting the arrival of cars where he had been informed by the carrier's agent that it was uncertain when cars for shipment could be furnished him: *Illinois Cent. R. Co. v. Holt*, 29 Ky. Law Rep. 135, 92 S. W. 540.

The failure of a shipper to accompany his shipment of hogs and unload them on arrival at their destination, as provided in the shipping contract, is no defense to the liability of the carrier for a misdelivery: *Southern Ry. Co. v. Webb*, 143 Ala. 304, 111 Am. St. Rep. 45, 39 South. 262. Where stock arrives at its destination on a dark and stormy night at a place where there are no conveniences for unloading, the shipper is not guilty of contributory negligence in waiting until morning before erecting temporary platforms to unload the stock: *Burns v. Chicago etc. Ry. Co.*, 104 Wis. 646, 80 N. W. 927.

SWARTSWOOD'S GUARDIAN v. LOUISVILLE AND
NASHVILLE RAILROAD COMPANY.

[129 Ky. 247, 111 S. W. 305.]

RAILROADS—Duty Toward Infant Trespassers.—Railroad companies whose lines traverse cities and other populous communities are not required to maintain a lookout for children in the habit of jumping on and off the cars while in motion, nor to provide against injuries to them. (pp. 465, 468.)

RAILROADS—Duty Toward Trespassing Children.—If the operators of a train know of the actual presence of children jumping on and off the moving cars, they are required to not injure them if with the means at their command they can avoid it. (p. 466.)

NEGLIGENCE.—Without Legal Duty There cannot be actionable negligence. (p. 466.)

RAILROADS—Trespassers on Its Cars.—All Who Venture Unbidden by a railroad company, and unknown to it, upon its trains do so at their own peril, since they can have no right and the company therefore owes them no duty. This rule applies without regard to the age or condition of the trespasser. (p. 468.)

NEGLIGENCE—Premises Attractive to Children.—The fact that a railroad company has placed a pile of sand, attractive to children, in a lot adjacent to its road does not render it liable to a child who is attracted to the sand, and thereafter leaves it to board a moving car, in which last act he is injured. (p. 468.)

B. F. Graziana, for the appellant.

Benjamin D. Warfield, John Galvin, S. D. Rouse and Maurice L. Galvin, for the appellee.

250 O'REAR, C. J. The question for decision in this case is whether railroad companies whose lines traverse cities and towns, or other populous communities, must maintain a lookout for children who are in the habit of jumping on and off the cars while in motion, although the railroad people did not know the particular child who might be injured by such practice was in fact upon its cars, and to provide against such injuries.

The petition in this case, which was held bad on demurrer, alleged that the infant plaintiff, aged eight years, was attracted to appellee's trains in the city of Covington by other children jumping on and off the cars while in motion, stealing rides, and that the defendants were aware of the practices of such children at that point; that a watchman of the appellees, whose duty it was to lower and raise a near-by gate across a street railroad intersection, also knew of the practice of the children, but on the occasion of the plaintiff's injury took no precaution to learn whether he was on the train or

not; that plaintiff, following the practice of the other children, and in attempting to jump on one of the moving cars, slipped and fell beneath it, thereby having a foot cut off. It is not charged that the defendants knew that plaintiff was attempting to make his perilous try at the time he did it, or that defendants neglected to use any precaution to save him from injury after discovering his peril. So the question comes down to the point stated in the beginning of this opinion. It is a fact of which we all know that railroads traverse streets and lots in our cities on their grade; that there is little or no ²⁵¹ protection against trespassing upon the railroad tracks; that children and others do so in spite of the well-known dangers of the practice. The legislature has not taken action to require the railroad companies or the cities to maintain barriers against such trespassers. The habit of such trespassing, including, perhaps, the childish tendency and practice of clambering onto the moving cars to get a short free ride, is well known also to everybody, including, of course, the railroad people. If the operators of the train know of the actual presence of such trespassers, for such they are, they are required by the humaneness of the law to not injure them if with the means at their command they can avoid doing so. Nor will the inconvenience and annoyance entailed be counted. The courts have never gone further than that. The legislature may, but it has not. Any other rule, particularly the one contended for by appellant, would require practically that such railroads should police all their lines and vehicles in such cities and towns in anticipation of the dangers to thoughtless and heedless persons. Because of their inexperience and childish instincts, infants of tender years are not always held to the same strict accountability as adults in such matters. The latter are charged with their own negligence in willfully going into such perilous places without right to do so; but, even if they were not negligent, as for example if they were insane, the rule would not be different. So the rule is not based entirely upon the negligence or even wrong of the so-called trespasser. Rather the reason a recovery is denied is because the railroad company has not been legally negligent of any duty it owed to such person. Without legal duty there cannot be actionable negligence. The duty is not owing because, as such person ²⁵² had not the right to be at the place, his presence need not be expected, and need not therefore be provided against. It is true it is known that such trespasses are probable; but they are sporadic. The railroads are required to serve the

public by running their trains over their tracks. They are held to a rather strict accountability in many matters connected therewith. To require this additional duty would be to put railroad operations beneath the rights of trespassers upon the railway tracks. It would be hard, if not impracticable, to draw a line between willful trespassers and those of other degrees, or between those who trespass in towns and those who trespass in the country. Both quarters are alike subject to the practice, though with varying frequency. Hence no distinction is recognized as existing with respect to such.

The courts have gone as far as seems allowable within the principles of the common law, in applying the doctrine of liability to technical trespassers; where, for example, the public uses a railroad as a street or passway for such time and with such frequency as to show with reasonable certainty that they are present at all times, the railroad company by its acquiescence seemingly assenting to and inviting such use, the traveler is not deemed a trespasser, or, if he is, the company is charged with notice of the fact of his presence. It may be thought harsh and arbitrary to draw a line between such and children who are allowed to habitually trespass on the moving cars. But the line must of necessity be drawn somewhere. And, where the gradation becomes shadowy and indistinct, it may appear that the line is drawn arbitrarily. But it is not so in this instance. A very practical differentiation exists logically. The public—which, of course, includes everybody—may ²⁵³ obtain an easement in land by prescription. The particular land thereby is dedicated to the public use. As railroads do run upon streets of cities, it is not inconsistent that streets may be opened up along the railroad track. If the railroad, in fact, so dedicates its track in a city or allows it to be so used for such a length of time as that the public right attaches as if there had been such dedication, then the public are there as a matter of right; or, at least, the railroad, because of its acquiescence and seeming invitation, will not be heard to deny it. Its duty in that event is to maintain a lookout for such persons, knowing they are probably present; and to take precautions against injuring them. But this rule of presumptive dedication does not apply as to sparsely settled sections, or where the use is comparatively infrequent, and without semblance of an assertion of a public right. These rules obtain without any respect to the ages or mental conditions of those using such ways. Now, as to the cars, there is no such thing as the public's acquiring

a right to use them by prescription. There is no precedent for such claim, and no principle in law analogous to it. All who venture unbidden by the company and unknown to it upon its trains do so at their own peril, as they can have no right, and the company therefore owes them no duty, in such case. This rule also applies from the very necessity of the matter, without respect to the age or condition of the trespasser, for the court must deal with the question first of legal duty, not compassionate innocence.

Counsel for appellant cites and relies upon *Louisville & Nashville R. R. Co. v. Popp*, 96 Ky. 99, 16 Ky. Law Rep. 369, 27 S. W. 992; *Bransom's Admr. v. Labrot*, 81 Ky. 638, 5 Ky. Law Rep. 827, 50 Am. Rep. 193, and a line of cases known as the ²⁵⁴ "turntable cases." In *Louisville & N. R. R. Co. v. Popp*, 96 Ky. 99, 16 Ky. Law Rep. 369, 27 S. W. 992, the injured child was known to be on the car by the trainmen when they bumped other cars against it so violently and negligently as to throw the plaintiff off and hurt him. The principle on which the recovery was allowed in that case is one firmly fixed, namely, the known presence of a trespasser imposes the duty on the trainmen to use care not to injure him. They have the right to eject him because he is a trespasser, but not to kill or maim him. *Bransom's Admr. v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193, 5 Ky. Law Rep. 827, rests on the same principle as the turntable cases, namely, the negligent leaving upon one's lands unguarded dangerous contrivances attractive to children, whereby they are lured onto the real property of the negligent owner and sustain injury. But that principle has not a place here. The cars were not left in unguarded lots, but were being used in the only way the conditions permitted them to be used at the time and place.

So far we have discussed this case omitting to mention another allegation of the petition which appellant seems to place some stress upon supporting a right to recover in this action; that is, it is alleged that on an open lot owned by defendants adjacent to their track where the injury occurred defendants had placed a pile of sand and left it unguarded, which was attractive to children, and did attract them and the plaintiff to that point to play; that whilst they were there the train came along, when plaintiff left the sand pile, and attempted to board the cars. The allegation as to the sand is wholly redundant. The sand had no connection with the injury, and was not a proximate cause of it. If the plaintiff had been injured by the sand, or by rolling or slipping from

it under the train, ²⁵⁵ and thereby got hurt, a different question would be presented. But such was not the fact.

We are of the opinion that the ruling on the demurrer was without error; and the judgment must be affirmed.

Children Going upon Railway Cars or Trains for purposes of their own, without invitation, are trespassers: *Jordan v. Grand Rapids etc. Ry. Co.*, 162 Ind. 464, 102 Am. St. Rep. 217; *Pollack v. Pennsylvania R. R. Co.*, 210 Pa. 631, 105 Am. St. Rep. 843; *Bjornquist v. Boston etc. R. R. Co.*, 185 Mass. 130, 102 Am. St. Rep. 332. But a railroad company owes the duty of ordinary care to any person of any age who enters upon one of its trains as a trespasser. This is especially true of children of tender years: *Enright v. Pittsburg Junction R. R. Co.*, 198 Pa. 166, 82 Am. St. Rep. 795.

A Slowly Moving Freight Train is not a dangerous machine, alluring to boys, so as to impose upon a railway corporation the duty of watching to see that no boy in stealing, or attempting to steal, a ride thereon is injured. To a boy who thus rides, or attempts to ride, the company owes no duty save not to injure him wantonly: *Catlett v. Railway Co.*, 57 Ark. 461, 38 Am. St. Rep. 254. See, also, *Western Ry. of Alabama v. Mutch*, 97 Ala. 194, 38 Am. St. Rep. 179; *Oregon Ry. & Nav. Co. v. Egley*, 2 Wash. 409, 26 Am. St. Rep. 860.

MAYFIELD WATER AND LIGHT COMPANY v. WEBB'S ADMINISTRATOR.

[129 Ky. 395, 111 S. W. 712.]

NEGLIGENCE—Structures Dangerous to Children.—The tendency of recent cases is to restrict rather than enlarge the principle of the turntable cases, and to hold the defendant not liable unless he knows, or in the exercise of ordinary care ought to know, that his structure is alluring to children and endangers them. (p. 472.)

ELECTRIC COMPANIES—Liability to Trespassing Children.—Where an electric light company stretches wires eighteen feet above the ground, and a telephone company attaches to one of its poles near by two guy wires, which pass within eight inches of the electric light wires and run to the ground at an angle of forty-five degrees, being four feet apart at the ground and coming together at the top of the pole, neither company is liable to a child who in playing runs up the guy wires and is killed by coming in contact with the electric wires. (pp. 470, 472.)

NEGLIGENCE—Liability to Trespassing Children.—Children, no less than adults, when they trespass upon the property of another, take the risk, unless he there maintains a dangerous instrumentality with the knowledge, actual or constructive, that it is alluring to children and endangers them. (p. 472.)

Robbins & Thomas, for the appellant water and light company.

W. B. Stanfield, for the telephone company.

W. J. Webb and Weakes & Weakes, for the appellee.

³⁹⁷ HOBSON, J. The Mayfield Water and Light Company maintains a system of electric lights in Mayfield. It erected along College Cross street a line of poles eighteen feet high ³⁹⁸ and at the top of the poles on a cross-arm it placed two electric wires twenty inches apart and eighteen feet from the ground. After this had been done, the Home Telephone Company put up a line of poles along the street thirty feet high, and on these poles it placed wire cables containing its telephone wires. At the intersection of Sixth street, the telephone poles turned in Sixth street, and to keep its pole straight at this point it attached two guy wires to the top of the pole and ran them out to a deadman, or log, buried in the ground; the guy wires running down from the top of the pole at an angle of about forty-five degrees, being about four feet apart at the ground and coming together at the top of the pole. The guy wires passed in about eight inches of the electric wire. The children of the neighborhood would hold on to the upper guy wire with their hands and walk on the lower wire, and then slide down, using the wires to play upon. Charles M. Webb, a little boy eleven years old, was playing upon the wires in this way, when his head touched the electric wire, thus completing the circuit, and he was instantly killed. This suit was brought against both the electric light company and the telephone company to recover for his death. A recovery was had in the circuit court for one thousand dollars, and the defendants appeal.

There was proof on the trial that the insulation on the electric light wire was defective, and there was also proof that, whatever the condition of the insulation might have been, the result would have been the same when the little boy's head touched it while he was standing on the other wire which ran into the ground; the proof being that the insulation will not protect from injury when such a high current of electricity is carried as was used on this wire. The ground upon which the recovery is rested is that in ³⁹⁹ the construction of the wires they were made attractive and inviting to children, and that the defendants were guilty of negligence in so maintaining the wires and permitting them to remain in this dangerous and unprotected condition. This court has in a number of cases held electric light companies responsible where it permitted live wires to hang in the street. Thus, in *City of Owensboro v. York's Admr.*, 117 Ky. 294, 25 Ky. Law Rep. 1397, 77 S. W. 1130, a little boy twelve years old discovered that a wire was hot, and, being dared by one of his companions to touch it, got on a board, took it in his hands,

and was killed. A judgment for the plaintiff was sustained. To same effect, see *Macon v. Paducah Street Ry. Co.*, 110 Ky. 680, 23 Ky. Law Rep. 46, 62 S. W. 496; *Lexington R. R. Co. v. Fain's Admr.*, 24 Ky. Law Rep. 1443, 71 S. W. 623; *Thomas v. City of Somerset*, 30 Ky. Law Rep. 131, 97 S. W. 420, 7 L. R. A., N. S., 963; *Maysville Gas Co. v. Thomas' Admr.*, 21 Ky. Law Rep. 1690, 56 S. W. 153, 53 L. R. A. 147, 25 Ky. Law Rep. 403, 75 S. W. 1129. But in all of these cases the wire was in the street. Here the wire was eighteen feet above the street. It could only be reached by a person climbing the electric light pole or walking up the guy wire of the telephone company. In all the cases where a liability has been imposed for what is known as an attractive nuisance to children, the nuisance has been placed within their reach. We know of no case where this has been applied to things put eighteen feet above the ground, which may only be reached by climbing a pole or walking up a wire. Such structures are not an invitation to children to use them. A child may climb a dead tree, and thus get hurt; but the owner of the tree cannot be said to maintain an attractive nuisance, because he keeps a rotten tree on his land. To climb this pole ⁴⁰⁰ or walk this wire was as difficult as to climb a tree, and no reason would exist for holding one an attractive nuisance more than the other, for, if the limbs of the tree were brittle or rotten, there would be great danger in climbing out on them. In *Simonton v. Citizens' Electric Light Co.*, 28 Tex. Civ. App. 374, 67 S. W. 530, the defendant had placed spikes in its poles for the use of its men in ascending and descending them. Children in the neighborhood got to using the pole in the same way. One of them went up on the pole and lost his balance and fell to the ground. It was held that the company was not liable. The spikes on the side of the pole would offer a much greater inducement to a child to climb the pole than the guy wire offered in the case before us. In *Johnson v. Paducah Laundry Co.*, 122 Ky. 369, 29 Ky. Law Rep. 59, 92 S. W. 330, 5 L. R. A., N. S., 733, the defendant had upon its open lot an open vat of hot water. The plaintiff, walking upon the lot in the night for a purpose of his own and without right, fell into the vat of hot water and was burned. It was held that he could not recover. In *Schauf's Admr. v. City of Paducah*, 106 Ky. 228, 20 Ky. Law Rep. 1796, 90 Am. St. Rep. 220, 50 S. W. 42, a little boy wading out into an open pond on the property of the city to catch a bird got over his depth and was drowned. It was held that there could be no recovery. Other authorities are collected in these opinions.

The tendency of the more recent cases is to restrict, rather than enlarge, the application of the principle laid down in what are called the "turntable cases," and to hold that the defendant is not liable unless he knows, or ought in the exercise of ordinary care to know, that his structure is alluring to children and endangers them: See note to *Barnes v. Shreveport R. R. Co.*, 49 Am. ⁴⁰¹ St. Rep. 416-426. In *Harris v. Cowles*, 38 Wash. 331, 107 Am. St. Rep. 847, 80 Pac. 537, a child was injured by a revolving door at the entrance to a building, the door being similar to those in common use in winter to keep out the cold. It was held that the trespasser, though a child of tender years, could not recover, on the ground that to extend the rule would be to impose a burden upon the property owners that would be unreasonable. The same principle was applied in *Fitzmaurice v. Connecticut R. R. Co.*, 78 Conn. 406, 112 Am. St. Rep. 159, 62 Atl. 620, 3 L. R. A., N. S., 149, where a child was burned at a pile of hot ashes left upon the defendant's premises, and in *Foster-Herbert v. Cut Stone Co.*, 115 Tenn. 688, 112 Am. St. Rep. 881, 91 S. W. 199, 4 L. R. A., N. S., 804, where a child climbed into a low wagon and was there hurt.

As long as electric light wires are not put underground, they must be put upon poles, and where they are placed above the street as high as eighteen feet, the company should not be required to anticipate that children will climb up to the wires and get hurt. Guy wires are necessary on high poles at street corners where the line turns. A guy wire placed on a high pole to keep it in place, or some such contrivance, cannot well be dispensed with. Such a wire is not a dangerous instrumentality, attractive or alluring to children within the meaning of the turntable cases. The little boy was a trespasser upon the defendant's wire, and, being a trespasser, he cannot complain that the premises were unsafe. Children, no less than adults, when they trespass upon the property of another, take the risk unless the circumstances bring the case within the principle of what is known as the turntable cases, where a dangerous instrumentality is maintained with the knowledge, actual or constructive, ⁴⁰² that it is alluring to children and endangers them. A wire eighteen feet above the ground, which can only be reached as this wire was, cannot be said to fall within the exception to the general rule.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

The Duties and Liabilities of Electric Companies in the management of their wires is the subject of a note to Hebert v. Lake Charles Ice Co., 100 Am. St. Rep. 515. Electricity being an exceedingly dangerous agency, those dealing with it are held to a high degree of care commensurate with the danger: Gilbert v. Duluth General Electric Co., 93 Minn. 99, 106 Am. St. Rep. 430; Barto v. Iowa Telephone Co., 126 Iowa, 241, 106 Am. St. Rep. 347; Eaton v. City of Weiser, 12 Idaho, 544, 118 Am. St. Rep. 225. As to the application of this rule to guy and intersecting wires, see Wilbert v. Sheboygan Light etc. Ry. Co., 129 Wis. 1, 116 Am. St. Rep. 931; Mize v. Rocky Mountain Bell Tel. Co., 38 Mont. 521, 129 Am. St. Rep. 659.

The Duty and Liability of a Property Owner Toward Trespassers on the premises are discussed in the recent cases of Hobbs v. Blanchard & Sons Co., 74 N. H. 116, 124 Am. St. Rep. 944; Weitzmann v. Barber Asphalt Co., 190 N. Y. 452, 123 Am. St. Rep. 560; Wheeling etc. R. R. Co. v. Harvey, 77 Ohio St. 235, 122 Am. St. Rep. 503; and his duty and liability toward trespassing children are considered in Henderson v. Continental Refining Co., 219 Pa. 384, 123 Am. St. Rep. 668; Wheeling etc. R. R. Co. v. Harvey, 77 Ohio St. 235, 122 Am. St. Rep. 503; Thompson v. Baltimore etc. R. R. Co., 218 Pa. 444, 120 Am. St. Rep. 897; Walker v. Potomac etc. R. R. Co., 105 Va. 226, 115 Am. St. Rep. 871; Mattson v. Minnesota etc. R. R. Co., 95 Minn. 477, 111 Am. St. Rep. 483; Harris v. Cowles, 38 Wash. 331, 107 Am. St. Rep. 847; Denison etc. Ry. Co. v. Carter, 98 Tex. 196, 107 Am. St. Rep. 626.

Negligence in Dealing with Children is the subject of a note to Barnes v. Shreveport City R. R. Co., 49 Am. St. Rep. 406.

GOULD CONSTRUCTION COMPANY v. CHILDERS' ADMINISTRATOR.

[129 Ky. 536, 112 S. W. 622.]

VICE-PRINCIPAL—Temporary Foreman.—Where a Foreman puts another person in his place for a short time during his absence, such person is, for the time being, a vice-principal, for whose negligence in giving orders and signals in the execution of the work the master is liable to the other employés. (p. 475.)

DEATH—Measure of Damages.—A Verdict of Four Thousand Dollars is reasonable for the death of a healthy man twenty-four years of age. (p. 476.)

J. N. Sharp, for the appellant.

Robert Harding, C. C. Williams and Green & Vanwinkle, for the appellee.

538 HOBSON, J. The Gould Construction Company was engaged in constructing a double-track railroad bridge across Rockcastle river. The tracks were some eight or ten feet apart, and the ends of the cross-ties were so far apart as to leave an opening of about three feet between them. Through this opening the construction company was drawing up logs from below,

and placing them on trucks, which were loaded on one of the railroad tracks. The logs were about twelve feet long and twelve inches in diameter. To get them up a rope attached to a ⁵³⁹ derrick was let down and fastened to one log at a time, and this was then raised through the opening by machinery to a point above the bridge, and then lowered to the truck placed to receive it. One man was stationed at the engine and controlled it. Another was stationed at a pulley and guided the rope. Men under the bridge tied the rope to the log, and when it was ready, the foreman, standing on the bridge, gave the signal to the engineer, who hoisted it up; and when it had reached the proper height he gave him the stop signal. In order to get the log placed on the truck properly, one man was placed at each end of the truck, and it was the duty of these two men, when the log had been raised to the proper height and was lowered, to take hold of the ends of the log and guide it to its proper position on the truck. The regular position of these two men was at the ends of the truck. The ties on which the truck rested extended out about six inches beyond the side of the truck. Childers and one James Neil were the men at the truck. The foreman had gone to the express office, and had put in his place a man named McEwan while he was gone. When the log was brought up the small end of the log was toward Childers, and, as the large end was the heavier, it hung lower down than the small end. The log, being tied in the middle by the rope, would not always swing parallel with the track, and the small end of this log swung out to the side, next to the opening between the two tracks. To pull it back to its position, Childers stepped to the side of the truck, and, standing there, was pushing the log back to its position, when McEwan suddenly gave the signal to the engineer to let the log drop. The engineer obeyed the signal. The log dropped to the truck through a space of about four ⁵⁴⁰ feet. The large end striking first, the smaller end was thrown around against Childers, striking him on the point of the chin and knocking him from the bridge. He fell to the river below, a distance of about sixty feet, and when rescued was dead. This suit was brought by his administrator to recover for his death, on the ground that there was negligence on the part of McEwan in giving the engineer the drop signal at the time he did, and that this was the cause of Childers' death. The answer controverted the allegations of the petition, and on a trial the jury found for the plaintiff, assessing the damages at four thousand dollars. The defendant appeals.

The first question to be considered on the appeal is whether the court should have instructed the jury peremptorily to find for the defendant. It is insisted that this should have been done for two reasons: First, because McEwan was a fellow-servant of Childers; second, because Childers would not have been hurt if he had remained at the end of the truck, and it was negligence of him to go to the side of the truck. It is also insisted that, if there was any evidence to take the case to the jury, the verdict is palpably against the evidence, and should be set aside.

1. If the foreman had not gone to the express office, and had remained on the bridge continuing to give signals as before, it would hardly be maintained that the company would not be responsible for his negligence. That there was negligence on the part of McEwan is manifest. The custom was to lower the log gradually until it reached the truck. Anyone would know that as large an object as this, if dropped through a space of four feet suddenly, was liable to hurt the man at the truck, whose duty it was to guide it into position and load the truck. Instead of giving ⁵⁴¹ the drop signal, when McEwan saw the man take hold of the log to push it over to its proper place, he should have given the engineer the signal to let it down slowly; and if this had been done, Childers would not have been hurt. The drop signal should not have been given until the log had reached the truck and been placed in its proper position. McEwan could see the log. He could see the men at the truck. He could not but know that Childers was at the side of the truck, and that the dropping of the log at the time it was dropped would imperil him. We do not think it is material that McEwan was not the regular boss. He was there at the time in the place of the boss. The gang of men had not been left without any head. McEwan for the time stood in the place of the boss, and the men were under the same obligation to obey his orders as the orders of the boss. He was not at the time a fellow-laborer. The other men could not control him, or exercise any supervision over him. His signals were his orders, and it was their duty to obey these orders. In giving these orders he represented the master, and they were not his equals, but his inferiors, for the time being. The case of *Dana v. Blackburn*, 121 Ky. 706, 28 Ky. Law Rep. 695, 90 S. W. 237, is not in point. There it was held that the engineer was a fellow-servant of the men who loaded the coal at a coal elevator, and that one of the loaders was a fellow-servant of the other loader. The same rule was in effect applied in *Cooper's Admr. v. Osear Daniels Co.*, 29 Ky. Law Rep. 1172, 96 S. W. 1100. There it was also held that

the engineer in charge of the engine employed in lifting the girders in a building was a fellow-servant of the other men employed in handling the girders. But this case does not turn on the negligence of the engineer. The engineer here ⁵⁴² simply obeyed the signal that was given him. The negligence was in the giving of the signals, and these signals were given by the man who was directing the work, and who for the time being was the foreman.

2. Everyone knows that a log one foot thick and twelve feet long, tied in the center with a rope, when drawn up will not always stay in one position, and that when it got above the truck it might be at right angles to the track, or parallel with it, or in any position between the two, so that it must necessarily be that the men who had to handle the log would have to leave the ends of the truck at times and push the log at the side back to its position. The testimony for the plaintiff clearly shows that such was the case when Childers went to the side of the truck. He could not reach the log from the end of the truck, and he went to the side, because that was the only practicable way of getting it into position. He was not, therefore, guilty of contributory negligence in taking this position. He was not required to anticipate that the log would be dropped before it reached the truck, or to anticipate, if it was dropped, which way it would jump when it rebounded on the truck. In cases of this sort the question of contributory negligence is ordinarily for the jury, and in this case there was no error in submitting the question of contributory negligence to the jury.

The weight of the evidence sustains the verdict of the jury. There was conflict in the testimony on several questions; but we think the facts as we have stated them are shown by the weight of the evidence. The instructions of the court submitted to the jury substantially the material questions in the case. There was no showing made which would warrant the court in continuing the case for the defendant after ⁵⁴³ the plaintiff's proof was introduced on the trial. The decedent was a healthy young man twenty-four years of age. The verdict for four thousand dollars is a reasonable one, and on the whole record we see no reason for disturbing it.

Judgment affirmed.

A Fellow-servant may Temporarily be Elevated to the rank of vice-principal: Sroufe v. Moran Bros. Co., 28 Wash. 381, 92 Am. St. Rep. 847. But it has been said that he cannot, without his master's knowledge, by an assumption of authority, convert himself into a vice-principal: Hilton & Dodge Lumber Co. v. Ingram, 119 Ga. 652, 100 Am. St. Rep. 204.

CITY OF OWENSBORO v. SWEENEY.

[129 Ky. 607, 111 S. W. 364.]

SPECIAL ASSESSMENTS.—A Municipality may Lay a Tax upon Abutting Land for purposes of local improvement, and assess it according to the frontage of the property without regard to its value. (p. 478.)

LOCAL ASSESSMENTS.—Local Assessments are Based upon the Ground that the property subjected thereto is benefited by the improvement for which the assessment is made; they rest upon the theory that they may be imposed as an equivalent for benefits conferred that are not enjoyed by the general public. The right to impose them is not derived from the police power. (p. 481.)

LOCAL ASSESSMENTS.—Special Taxes cannot be Levied unless the property charged receives a corresponding physical, material, and substantial benefit from the exaction. (p. 482.)

LOCAL ASSESSMENTS.—Imposition for Street Sprinkling.—The legislature cannot authorize a city to impose a frontage tax to defray the cost of sprinkling the streets upon which the property abuts, since sprinkling streets does not confer a special benefit upon the adjacent property in the sense of contributing to its value. (p. 482.)

George W. Jolly, for the appellant.

W. T. Ellis, C. M. Finn, Miller & Todd and C. S. Walker, for the appellee.

609 **CARROLL, J.** The only question we need consider in this case is: Has the General Assembly of the state the power to enact a law giving cities the right to adopt ordinances imposing upon property abutting upon the streets and public places of the city a tax based upon the frontage of the property for the purpose of defraying the cost of sprinkling the streets and public places upon which the property abuts?

It has been expressly ruled by this court in *Maydwell* ⁶¹⁰ v. Louisville, 116 Ky. 885, 105 Am. St. Rep. 245, 25 Ky. Law Rep. 1062, 76 S. W. 1091, 63 L. R. A. 655, that an ordinance enacted in pursuance of legislative authority levying an ad valorem tax upon property for the purpose of sprinkling the streets is not unconstitutional. The opinion was rested upon the ground that the sprinkling of streets contributes to the preservation of the public health, and hence the tax levied was for public purposes within the meaning of section 171 of the constitution, providing that "taxes shall be levied and collected for public purposes only." The reasoning of that opinion, and the conclusion therein reached, we adhere to; but there is, as we shall endeavor to show, a marked difference in principle between laying a distinct tax for this purpose upon all property of a city, or upon all of the property in a

taxing district if the city is divided into taxing districts, and levying a special tax upon real property according to its frontage. In the case before us, the tax is not levied upon property according to its value. The value of the property is not taken into consideration. Nor is the tax apportioned to correspond with the benefits received. A vacant lot, with a frontage of fifty feet, and worth only one hundred dollars, must pay the same amount of taxes as a highly improved lot, with the same frontage, but worth one hundred thousand dollars. There seems to be something radically wrong with a tax that is arbitrarily assessed without any reference to the value of the property or benefits conferred, and, although it is everywhere recognized that perfect equality in taxation is impossible of attainment, the fundamental theory upon which all property taxes are imposed is that the property shall contribute in proportion to its value, and thus bear as near as may be its equal share of the burden. And ⁶¹¹ this theory of equality and uniformity is firmly fixed in the tax laws of this state. In more than one section of the constitution it is clearly expressed that taxes shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale. But it is generally agreed that these principles, conceded to be sound, only apply to taxes collected for the purpose of defraying the expenses made necessary in the conduct of the governmental affairs of a city, and have no application to special taxes assessed for improvements, such as streets, sidewalks, gutters, and sewers. It is recognized by all the courts, including our own, that a municipality may lay a tax upon abutting land for purposes of local improvement, and the tax may be assessed according to the frontage of the property without regard to its value: *Gosnell v. City of Louisville*, 20 Ky. Law Rep. 519, 46 S. W. 722; *Dillon on Municipal Corporations*, sec. 752. This manner of assessment and taxation in many instances works a gross injustice upon the property owners, as under it a vacant lot practically worthless may be burdened with the same tax as an adjacent highly improved and valuable lot. But, as this method of taxation under legislative authority has now become too firmly established to even question its soundness, all that remains for the courts is to restrain the power within proper and reasonable limits, and this restrictive supervision is made necessary by the growing disposition of municipal bodies to extend it to embrace many subjects not contemplated in its origin.

The question of municipal taxation is one of the most important and intricate public questions of the ⁶¹² day. Municipal authorities, as a rule, are disposed to be liberal in the imposition of taxes, and do not seem disturbed by the ever-increasing burden of indebtedness that is accumulating upon the cities of the country. Fortunately, the constitution of this state has placed a check upon the extravagant expenditure of public moneys and has fixed a limit beyond which a general property tax for public purposes cannot go unless assented to by the voters at an election held for that purpose. But this valuable and salutary limitation would afford little protection if, under the guise of improving property, special taxes might be levied without let or hindrance, and without regard to the constitutional limitations which do not apply to this method of taxation. If the right to lay these special assessments can be extended to embrace any subject which the municipal authorities, with the aid of the legislature, deem it expedient to reach, it will soon come to pass that the wise safeguards of the constitution will afford slight security to the taxpayer. To evade them, it will only be necessary for the municipal authorities to place the burden upon abutting owners under the pretense that it is an improvement tax, and hence may be charged in addition to the property tax imposed. Under this plan or scheme, should it be held allowable, if the general property tax in a city has reached the limit, and no larger sum can be gathered from this source, the city council may, by charging some of the current expenses of the city to abutting owners, divert to other uses the amount theretofore expended for this purpose out of the property tax collected. To illustrate: if the cost of maintaining the police department of a city is ten thousand dollars, and this sum has been paid out of the revenue derived from a general property tax, and the legislature ⁶¹³ can give the city the right to charge this item of expense against the abutting property owners, upon the ground that it is conferring a special benefit upon them in the preservation of the peace, order and quiet of the city, then this ten thousand dollars may be applied to other purposes. And so, if the fire department cost annually twenty thousand dollars, and the city had appropriated this sum from the general revenue collected, it could, if so authorized, charge it against the property owners, and thus have this additional sum to use in other ways. And thus the matter might be extended, until the taxation, general and special, upon real property, would far exceed the constitutional limit, and the property owners

be helpless. If property can be charged under a special tax with the expense of sprinkling the streets upon the ground that it is an improvement beneficial to the property, we see no reason why it may not be charged with the cost of maintaining the fire department, the police department, and the water and lighting system of the city, as it is more important that the city should have police and fire protection and a supply of water and light, than that the streets should be sprinkled. Indeed, there is more force and propriety in the argument that abutting property would receive benefits from police, fire, water and light than it would from sprinkling.

But, in answer to all this, the argument is made that, in the absence of constitutional limitation, the legislature is supreme, and to its wisdom and discretion must be left the settlement of these questions. It is true there is no limitation in the constitution upon the power to levy improvement taxes, nor definition of what an "improvement tax" is; but it does not follow from this that the legislature is so absolutely ⁶¹⁴ supreme that its authority cannot be questioned. Arbitrary power exists nowhere in this republic. There is a line at which the power to tax and take for special assessments must stop. The only question is where to draw it, and, in the character of tax under consideration, we may safely say that it must stop when it goes beyond real and substantial benefits to the abutting property, distinct from those enjoyed by the public. The theory upon which special taxes are sustained is that the property assessed receives special benefits in addition to those received by the community at large. "This," says Dillon in his work on Municipal Corporations, in section 761, "is the true and only just foundation upon which local assessments can rest. And to the extent of special benefits, it is everywhere admitted that the legislature may authorize local taxes or assessments to be made." Cooley on Taxation, section 1153, lays it down that: "There can be no jurisdiction for any proceeding which charges the land with an assessment greater than the benefits. It is a plain case of appropriating private property to public use without just compensation; and a clear case of abuse of legislative authority in imposing the burdens of a public improvement on persons or property not specially benefited would undoubtedly be treated as an excess of power and void." The supreme court of the United States, in *Illinois Central R. Co. v. City of Decatur*, 147 U. S. 190, 13 Sup. Ct. Rep. 293, 37 L. ed. 132, in discussing the difference between general taxes and

special taxes, said: "On the other hand, special assessments or special taxes proceed upon the theory that, when a local improvement enhances the value of neighboring property, that property should pay for the improvement"; and quotes with approval from ⁶¹⁵ Cooley on Taxation, the following: "Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be especially or peculiarly benefited in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds. And in addition to the general levy they demand that special contributions in consideration of the special benefit shall be made by the person receiving it. The justice of demanding special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of the public work, are, at the same time, to suffer no pecuniary loss thereby; their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay. This is the idea that underlies all these levies." And so in the Law of Special Assessments by Hamilton (section 236) the rule is announced, supported by ample authority, that: "Special taxation for a local improvement, as well as special assessments of benefits for same, necessarily proceeds upon the theory of benefits to the property on which it is levied, and that a burden imposed upon any other theory is a mere arbitrary exaction—a taking of private property for public use without just compensation." And in Smith's Modern Law of Municipalities, section 1228: "A special assessment, or local assessment, as it is frequently called, is a species of taxation imposed by municipalities for the purpose of local improvement, and is based upon the assumption that the property in the locality of the property improved will be specially and peculiarly benefited thereby, by which a duty is imposed upon owners to contribute an amount in payment of the cost of the improvement equal to the ⁶¹⁶ benefits received. . . . Special assessments rest upon the ground that special burdens may be imposed for special or peculiar benefits accruing from public improvements. Local assessments can only be imposed to pay for local improvements clearly conferring special benefits on property assessed, and to the extent of those benefits only." And this court, in a long line of cases in harmony with the foregoing principles, has held that all municipal assessments are based upon the ground that the property subjected to the assessment is

benefited by the improvement for which the assessment is made: *Preston v. Roberts*, 12 Bush, 570; *Broadway Baptist Church v. McAtee*, 8 Bush, 508, 8 Am. Rep. 480; *Bradley v. McAtee*, 7 Bush, 667, 3 Am. Rep. 309; *Zable v. Louisville Baptist Orphans' Home*, 92 Ky. 89, 13 Ky. Law Rep. 385, 17 S. W. 212, 13 L. R. A. 668. Some courts hold that the right to impose local assessments is derived from the police power of the state: *Hamilton on Special Assessments*, sec. 40. But it is not necessary to resort to the police power to find authority for the laying of taxes of this character. We think the safe, conservative and well-defined place to rest them is upon the theory that they may be imposed as an equivalent for benefits conferred that are not enjoyed by the general public. It is upon this ground that this court, as well as nearly all the others, has found its justification in imposing them.

We may therefore announce, as sound in principle and supported by ample authority, the doctrine that special taxes cannot be levied unless the property charged receives a corresponding physical, material, and substantial benefit from the exaction; and, furthermore, that if the assessment does not confer a ⁶¹⁷ physical, material and substantial benefit, it will be invalid upon the ground that it is an attempt to take private property without just compensation, in violation of the constitution. So that the question narrows down to the proposition whether or not street sprinkling may be considered an improvement in the sense that the adjacent property derives special benefits of the character described from it distinct from the benefits received by the public generally. If a sidewalk or gutter or street is constructed in front of property, the reasonable and natural result is that the property derives some benefit and advantage from the improvement, and something substantial or at least tangible is added to its value. Of course, the value of improvements to adjacent property may be different, depending on the use to which the property is put, its situation and surroundings, and in many instances it may not be very appreciable and fail to realize the expectation on which the levy is made. But, nevertheless, all of the property is, to some extent, benefited, or at least this is the object and reasonable intent of the improvement. But sprinkling streets does not, in our opinion, confer a special benefit upon the adjacent property in the sense of contributing to its value, and hence a special tax for this purpose cannot be sustained upon the only ground that this class of taxation rests.

The view we have announced is in harmony with the ruling of the supreme court of Illinois in *Chicago v. Blair*, 149 Ill. 310, 36 N. E. 829, 24 L. R. A. 412, where, in considering a similar question, it was said: "In the nature of things, the sprinkling is only useful while the work is continued. In a few hours the beneficial effects are gone, and the property is worth no more than before the street was sprinkled. It ⁶¹⁸ is insisted, however, that all improvements—the building of sidewalks, the paving of streets, of however lasting material—are evanescent, and that in a few years at most they will necessarily require renewing, and that it makes no difference whether it be water put upon the street, or wood or granite; that all alike are but temporary in character. In a sense this is true, but not in a practical sense. It is common experience that well-paved streets and convenient and durable sidewalks, furnishing access to property, do in fact enhance its market value. It is, however, insisted that the sprinkling of the street during the summer months renders the occupation of the adjacent property more enjoyable and comfortable, and that therefore the property is enhanced in value. Doubtless, the same result would follow by placing vases at convenient points on the street, to be filled every morning with fresh-cut flowers; or by open-air concerts in which music should be selected with reference to the taste of the adjacent dwellers." To the same effect is *Petitt v. Duke*, 10 Utah, 311, 37 Pac. 568. Judge Phillips, in *New York Life Ins. Co. v. Prest* (C. C.), 71 Fed. 815, said: "Under such ordinances, streets are sprinkled in front of vacant lots on which are neither houses nor any living creatures. It could hardly be said with reason that running a sprinkling car now and then in front of such a lot adds to its market value; nor is there in such occasional laying of the dust any semblances of permanency. It is evanescent as the early and later dew, and in my judgment it is no more within the power of the municipality thus to create liens on the citizen's property than to hire 'rainmakers' to vex the skies for refreshing showers, and charge the lots adjacent to the raindrops with the ⁶¹⁹ cost thereof. As the sprinkling of the public highways of a city, like the cleaning thereof, contributes much to the comfort and enjoyment of the property, its cost should be made a general, and not a special, burden."

A contrary view is maintained in *State v. Reis*, 38 Minn. 371, 38 N. W. 97, where it is said: "The relator's main contention, however, is that street sprinkling is not an 'improvement' within the meaning of this section of the constitu-

tion, because it lacks the element of permanence; that its results are transient; and that, to constitute an improvement, there must be some work or structure, such as a pavement, sidewalk, or the like, that will remain after the labor is performed, and permanently enhance the value of the property. But if permanence or durability is to be the test, how long must the beneficial results last in order to constitute an improvement? It certainly will not be claimed that the work must be eternal in duration, or imperishable in character. We are unable to see any difference in principle between the work of street sprinkling, the results of which, unless repeated, last but a day, and the construction of a block pavement or wooden sidewalk, which wears out or decays, and has to be rebuilt every few years. When a pavement or sidewalk has worn out, the future value of the property is not enhanced by it, any more than it is by street sprinkling when that ceases. Neither do we see that it makes any difference whether the substance applied to the surface of the street is wood, which has to be renewed every few years, or water, which has to be applied daily. Each benefits the adjacent property as long as it lasts, and no longer. It is not the agency used, or its comparative durability, but the result accomplished, which ⁶²⁰ must determine whether a work is an improvement in the sense in which that work is here used"; and by the Massachusetts supreme court, in *Sears v. Board of Aldermen*, 173 Mass. 71, 53 N. E. 138, 43 L. R. A. 834, and the supreme court of Indiana, in *Reinken v. Fuehring*, 130 Ind. 382, 30 Am. St. Rep. 247, 30 N. E. 414, 15 L. R. A. 624.

The foregoing opinions present the conflicting views touching this question held by other courts, and, while there is much plausibility in the reasoning of the Minnesota case (38 Minn. 371, 38 N. W. 97), we are not impressed with its soundness. There is clearly a difference not only in degree, but in principle, between the occasional and temporary convenience and pleasure that laying the dust in the street confers, and the permanent and useful advantage that comes from well-paved sidewalks or macadam streets that are suitable and serviceable for travel in rain or shine, summer and winter. Abutting property cannot be taxed alone for the convenience or pleasure or comfort of the persons who use the streets, or in order that the neighboring premises may be made more attractive and beautiful to look upon. The rights of the owner must be considered. If his property is taken he must receive some material substantial benefit as an equivalent for the exaction. The city as a whole may, as we have

held, devote a portion of its revenue to this purpose, as indeed it may and often does to the purchase of other conveniences that are esteemed of public service, and yet, practically considered, result in doubtful benefits to the general public. But there is no good reason why the individual owner should be burdened, in addition to the heavy load of municipal taxes, with charges that are levied without corresponding benefits.

⁶²¹ The law authorizing the tax, as well as the ordinance under which it was imposed, are both invalid, and the judgment of the lower court is affirmed.

Judge Hobson Dissented, and Judges Barker and Lassing concurred with him in the following opinion:

"The opinion of the court is based on the case of *Chicago v. Blair*, 149 Ill. 310, 36 N. E. 829, 24 L. R. A. 412; but the court fails to observe that there the legislature had not authorized the city to provide that the cost of sprinkling the streets should be paid by special assessments. The legislature there had only authorized the city to make local improvements by special assessments. That is not the case here. The legislature has in express terms authorized the city to make the assessment for sprinkling the streets precisely as it was made. That case is therefore not in point. It was followed in *New York Life Ins. Co. v. Prest* (C. C.), 71 Fed. 815, a nisi prius opinion by the district judge, who also failed to notice that the case rested on a want of legislative authority to the city to do what it had done. Whenever the legislature has authorized a special assessment to pay for the sprinkling of the streets, the courts have, as a rule, sustained the legislation: See *Stark v. Boston*, 180 Mass. 293, 62 N. E. 375; *Reinken v. Fuehring*, 130 Ind. 382, 30 Am. St. Rep. 247, 30 N. E. 414, 15 L. R. A. 624; *State v. Reis*, 38 Minn. 371, 38 N. W. 97. Special assessments to pay for the sprinkling of the streets are not unlike special assessments to keep the streets free from snow and ice or to keep them free from dirt by sweeping, and these have been, we believe, universally sustained: *Carthage v. Frederick*, 122 N. Y. 268, 19 Am. St. Rep. 490, 25 N. E. 480, 10 L. R. A. 178; 1 *Abbott on Municipal Corporations*, sec. 340, and cases cited. If a tax is levied upon the whole city and applied to the sprinkling of the streets, a large number of persons who pay the taxes must of necessity get little benefit from it, as the sprinkling is necessarily confined in the main to the business and more populous parts of the city. It is one of those things of which the persons who peculiarly receive the benefit should bear the burden. The limitation placed by the constitution as to the amount of taxes which municipalities may levy applies to those things which should be met by a general tax on all the people. It does not apply to those things which are local in character and ought to be paid for by those receiving the benefit. It is conceded that there is no other limitation in the con-

stitution affecting the matter, and, this being so, the discretion of the legislature in prescribing how a matter of local benefit, like sprinkling the streets, shall be paid for, is unrestricted. So it is that the great weight of authority sustains the legislation in question. Any plan for paying for street sprinkling will produce great hardships. Under the plan which was held constitutional in *Maydwell v. Louisville*, 116 Ky. 885, 25 Ky. Law Rep. 1062, 105 Am. St. Rep. 246, 76 S. W. 1091, 63 L. R. A. 655, precisely the same hardship might result as is illustrated in the opinion. A man might have property worth one hundred thousand dollars, and be so situated that no sprinkling would ever be done in front of his property or where he might get no benefit from it, and if his one hundred thousand dollars' worth of property consisted of vacant lots, we would have just the hardship supposed in the opinion. What is the most just way of placing the burden may vary from time to time, and therefore the whole matter should be left to the discretion of the legislative and the municipal councils who represent the people that must in the end pay the taxes and are best qualified to properly consider the interests of their constituents."

A City may Legally Levy and Collect a Tax for street sprinkling purposes, under a constitutional provision that taxes shall be levied and collected for public purposes only: *Maydwell v. City of Louisville*, 116 Ky. 885, 105 Am. St. Rep. 245. An assessment made against the owners of property abutting on streets required to be swept and sprinkled, for the purpose of paying the expense of such sweeping and sprinkling, is not a tax, but a local assessment, and a statute authorizing such an assessment does not violate a constitutional provision requiring an equal and uniform rate of taxation: *Reinken v. Fuehring*, 130 Ind. 382, 30 Am. St. Rep. 247. But it has been held that the imposition upon abutting property of a specified sum per front foot for the expense of laying water-pipes in the street by a city cannot be supported under the power of general taxation nor under the power to tax property benefited by a public improvement: *Doughten v. Camden*, 72 N. J. L. 451, 111 Am. St. Rep. 680.

LEUCHT v. LEUCHT.

[129 Ky. 700, 112 S. W. 845.]

ALIENATION OF AFFECTIONS—Hearsay Evidence.—In an action by a wife against the mother of her husband for alienating his affections, statements made by the husband to the wife or to third persons in the absence of the defendant, indicating the defendant's purpose to effect a separation, are hearsay evidence, and not admissible to establish the offense. (p. 488.)

ALIENATION OF AFFECTIONS—Admissibility of Evidence.—In an action by a wife for the alienation of her husband's affections, she may prove by his declarations and conduct, and by third persons who can testify from their knowledge or from statements made by him, the affectionate relations that existed between them before the

estrangement, and his conduct and declarations indicating a loss of his affections. (p. 488)

ALIENATION OF AFFECTIONS—Admissibility of Evidence.—

In an action by a wife against the mother of her husband for the alienation of his affections, declarations made by the defendant to or in the presence of the plaintiff or other persons, manifesting a purpose upon her part to alienate the affections of the husband or bring about a separation, are admissible. (p. 488.)

ALIENATION OF AFFECTIONS—Hearsay Evidence.—

In an action by a wife for the alienation of her husband's affections, she cannot make out her case by relating statements purporting to have been made by the defendant to the husband and repeated by him to her in the absence of the defendant, nor by declarations of third persons who relate statements purporting to have been made to them by the husband that he said were made to him by the defendant. (p. 489.)

ALIENATION OF AFFECTIONS—Privileged Communications.

In an action by a wife against the mother of her husband for alienating his affections, evidence of statements made by him to her by virtue of the marriage relation, in the absence of the defendant, which indicated that the defendant was trying to separate them, are not admissible. (p. 491.)

ALIENATION OF AFFECTIONS—Admissibility of Evidence.—

In an action by a wife for the alienation of her husband's affections, a witness may testify that he heard her make a slighting or disrespectful remark about him. (p. 491.)

Frank M. Tracy, for the appellant.

H. M. McLean, for the appellee.

⁷⁰⁴ CARROLL, J. This is an action by appellant, who was plaintiff below, to recover damages for the alienation of her husband's affections by the appellee, defendant below, who was his mother. There was a judgment in favor of appellee upon the verdict of a jury who found in her behalf.

A reversal is asked for alleged errors of the court in admitting and rejecting evidence. The rulings chiefly complained of are, first, the exclusion of evidence offered by appellant relating to statements ⁷⁰⁵ made by the husband of appellant in the absence of other persons, which statements indicated that his mother was endeavoring to cause a separation between her son and his wife; and, second, the competency of statements of a similar character said to have been made by the husband of appellant in the absence of his mother to third persons, who gave evidence concerning them in behalf of appellant. In admitting the statements to third persons, the court instructed the jury in respect to them as follows: "The jury is instructed that the declarations of Louis Leucht to third persons as testified to by said parties, not made in the presence of the defendant Barbara Leucht, were admitted, and are to be considered, solely for the pur-

pose of showing the state of mind and feeling of the said Louis Leucht, if they do show such state of mind and feeling, and for the purpose of disclosing or explaining the motives influencing his action or conduct, if they do disclose or explain such motive; and they are to be considered by the jury for no other purpose." In our opinion the court correctly excluded the statements made to appellant by her husband, and erred to the prejudice of appellee in admitting the statements made by him to third parties, although the effect of this evidence was limited by the instruction. The statements made to appellant by her husband were incompetent, first, because they were made in the absence of his mother, and come under the head of what may be called "hearsay" evidence; second, because they are forbidden by subsection 1 of section 606 of the Civil Code of Practice, reading in part as follows: "Neither a husband nor his wife shall testify while the marriage exists or afterward, concerning any communication between them during marriage." The statements made by the husband to third parties ⁷⁰⁶ also come under the head of "hearsay" evidence, and for this reason should have been excluded. It was attempted by the statements, not made in the presence or hearing of appellee, to fasten upon her the offense of alienating the affections of her son from his wife. She may or may not have made to her son the statements he repeated to his wife and other persons as coming from her. If she had been present when they were told to the wife or others, she would have had an opportunity to admit or deny them, and, of course, have been bound by her declarations and actions. We know of no reason why an exception should be made in cases of this character to the general rule excluding "hearsay" evidence. It was competent for the wife to prove by the declarations and conduct of her husband and by third persons, who could testify from their knowledge or from statements made by the husband, the affectionate relations that existed between them before the estrangement; and his conduct and declarations indicating a loss or withdrawal of his affection. And also proper to introduce evidence of acts and declarations made by the defendant to or in the presence of the plaintiff or other persons manifesting a purpose upon her part to alienate the affections of the husband or bring about a separation between them. But there is a wide difference between this evidence and that excluded and introduced in this case. The injustice of permitting the plaintiff and third persons to relate statements alleged to have been made to them by the husband in the absence of the defendant, and

that purported to have been made by the defendant to the husband, is apparent. The defendant had no opportunity to deny nor explain them, as she was not present when they were made, and could not have known anything about them, ⁷⁰⁷ or whether they were, in fact, related by the husband to these parties. It seems to us that it would be a flagrant violation of the established rules of evidence to permit the plaintiff to make out a case against the defendant under circumstances like these. If evidence of this character was admissible, a defendant would be helpless, in fact, almost denied the right to make a defense. Here the plaintiff's cause of action was rested upon the proposition that the defendant by her acts and declarations had alienated the affections of the plaintiff's husband, and she undertook to make out her case by relating statements purporting to have been made by the defendant to the husband and repeated by him to her in the absence of the defendant, and by declarations of third parties who related statements purporting to have been made to them by the husband that he said were made to him by the defendant. This is as striking an example of hearsay evidence as could be imagined. It would be difficult to conceive a case in which justice to the defendant more strongly demanded the exclusion of all this evidence. If a case could be made out upon evidence of this character, it would be an easy matter for designing or unscrupulous persons to present to a jury a state of facts that might induce them to return a verdict against the defendant. As said by Greenleaf in his work on Evidence, section 99, in speaking of this class of evidence: "Its extrinsic weakness, its incompetency to satisfy the mind of the existence of a fact, and the frauds which may be practiced under its cover combine to support the rule that hearsay evidence is totally inadmissible." The reason that would exclude this evidence when offered by the wife applies with equal force to the statements of third persons, who testified as to what the husband said to them. In neither case ⁷⁰⁸ would the defendant deny that the husband made the statements.

The code provision forbidding either the husband or wife from testifying as to communications between them has been often construed. Among the cases holding that evidence of the character attempted to be made by the wife in this case was incompetent, we may notice as directly in point *Manhattan Life Ins. Co. v. Beard*, 112 Ky. 455, 66 S. W. 35 where the court said: "On the trial the widow of the deceased, the beneficiary under the policy, was permitted to testify to

numerous conversations with her husband of facts learned from him and to the contents of letters written from one to the other. Under subsection 1 of section 606 of the Civil Code of Practice providing 'neither a husband nor a wife shall testify, even after the cessation of their marriage, concerning any communication between them during marriage,' all the foregoing testimony was incompetent." To the same effect is *New York Life Ins. Co. v. Johnson's Admr.*, 24 Ky. Law Rep. 1867, 72 S. W. 762; *Buckel v. Smith's Admr.*, 26 Ky. Law Rep. 494, 82 S. W. 235.

If the testimony offered by the wife as to what her husband told her, when no one else was present, was not a "communication" between them, we are at a loss to know what would be a "communication." It will be noticed that the code prohibition is not against the disclosure of "confidential" communications; but, although the word "confidential" is not used, it was evidently the purpose to exclude only such communications as would naturally grow out of the marriage relation. As was said in *Commonwealth v. Sapp*, 90 Ky. 580, 29 Am. St. Rep. 405, 12 Ky. Law Rep. 484, 14 S. W. 834: "The word 'communication,' therefore, as used in our statute should be given a liberal construction. ⁷⁰⁹ It would not be confined to a mere statement by the husband to the wife or vice versa, but should be construed to embrace all knowledge upon the part of the one or the other obtained by reason of the marriage relation, and which but for the confidence growing out of it would not have been known to the party." There might be communications between the husband and wife that it would be competent for either to testify concerning, as when they were made in the presence or hearing of third parties; thus making it plain that they were not that character of communications that the law will protect and prohibit either party from disclosing. So third parties may testify as to conversation overheard by them between husband and wife: *Commonwealth v. Everson*, 29 Ky. Law Rep. 760, 96 S. W. 460. Another exception to the rule is made in the *Sapp* case (90 Ky. 580, 12 Ky. Law Rep. 484, 29 Am. St. Rep. 405, 14 S. W. 834), where it was held that either could testify in a prosecution against the other for an assault or attempt to do violence; and yet another exception made in cases where the husband or wife may testify to facts known to the witness from other means of information than such as result from the marriage relation or that come to either of them independent of it: *Elswick v. Commonwealth*, 13 Bush,

155; English's Admr. v. Cropper, 8 Bush, 292. Again, other exceptions are made in Shepherd v. Commonwealth, 119 Ky. 931, 24 Ky. Law Rep. 698, 85 S. W. 191, and Shipp v. Commonwealth, 124 Ky. 643, 30 Ky. Law Rep. 904, 99 S. W. 945, 10 L. R. A., N. S., 335. But here the communication concerning which the wife offered to testify was manifestly made to her by the husband because she was his wife, and solely by virtue of the marriage relation. It does not fall within any of the exceptions mentioned, nor those specified in the Code of Practice.

⁷¹⁰ Another error complained of is in permitting a witness to testify that he heard the plaintiff make a slighting or disrespectful remark about her husband. We think this evidence was competent. It was admissible to prove acts and declarations of the plaintiff that tended to show the state of feeling of plaintiff toward her husband, for the purpose of illustrating the extent of her affection for him, and the part she took, if any, in contributing to sever the marital relations or in causing her husband's affections to be alienated from her.

The other errors complained of are of minor importance; and, as they did not prejudice the substantial rights of the plaintiff, we do not deem it necessary to extend this opinion in discussing them.

The judgment of the lower court is affirmed.

Actions by a Wife for the Alienation of Her Husband's Affections are discussed in the note to Clow v. Chapman, 46 Am. St. Rep. 472-478. There are many authorities recognizing the right of a married woman to sue a third person for alienating her husband's affections: See Betser v. Betser, 186 Ill. 537, 78 Am. St. Rep. 303; Reed v. Reed, 6 Ind. App. 317, 51 Am. St. Rep. 310; Price v. Price, 91 Iowa, 693, 51 Am. St. Rep. 360; Deitzman v. Mullin, 108 Ky. 610, 94 Am. St. Rep. 390; Scott v. O'Brien, 129 Ky. 1, ante, p. 419. Actions against a mother in law or father in law for alienation of affections are discussed in the recent cases of Boland v. Stanley, 88 Ark. 562, 129 Am. St. Rep. 114; Jones v. Monson, 137 Wis. 478, 129 Am. St. Rep. 1082, and cases cited in the cross-reference note thereto.

The Admissibility in Evidence of Privileged Communications between husband and wife are discussed in the note to Commonwealth v. Sepp, 29 Am. St. Rep. 418. The matter that the law prohibits either the husband or the wife from testifying to as witnesses includes any information obtained by either during the marriage or by reason of its existence. It should not be confined to mere statements by one to the other, but embraces all knowledge upon the part of either obtained by reason of the marriage relation, and which, but for the confidence growing out of it, would not have been known: Mercer v. State, 40 Fla. 216, 74 Am. St. Rep. 135. See, also, Fuller v. Fuller, 177 Mass. 184, 83 Am. St. Rep. 273; National Lumberman's Bank v. Miller, 131 Mich. 564, 100 Am. St. Rep. 623; Johnson v. Johnson's Committee, 122 Ky. 13, 121 Am. St. Rep. 449.

SPARKS v. BARBER ASPHALT PAVING COMPANY.

[129 Ky. 769, 112 S. W. 830.]

STREET ASSESSMENT—Original Construction.—A city, in ordering a street to be graded and paved after a part of it has already been improved by an abutting owner, at his own cost, orders the original construction of the street for which abutting owners may be taxed. (p. 493.)

STREET ASSESSMENT—Original Construction.—A street is not constructed, within the meaning of the law, until its construction is prescribed by the city authorities; and until the construction is so prescribed and property holders required to pay therefor, the cost thereof as required by the city may be assessed against their property. (p. 494.)

A. E. Richards and A. B. Bensinger, for city of Louisville.

Wm. Furlong and John Woodbury, for Barber Asphalt Paving Company.

Gregory & McHenry, for appellant Sparks.

Wm. Furlong, John L. Woodbury, A. E. Richards and A. B. Bensinger, for the appellee.

771 HOBSON, J. What is now Frankfort avenue in the city of **772** Louisville was formerly the Louisville and Shelbyville turnpike. While the pike was still in the possession of the turnpike company, the town of Crescent Hill was formed, which included within its limits a part of the pike. While the road was the property of the turnpike company and within the town of Crescent Hill, the Louisville Water Company improved the part of the road with macadam along the front of the Louisville Water Company's property, extending westwardly to the intersection of Crescent avenue. The width of the improvement was forty-four feet. A part of the road was raised three or four feet, to the level of the tracks of the Louisville and Nashville Railroad Company, which run parallel with the road. In addition to this gutters and curbings were put in. The entire cost of the improvement was borne by the Louisville Water Company. After all this had been done some years, the boundaries of the city of Louisville were extended so as to take in the town of Crescent Hill; and on April 7, 1905, the city passed an ordinance for the construction of a part of Frankfort avenue by grading, curbing, and paving with asphalt. The section so ordered to be improved included within it that part of the street which had been before improved by the water company

voluntarily for reasons of its own. The only question necessary to be determined on this appeal is whether the making of the asphalt street under the ordinance was original construction as to this part of the street which had before been improved by the Louisville Water Company. The circuit court held that it was original construction, and the property owners who were assessed for it have appealed.

The rule as declared by this court in a number of opinions is that until the street is improved as provided ⁷⁷³ by the municipal authorities, and an improvement is made for which the property owners are charged, there is no original construction of the street; in other words, the abutting property may be taxed to construct the street, and this power of taxation is not affected until it is exercised: *McHenry v. Selvage*, 99 Ky. 232, 18 Ky. Law Rep. 473, 35 S. W. 645; *Wymond v. Barber Asphalt Paving Co.*, 25 Ky. Law Rep. 1135, 77 S. W. 203; *Helm v. Figg*, 28 Ky. Law Rep. 396, 89 S. W. 301; *Catlettsburg v. Self*, 115 Ky. 669, 25 Ky. Law Rep. 161, 74 S. W. 1064; *Adams v. Ashland*, 26 Ky. Law Rep. 184, 80 S. W. 1105; *Lindsey v. Brawner*, 29 Ky. Law Rep. 1238, 97 S. W. 1; *Gast v. Minor*, 28 Ky. Law Rep. 1256, 91 S. W. 251; *Barfield v. Gleason*, 111 Ky. 491, 23 Ky. Law Rep. 128, 1120, 63 S. W. 964. The circuit court followed the rule declared in these opinions. The facts in many of these cases cannot be distinguished from the facts of this case. The cases differ in degree, but not in principle. The rule declared by the court rests upon the ground that until the abutting property has once been compelled to bear the burden the city has not constructed originally the street, which in justice to all other property within the city and upon an equal basis under the statute it should do. If appellant's contention were sustained, it would follow that Frankfort avenue might be constructed as an asphalt street at the cost of the adjoining land owners on certain squares, and could not be so constructed on other squares, although the city authorities had not before defined how the street should be constructed. If this were the rule, there could be no uniformity in the streets of the city, and persons who paid for the construction of an asphalt street in front of their property might not receive ⁷⁷⁴ the benefits contemplated by law, because right by the side of them might be property owners who could not be required to pay, and either there could be no asphalt street constructed in front of them or it must be done at the cost of the city. If it was done at the cost of the city, the burden would in part fall on those who had already paid for the con-

for, and in giving instruction No. 5, of which appellant now complains.

The evidence shows that appellee and her husband and two others were driving west on Frankfort avenue on Sunday afternoon, and a car of appellant company was going in the same direction, and while the carriage in which appellee was riding was upon the west-bound track of appellant its car ran into the vehicle from behind, overturned it, and threw them out, and appellee sustained the injury complained of. It is the contention of appellant that the horse which was being driven by appellee's husband become frightened at a passing train, and swerved suddenly upon the track a short distance before the car, and when the car was so close upon it that the accident and collision was unavoidable. It is conceded for appellant that appellee did nothing whatever, and was a passive occupant of the carriage, and unless the negligence of her husband (if any there was), as driver, can be imputed to her, then she is without fault, and must recover in any event, if those in charge of the car were shown to have been negligent of their duty. This presents the question squarely as to whether or not the negligence of a husband while driving a vehicle in which his wife is a passenger can be imputed to the wife, in an action for damages by her, and whether or not the relation of husband and wife is such as that the wife cannot recover under such circumstances if it is shown that the husband, ⁸¹⁹ with whom she was riding, was guilty of negligence. A somewhat similar question was raised in the case of *Cahill v. Cincinnati etc. R. R. Co.*, 92 Ky. 345, 13 Ky. Law Rep. 714, 18 S. W. 2, where it was held that a person, who was injured while riding in a vehicle at the invitation of the owner, cannot have the contributory neglect of the owner, who was the driver, imputed to him, unless the relation of principal and agent or master and servant exist between the passenger and the owner of the vehicle. The principle announced in that case has been followed in a number of subsequent cases.

While admitting that the trend of this opinion is to the effect that the occupant of a vehicle is not chargeable with the contributory neglect of the driver thereof, unless the relation between them is that of principal and agent or master and servant, or such that the passenger has some authority and control of direction over the acts of the driver, appellant relies upon the case of *Central Passenger Ry. Co. v. Chatterson*, 14 Ky. Law Rep. 665, and the authority of numerous courts of last resort in other states, to support its contention that the

contributory neglect of the husband is to be imputed to the wife, because of the marital relation. The case of Central Passenger Ry. Co. v. Chatterson was decided before the passage of the Weissinger act, and, as counsel for appellant correctly states, the doctrine of imputing the neglect of the husband to the wife did not arise at common law by reason of the fact of the husband's interest in his wife's estate, and of the further fact that the wife was not allowed to sue without joining her husband as a party plaintiff. Such was the rule in Kentucky prior to the passage of the Weissinger act, and necessarily "this ⁸²⁰ question could not have arisen in Kentucky before the Weissinger act was passed." This being true, the Kentucky authority relied upon by appellant does not apply. In the Chatterson case both husband and wife were joined as plaintiffs, and the court evidently regarded the driver as the agent and servant of both, and held that the jury should have been so instructed. Since the passage of the Weissinger act our court has not been called upon to pass upon this question; but, as above indicated, it is not a new one, but one which has been passed upon by most every state in the Union. An examination of the authorities shows that in many states the negligence of the husband in driving a vehicle is attributed to the wife, and she has been denied the right to recover. The supreme court of Illinois, Texas, Vermont, Pennsylvania, Iowa, Connecticut, and Massachusetts have so held; while on the other hand, the supreme courts of the states of Indiana, New York, and Ohio, and numerous federal authorities, hold that the negligence of the husband is not to be imputed to the wife, and that, even though he is negligent, she is not denied the right of recovery because thereof.

In the case of Louisville etc. Ry. Co. v. Creek, 130 Ind. 139, 29 N. E. 481, 14 L. R. A. 733, in passing upon the right of one to recover for injuries sustained while riding in a carriage as the guest of the driver, the court said: "We can see no good reason why the foregoing statement does not apply to a wife riding with her husband with as much reason as to a stranger riding with him, nor why she may not be in such case a mere passive guest, without authority to direct or control his movements, and without reason to suspect his prudence or his skill. A husband and wife may undoubtedly sustain ⁸²¹ such relations to each other in a given case that the negligence of one will be imputed to the other. The mere existence of the marital relation, however, will not have that effect. In our

for, and in giving instruction No. 5, of which appellant now complains.

The evidence shows that appellee and her husband and two others were driving west on Frankfort avenue on Sunday afternoon, and a car of appellant company was going in the same direction, and while the carriage in which appellee was riding was upon the west-bound track of appellant its car ran into the vehicle from behind, overturned it, and threw them out, and appellee sustained the injury complained of. It is the contention of appellant that the horse which was being driven by appellee's husband become frightened at a passing train, and swerved suddenly upon the track a short distance before the car, and when the car was so close upon it that the accident and collision was unavoidable. It is conceded for appellant that appellee did nothing whatever, and was a passive occupant of the carriage, and unless the negligence of her husband (if any there was), as driver, can be imputed to her, then she is without fault, and must recover in any event, if those in charge of the car were shown to have been negligent of their duty. This presents the question squarely as to whether or not the negligence of a husband while driving a vehicle in which his wife is a passenger can be imputed to the wife, in an action for damages by her, and whether or not the relation of husband and wife is such as that the wife cannot recover under such circumstances if it is shown that the husband, ⁸¹⁹ with whom she was riding, was guilty of negligence. A somewhat similar question was raised in the case of *Cahill v. Cincinnati etc. R. R. Co.*, 92 Ky. 345, 13 Ky. Law Rep. 714, 18 S. W. 2, where it was held that a person, who was injured while riding in a vehicle at the invitation of the owner, cannot have the contributory neglect of the owner, who was the driver, imputed to him, unless the relation of principal and agent or master and servant exist between the passenger and the owner of the vehicle. The principle announced in that case has been followed in a number of subsequent cases.

While admitting that the trend of this opinion is to the effect that the occupant of a vehicle is not chargeable with the contributory neglect of the driver thereof, unless the relation between them is that of principal and agent or master and servant, or such that the passenger has some authority and control of direction over the acts of the driver, appellant relies upon the case of *Central Passenger Ry. Co. v. Chatterson*, 14 Ky. Law Rep. 665, and the authority of numerous courts of last resort in other states, to support its contention that the

contributory neglect of the husband is to be imputed to the wife, because of the marital relation. The case of Central Passenger Ry. Co. v. Chatterson was decided before the passage of the Weissinger act, and, as counsel for appellant correctly states, the doctrine of imputing the neglect of the husband to the wife did not arise at common law by reason of the fact of the husband's interest in his wife's estate, and of the further fact that the wife was not allowed to sue without joining her husband as a party plaintiff. Such was the rule in Kentucky prior to the passage of the Weissinger act, and necessarily "this ⁸²⁰ question could not have arisen in Kentucky before the Weissinger act was passed." This being true, the Kentucky authority relied upon by appellant does not apply. In the Chatterson case both husband and wife were joined as plaintiffs, and the court evidently regarded the driver as the agent and servant of both, and held that the jury should have been so instructed. Since the passage of the Weissinger act our court has not been called upon to pass upon this question; but, as above indicated, it is not a new one, but one which has been passed upon by most every state in the Union. An examination of the authorities shows that in many states the negligence of the husband in driving a vehicle is attributed to the wife, and she has been denied the right to recover. The supreme court of Illinois, Texas, Vermont, Pennsylvania, Iowa, Connecticut, and Massachusetts have so held; while on the other hand, the supreme courts of the states of Indiana, New York, and Ohio, and numerous federal authorities, hold that the negligence of the husband is not to be imputed to the wife, and that, even though he is negligent, she is not denied the right of recovery because thereof.

In the case of Louisville etc. Ry. Co. v. Creek, 130 Ind. 139, 29 N. E. 481, 14 L. R. A. 733, in passing upon the right of one to recover for injuries sustained while riding in a carriage as the guest of the driver, the court said: "We can see no good reason why the foregoing statement does not apply to a wife riding with her husband with as much reason as to a stranger riding with him, nor why she may not be in such case a mere passive guest, without authority to direct or control his movements, and without reason to suspect his prudence or his skill. A husband and wife may undoubtedly sustain ⁸²¹ such relations to each other in a given case that the negligence of one will be imputed to the other. The mere existence of the marital relation, however, will not have that effect. In our

opinion, there will be no more reason or justice in a rule that would, in cases of this character, inflict upon a wife the consequences of her husband's negligence solely and alone because of that relationship, than to hold her accountable at the bar of eternal justice for his sin because she was his wife." And in the case of *Knightstown v. Musgrove*, 116 Ind. 121, 9 Am. St. Rep. 827, 18 N. E. 452, the rule was thus stated: "Where the negligence of a driver is sought to be imputed to an occupant of the vehicle, it must be shown that the relation of the person injured to the one whose negligence contributed to the injury was such that in contemplation of law the negligent act of a third person was, upon the principle of agency or co-operation in a joint or common enterprise, the act of the person injured." And in the case of *Honey v. Chicago etc. R. R. Co. (C. C.)*, 59 Fed. 423, it was held that "to render the contributory negligence of a wife, regarded as the agent or servant of her husband, imputable to him, the circumstances must be such that he would be liable for her negligent act if it had resulted in injury to a third person."

It seems to us that this rule is in consonance with reason and justice; that the negligence of the husband or the wife, as the case may be, should be attributable to or charged to the other, unless it should appear that in that particular instance the relation of principal and agent or master and servant existed between them. The mere fact that the one is the husband or the wife of the other should not render him or her answerable for the negligence of the other. Under ⁸²² the enlarged property rights which a married woman now enjoys she may prosecute a suit in her own name for personal injury without joining her husband. The husband has no interest in the recovery, and we see no good reason for denying to a wife the right of a recovery because her husband, into whose care she, for the time being, intrusted herself, was guilty of an act of negligence which contributed to bring about her injury. This was the wife's status at common law; but the purpose of all modern legislation, and the trend of judicial interpretation thereof, has been to give to married women, when dealing with their property rights, more and more freedom from the restraint, control and dominion of their husbands, until now, in Kentucky, and in most states, they may deal with the same, with few exceptions, as though they were unmarried. Hence the reason for the rule that unless the relation of master and servant or principal and agent is made to appear in a particular case, the wife is not held chargeable with the negligent acts of her husband, and in cases where

personal injury results from the concurrent negligence of her husband and a third party the negligence of the husband is not ordinarily attributable to the wife, so as to bar her right of recovery.

We are of opinion that the trial court did not err in refusing to give the instructions asked for by appellant, as the whole law of the case was embodied in the instructions given.

The judgment is therefore affirmed.

Imputed Negligence is the subject of a note to *Hampel v. Detroit etc. R. R. Co.*, 110 Am. St. Rep. 278. The better rule is that there can be no imputation of negligence except where the relation of master and servant or principal and agent exists: *Nonn v. Chicago City Ry. Co.*, 232 Ill. 378, 122 Am. St. Rep. 114. Indeed, it is said that the whole doctrine of imputed negligence has been as thoroughly exploded as any heresy ever was: *Neff v. City of Cameron*, 213 Mo. 350, 127 Am. St. Rep. 606. That the negligence of a parent cannot be imputed to his child where the latter sues in his own right, see *Neff v. City of Cameron*, 213 Mo. 350, 127 Am. St. Rep. 606; *Serano v. New York etc. R. R. Co.*, 188 N. Y. 156, 117 Am. St. Rep. 833; *Mattson v. Minnesota etc. R. R. Co.*, 95 Minn. 477, 111 Am. St. Rep. 483; and that the negligence of a husband while driving a vehicle is not imputable to his wife, who is riding with him, see *Southern Ry. Co. v. King*, 128 Ga. 383, 119 Am. St. Rep. 390.

BOARD OF COUNCIL v. ILLINOIS LIFE INSURANCE COMPANY.

[129 Ky. 823, 112 S. W. 924.]

TAXATION—Situs of Property Wrongfully Withheld.—A person, by taking possession of personal property and holding it against the consent of the owners, cannot give it a situs for taxation in the place where he happens to reside. (p. 501.)

TAXATION—Situs of Securities Wrongfully Withheld.—If a foreign insurance company buys out a domestic company that has securities on deposit with the state treasurer, and he wrongfully withholds them from the purchasing company, they are not taxable, while thus withheld, at the place of his residence. (pp. 501, 502.)

Wm. Cromwell, for the appellant.

Greene & Vanwinkle, Kohn, Baird, Sloss & Kohn and Long & Price, for the appellee.

825 CARROLL, J. The Mutual Life Insurance Company of Kentucky, incorporated under the laws of this state, had on deposit with the state treasurer on the thirty-first day of July, 1902, notes, bonds, and other securities amounting to two hundred and eleven thousand dollars. These securities

were deposited with the treasurer in compliance with section 648 of the Kentucky Statutes of 1903, providing in substance that every domestic life insurance company shall deposit with the state not less than one hundred thousand dollars, to be held by the treasurer for the benefit of the policy-holders of the company making the deposit. On July 31, 1902, the Mutual Life Insurance Company, with the consent and approval of the insurance commissioner of this state, and its policy-holders, sold and transferred all of its property, including the securities on deposit with the treasurer, to the Illinois Life Insurance Company. Thereupon the Mutual Life Insurance Company ceased to do business as an insurance company. The Illinois Life Insurance Company is a foreign insurance company, and is not required by the laws of this state to make in this state a deposit of securities for the protection of its policy-holders. Soon after it purchased the business and assets of the Mutual Life Insurance Company, it ⁸²⁶ demanded of the state treasurer the securities that had been deposited with him by the Mutual Life Insurance Company, and upon his refusal to deliver them instituted an action to compel their surrender, and this court, in *Illinois Life Ins. Co. v. Prewitt*, 123 Ky. 36, 29 Ky. Law Rep. 447, 93 S. W. 633, held that the insurance company was entitled to the relief sought and adjudged that the securities be delivered to it. In 1907 this action was brought by the appellant, seeking to tax the securities for the benefit of the city of Frankfort for the years 1903, 1904, 1905, and 1906. The lower court dismissed the petition, and the city appeals.

Briefly stated, the facts are: First, that on July 31, 1902, the Illinois Life Insurance Company became the owner and entitled to the possession of the securities deposited by the Mutual Life Insurance Company and in the custody of the state treasurer; second, that it demanded the surrender of the securities, and upon the failure of the treasurer to deliver them brought a suit for their possession, which terminated in a judgment declaring that it was entitled to the securities and that they were wrongfully withheld by the treasurer; and, third, that, except for the erroneous opinion of the treasurer that he was entitled to hold the securities, they would have been removed from the county of Franklin when their delivery was first demanded. It thus appears that the city of Frankfort is seeking to tax the securities for the years they were improperly and against the consent of the company retained within the city by an officer of the state. Except for his mistaken conception of duty in failing to deliver the

securities upon demand no attempt to tax them would or could have been made, because they would not have been within the jurisdiction of the taxing ⁸²⁷ authorities of the city. Under these circumstances it would be manifestly unfair to tax these securities. While all personal estate within the city is subject to taxation, evidently this means personal property that is within the city by the consent of the owner. An individual, by taking possession of personal property and holding it against the consent of the owner, cannot give it a situs for taxation in the place where the wrongful custodian happens to reside. The situs of personal property is generally, but not always, determined by the residence of the owner. But in no state of case can it be subjected to taxation against the consent of the owner at the place of residence of a person who is wrongfully in possession of it.

Neither the case of *Higgins v. Commonwealth*, 126 Ky. 211, 31 Ky. Law Rep. 653, 103 S. W. 306, nor *Commonwealth v. Dun & Co.*, 126 Ky. 108, 31 Ky. Law Rep. 561, 102 S. W. 859, 10 L. R. A., N. S., 920, are applicable to the state of facts here presented. In the *Higgins* case, the securities of a non-resident sought to be taxed were in the possession of a resident trustee who rightfully exercised control over them, collected the interest, renewed and changed the evidences of debt, invested the surplus and in these particulars exercised the same dominion over them as if he had been the actual owner. In the *Dun* case (126 Ky. 108, 102 S. W. 859, 10 L. R. A., N. S., 920), the money taxed was in the rightful possession of resident agents and managers of the nonresident owner, and was within the state as part of the business of the owner and for the purpose of aiding in its conduct. In each instance the will of the owner was consulted and the property with his consent was within the jurisdiction of the taxing authorities. The facts of this case are somewhat similar to *Commonwealth v. Northwestern Mut. Life Ins. Co.*, ⁸²⁸ 32 Ky. Law Rep. 796, 107 S. W. 233. There it was sought to tax notes and choses in action representing loans made by the nonresident company and secured by mortgages on land in this state and by pledges of policies of insurance or other collateral. But the court held that these evidences of debt were not subject to taxation in this state, although they were in this state by the authority of the company.

Without further elaboration or citation of cases involving questions of taxation we may safely rest our decision upon the ground that, as the securities sought to be taxed were wrongfully retained in this state, their presence here did not

give them, under any statute or rule of law that we are familiar with, a situs for taxation in this state.

The judgment of the lower court is affirmed.

The Situs of Personal Property for the purpose of taxation is the subject of a note to *Buck v. Miller*, 62 Am. St. Rep. 448. That such property does not, for purposes of taxation, necessarily follow the domicile of the owner, see *Hall v. American Refrigerator Transit Co.*, 24 Colo. 291, 65 Am. St. Rep. 223; *Buck v. Miller*, 147 Ind. 586, 62 Am. St. Rep. 436; note to *English v. Crenshaw*, 127 Am. St. Rep. 1088.

CASES

IN THE

COURT OF APPEALS

OF

MARYLAND.

DODGE v. DODGE.

[109 Md. 164, 71 Atl. 519.]

TRUST, TESTAMENTARY—Personal, Test of.—It is purely a matter of intention, to be gathered from a consideration of the whole will and from the nature and object of the trusts created thereby, as to whether a trust is personal in its character or is annexed to the office of trustee. (p. 505.)

TRUST, TESTAMENTARY, When may be Exercised by a Substituted Trustee.—If a will devises and bequeaths the property of the testator to three trustees and the survivors and last survivor, and the heirs, executors, administrators and assigns of the last survivor, to hold with full power according to their or his best judgment, to sell and convey such property, the power may be exercised by a substituted trustee appointed after the death of the original trustees. (p. 505.)

TRUSTEE, Power of Sale Given to, When Deemed Annexed to the Office.—Generally, in the absence of a specially expressed intent to the contrary, a power of sale conferred upon a trustee in a will is regarded as a ministerial duty annexed to the office and passing to any person legally substituted in place of the original trustee. (p. 506.)

TRUSTEES, Decree Appointing a New Trustee and not Distinguishing Between Personal and Other Trusts.—Where some of the trusts conferred upon a testamentary trustee are personal and others pertinent to the office, and a decree undertakes to appoint a new trustee and to confer upon him authority to execute both classes of trusts, the decree is good pro tanto, but cannot invest the substituted trustee with powers of a personal nature. (p. 506.)

TRUST, When Descends to the Heir at Law, and What Amounts to a Disclaimer by Him.—When property is devised to trustees and to the last survivor of them, and the heirs, executors, administrators and assigns of such last survivor, the property descends to the heir of the last surviving trustee, but if he is complainant in a suit seeking the appointment of a new trustee, this amounts to a renunciation of the trust, and authorizes the court to appoint a substituted trustee. (p. 507.)

TRUSTEE, NONRESIDENT, Selection of by the Court.—Though it is the custom of courts and the better practice to select a resident of the state, yet they are not without power to appoint a nonresident, and there may be circumstances justifying such an appointment. (p. 507.)

TRUST, Selection of New Trustee.—The recommendation of the parties in interest is always entitled to weight, and the court, on such recommendation, may select as trustee one who is not a resident of the state. (p. 507.)

TRUSTEE'S SALE.—The Failure in the Report of a Trustee's Sale to state that it was for the advantage of all the parties in interest, and was made with their consent, does not constitute a sufficient objection to the ratification of the sale, though it is possible for the trust to open and let in unborn persons. (p. 507.)

Edward C. Peter, for the appellant.

Robert B. Peter, for the appellee.

165 HENRY, J. This appeal brings up for consideration the question as to the right of Joseph H. Bradley, substituted trustee under the last will and testament of the late Henry Henley Dodge, to sell certain real estate of the testator lying in Montgomery county.

In the item of the will with which we are primarily concerned, the testator devises and bequeaths the residue of his estate to Ysidora B. M. Dodge, Maurice J. Adler, and Harrison Howell Dodge, all of the District of Columbia, "and the survivors and last survivor, and the heirs, executors, administrators and assigns of such last survivor, in trust, to have and to hold the same with full power according to their, his or her best judgment and discretion, to manage and direct the same, to sell and convey and deliver the same or any part thereof, according to the quality of said estate, to lease or encumber the same or any part thereof, with full power to invest the same or any part thereof, and to change investments, etc.," for the benefit of his children, etc.

Maurice J. Adler and Harrison Howell Dodge renounced the trust imposed by the will aforesaid, but Ysidora M. Dodge qualified as executrix and trustee, and continued to act in both capacities until her death in February, 1904.

In December of that year, the appellees filed a bill of complaint in the circuit court for Montgomery county, to which **166** all the parties in interest under the aforementioned will were made parties, and which, after reciting the foregoing and other facts, stated that all parties desired the appointment of Joseph H. Bradley, of the District of Columbia, as trustee in the place of the said Ysidora M. Dodge, deceased, and praying that he, or some other suitable person or persons, be so appointed and be invested with all the rights and powers given to the trustees mentioned in the will.

In March, 1906, Mr. Bradley was appointed trustee, as prayed, and duly qualified by filing an approved bond. Shortly thereafter he sold a valuable tract of land to the Chevy Chase Club, a corporation, which, after making a cash payment of five thousand dollars, filed objections to the ratification of the sale on the ground that the court was without jurisdiction to appoint a trustee; that the said Bradley had no power to make said sale, and because the trust created by the will, upon the death of Ysidora M. Dodge, devolved upon one of the complainants in this suit, William M. C. Dodge, her eldest son and heir at law.

Notwithstanding such objections, the court finally ratified and confirmed the sale on September 19, 1908, overruling the exceptions filed. From the order of ratification, an appeal was entered to this court.

It is contended by the appellants, in the first place, that the trust created by the will was personal in its nature and incapable of transmission to a trustee appointed by the court.

This question has not infrequently been before this court, which has uniformly held that it is purely a matter of intention, to be gathered from a consideration of the whole will and from the nature and objects of the trust created thereby, as to whether a trust is personal in its character or is annexed to the office of trustee. Among the latest decisions on the subject is that in *Snyder v. Safe Deposit etc. Co.*, 93 Md. 225, 48 Atl. 719, where the court, speaking through Judge Pearce, reviews several earlier decisions and clearly announces the rule on the subject. And in the case of *Safe Deposit etc. Co. v. Sutro*, 75 Md. 361, 23 Atl. 732, it was held that when the ¹⁶⁷ words "heirs, administrators and executors," or words of similar import, were added to the designation of the trustee by name, it had the effect of excluding the idea of a personal trust, inasmuch as it was impossible for a testator to know who the heirs, etc., of any person named as trustee by him might be. Applying this test to the will of Mr. Dodge, we find that in the section quoted, after the designation of the trustees by name, he adds, "and the survivors and last survivor, and the heirs, executors, administrators and assigns of such last survivor," and similar words are used in all other sections of the will, except two.

One of these exceptions is in the clause where the testator authorized the trustees to render assistance to such person as

he may suggest in a letter to be addressed by him to them, "the character and amount of such assistance to be according to the judgment" of the said trustees, and the other exception is in the clause appointing the said trustees guardians for his infant children.

In both of these instances, the words, "heirs, etc.," are omitted after the designation of the trustees, while the nature of the duties imposed, particularly in the instance first cited, makes it apparent that the testator was creating a personal trust to be executed only in the discretion of the trustees actually named in the will. But the particularity with which the words "heirs, etc.," are added in other sections indicates a different purpose as to them; and, generally speaking, it may be said that, in the absence of a clearly expressed intent to the contrary, the power of sale conferred upon a trustee in a will is regarded as a ministerial duty, annexed to the office and passing to any person lawfully substituted in the place of the original trustee. It is contended in argument by the appellant that some, at least, of the trusts created by the will are personal, and that the decree naming a new trustee is invalid in not making a distinction in this respect. Accepting the statement as a fact, we think that the decree is good pro tanto, though ineffectual in attempting to invest the substituted trustee ¹⁶⁸ with those powers which, as above set forth, are of a personal nature.

It is further urged that upon the death of Ysidora M. Dodge, the trust descended upon her heir at law, under the provisions of section 24, article 46, Code of Public General Laws. While this is true, the heir at law in this case is a party complainant in the suit, and this is in effect a renunciation of the trust. A disclaimer of a trust may be by acts and conduct, as well as by deed, though in this case it is one of the admitted facts that William M. C. Dodge, the heir at common law, conveyed the legal estate to the aforesaid Joseph H. Bradley, so that both by deed, as well as by conduct amounting to a disclaimer, the heir has renounced the trust, and there was a vacancy which the court was called upon to fill. It is a rule in equity, which admits of no exception, that the court never wants a trustee, and under its general powers, even if statutory authority were not given by section 90 of article 16, Code of Public General Laws, it would have, under circumstances

like those in the present case, power to appoint some suitable person to execute the trusts made in the will of the testator.

The objection is also made that Mr. Bradley, being a non-resident of the state, is ineligible to the office. The selection of a trustee is a matter in the discretion of the court, and while it is a wise custom and the better practice to select a resident, yet there are circumstances which will justify a departure from the rule. The testator in this case was himself a resident of the District of Columbia, the original trustees appointed by the will were residents of the same district, the beneficiaries under the trust now reside there and all have united in a petition for the appointment of Mr. Bradley, while the larger part of the trust property is situated in Montgomery county in convenient proximity to the residence of the trustee, so that its management and supervision can be easily looked after by him. The recommendation of the parties in interest is always entitled to weight, and, in view of this and the other facts recited, we think the court exercised a sound discretion in appointing Mr. Bradley to the vacant trusteeship: ¹⁶⁹ 2 Story's Equity, sec. 976; 28 Am. & Eng. Ency. of Law, p. 960; Miller's Equity, sec. 315.

Another, and final, objection made in the appellant's brief is that the allegations in the trustee's report of sale should have been supported by proof, and that, inasmuch as it is possible for the trust to open to let in unborn persons, the report should have stated that the sale was to the advantage of such unborn cestuis que trustent. We do not think that either, under the circumstances, was necessary. Neither party asked for leave to take testimony, and the allegations of the report were not disputed by the written exceptions filed, which merely raised some points of law upon admitted facts. It would be entirely speculative for the court to hold that the interest of persons unborn would not be identical with those of the living cestuis que trustent. Every person in esse, having an interest in the trust, was made a party to the proceedings, and the report states, under affidavit, that such sale was to the advantage of all the parties and that it was made with the approval of the children of the testator. We think this sufficient, under the circumstances stated, to warrant the action of the court in ratifying the sale.

Order affirmed, the costs to be paid out of the estate.

WHO MAY EXECUTE A TRUST AFTER THE DEATH OF ONE OR ALL OF THE TRUSTEES.*

I. On the Death of Less than All the Trustees.

- a. General Intent of the Trustor, 508.
- b. Devolution of the Title,
 1. At Common Law, 508.
 2. Under Statutes Against Joint Tenancy, 509.
 3. Exceptions, 512.
- c. Right of the Survivors to Execute, 514.

II. On the Death of a Sole or Last Surviving Trustee.

- a. Devolution of the Title.
 1. At Common Law, 515.
 2. Under Statutes Against Descent to Heirs and Personal Representatives of Deceased Trustee, 517.
- b. Who may Execute Trust After Death of a Sole or Last Surviving Trustee, 522.

III. Right of Administrator Cum Testamento Annexo, 523.

IV. Who may Move the Appointment of a Successor, 523.

V. Expiration of Trust by Operation of Law, 523.

I. On the Death of Less than All the Trustees.

a. General Intent of the Trustor.—In the execution of the trust created by a testator, his intention must govern the management of the trust estate, if it is ascertainable and possible of performance; but this intent must be determined from the general meaning of the whole instrument creating the trust, and consistent with established rules of law. When, however, such a contingency as the death of one or more of the trustees named is not provided against, since the instrument is silent, the case must be governed by general rules adopted by the courts to meet such conditions, unless there exists some express statutory provision which changes these rules. Questions very analogous to these considered in this note are treated in the note to *Crouse v. Peterson*, 80 Am. St. Rep. 96. That note is, however, restricted to powers contained in wills where the donor of the power may or may not have an estate or interest conferred upon him. The trusts herein considered may or may not be created by or under a will, but these are distinguishable from mere powers, the donees of which have not been given any legal estate or interest in the property.

b. The Devolution of the Title.

1. At the Common Law, several trustees held as joint tenants, and, on the death of one, the property vested in the survivors down to the last survivor: *Freeman on Cotenancy and Partition*, sec. 44; *Missouri & Ill. Coal Co. v. Reichert*, 119 Ill. App. 148, 231 Ill. 238, 121 Am. St. Rep. 307, 83 N. E. 66; *Muldrow's Exrs. v. Fox's Heirs*, 2 Dana, 74; *Warden v. Richards*, 11 Gray, 277; *Coykendall v. Rutherford*, 1 Green Ch. 360; *Belmont v. O'Brien*, 12 N. Y. 394; *Davone v. Fanning*, 2 Johns. Ch. 254; *Wood v. Sparks*, 18 N. C. 389; *Zebach's Lessee v. Smith*, 3 Binn. 69, 5 Am. Dec. 352; *Burr v. Sim*, 1 Whart. 266, 29

*REFERENCES TO MONOGRAPHIC NOTES.

Whether and when an administrator with the will annexed may execute trusts created by a will: 12 Am. Dec. 102.

Powers of sale in wills and who may execute them: 80 Am. St. Rep. 96.

Am. Dec. 48; Philadelphia T. S. D. & Ins. Co. v. Lippincott, 106 Pa. 295; Dick v. Harly, 48 S. C. 516, 26 S. E. 900; Robertson v. Gaines, 2 Humph. 367.

That this is the common-law rule is clearly shown in *Lane v. Debenham*, 11 Hare, 188, 68 Eng. Rep. Reprint, 1241, where it is said: "When a testator gives his property, not to one party subject to a power in others, but to trustees, upon special trusts, it is the duty of the trustee to execute the trust. If an estate be given to two persons, upon trust, to sell, there is no doubt the survivor may sell. The case is then within the rule put by Lord Coke, and which I am not aware has ever been disputed, that 'as the estate, so the trust shall survive'": Coke's *Littleton*, 113a, 181b; *Lewin on Trusts*, 11th ed., 287; *Hudson v. Hudson*, Cas. t. Talb. 129; *Attorney General v. Glegg*, Amb. 585; *Gwilliams v. Rowel*, Hard. 204; *Billingsley v. Mathew*, Toth. 168; *In re Smith*, 73 L. J. Ch. 74, [1904] Ch. 139, 89 L. T. 604. The last case cited fully discloses the attitude of the English courts on the question of discretionary powers in trustees.

2. Under Statutes Against Joint Tenancy.—Although in this country most of the states have attempted by legislation to abolish estates in joint tenancy, executors and other trustees of testamentary trusts are generally excepted, either by express provisions in the statutes themselves, or by the construction placed upon them by the courts. This exception in favor of joint tenancy in trust estates is based upon sound reason and in perfect harmony with equitable principles; for when a testator or other trustor has shown such confidence in certain persons as to select them from among all his acquaintances, and bestow upon them the management of his estate, or a definite portion of it, there is little doubt but that he would prefer any number less than all, or even the lone survivor of them, to some person in whose selection he could have no part. Therefore, by the rule that the testator's intent should govern, there can be no question as to the propriety of applying the principle of survivorship to such cases.

"The general principle of the common law as laid down by Lord Coke (Coke's *Littleton*, 112b), and sanctioned by many judicial decisions, is that when the power given to several persons is a mere naked power to sell, not coupled with an interest, it must be executed by all, and does not survive. But when the power is coupled with an interest, it may be executed by the survivor. . . . When anything is directed to be done in which third persons are interested, and who have a right to call on the executors to execute the power, such power survives. This becomes necessary for the purpose of effecting the object of the power. It is not a power coupled with an interest in executors, because they may derive a personal benefit from the devise. For a trust will survive, though no way beneficial to the trustee. It is the possession of the legal estate, or a right in the subject over which the power is to be exercised, that makes the interest in question. And when an executor, guardian, or other trustee is invested with the rents and profits of land for the sale or use of another,

it is still an authority coupled with an interest, and survives. . . . It is the settled doctrine of courts of chancery that the trust does not become extinct by the death of one of the trustees. It will be continued in the survivors, and not be permitted, in any event, to fail for want of a trustee": *Peter v. Beverly*, 10 Pet. 532, 9 L. ed. 522. The question was again before this court in *Taylor v. Benham*, 5 How. (U. S.) 233, 12 L. ed. 130, and it was there said: "Now, it appears that Savage, in his deeds of this land, averred himself to be the surviving executor of Taylor's will. And the case discloses the death of two of them, but says nothing of the other, except in 1824 and 1825 he is referred to as dead 'some time ago.' Considering him also as then dead, which is the probable inference from these facts, the right of Savage alone to sell under the will would be good. A power, . . . coupled with an interest or a trust, survives to the surviving executor." Here all the heirs were aliens, except one who was in such feeble health it did not seem probable that he would survive the testator. It was evident that he wished to secure his estate from escheat. "Either of two constructions of his will would accomplish this object. The one we have just adopted, considering him as devising the proceeds of the lands, and hence their title, to his brother and sister, subject to a power in the executors, coupled with a trust to sell them and pay certain legacies; or another, which would consider the power of the executors as one coupled with an interest, and vest the title at once in them for the purpose of selling the lands and discharging the small legacies and debts, if any, but holding the proceeds in trust to be paid over to his brother and sister, for the benefit of the heirs of William Forbes."

Whether a husband and wife hold a trust estate in joint tenancy or in common was decided in *Parrott v. Edmonson*, 64 Ga. 332. Although the statutes had "abolished the doctrine of survivorship in estates by joint tenancy," the court said: "Even if he [the husband] had entered thereon, man and wife were one, and the entry was joint. Nowhere, clearly, did he ever set up exclusive title or take several possession. Besides, it is clear that this power is fiduciary. . . . There is coupled with it a trust to reinvest for the use of the life tenants and remaindermen. . . . The general intent of the power is clear, and to that general intent any narrow, particular view must yield."

The power of surviving trustees to add to their number is denied in *Mallory v. Mallory*, 72 Conn. 494, 45 Atl. 164, but the general principle that the estate, on the death of one of several trustees, vests in the survivors or survivor, for the purposes set forth in the trust instrument, was upheld, as it was also in *Parsons v. Boyd*, 20 Ala. 112. In this case are given the reasons for the exception of trust estates from the effect of statutes abolishing all estates in joint tenancy. The court says: "But when the tenants hold as trustees for particular purposes or in autre droit, and can gain no advantage to themselves by the right of survivorship, then they are not within the reason of the statute, nor does the evil exist which it intended to

remedy, for no profit or benefit will result to the survivor, and although he take, by the death of his cotenant, the entire legal title, yet he will hold it as trustee, or in the right of another, and for his use and benefit. Joint trustees are not within the reason of the statute, nor the evil intended to be remedied by it, and to hold that their joint title is affected by the act could be productive of no good; it could avoid no evil, but, on the contrary, might often lead to protracted litigation and serious injury to the estate": *Burbach v. Burbach*, 217 Ill. 547, 75 N. E. 519; *Missouri & Ill. Coal Co. v. Reichert*, 119 Ill. App. 148; affirmed in 231 Ill. 238, 121 Am. St. Rep. 307, 83 N. E. 166; *Crafton v. Beal*, 1 Ga. 322; *Noble v. Teeple*, 58 Kan. 398, 49 Pac. 598; *Boyer v. Sims*, 61 Kan. 593, 60 Pac. 309; *Brown v. Hobson*, 3 A. K. Marsh. 380, 13 Am. Dec. 187; *Clay v. Hart*, 7 Dana, 1; *Stewart v. Pettus*, 10 Mo. 755; *Williams v. Otey*, 8 Humph. 563, 47 Am. Dec. 632.

The estate survives to the remaining trustees, although the principles of joint tenancy have been abrogated by statute: *Freeman on Cotenancy and Partition*, sec. 43; *Powell v. Knox*, 16 Ala. 364; *Parsons v. Boyd*, 20 Ala. 112; *Stewart v. Pettus*, 10 Mo. 755; *Shortz v. Unangst*, 3 Watts & S. 45. "Otherwise, indeed, the more precautions a person took by increasing the number of trustees, the greater would be the chance of the abrupt termination of the trust, by the death of any one": *Gray v. Lynch*, 8 Gill (Md.), 403. And even though the appointment of successors to deceased trustees, under an authority conferred by the will, was not made in conformity with statutory regulations, the title "remained in the surviving original trustee as a naked trust": *National Webster Bank v. Eldridge*, 115 Mass. 424. The court may, however, appoint "suitable persons to aid in executing the trust according to the will": *Sowers v. Cyrenius*, 39 Ohio St. 29, 48 Am. Rep. 418; *Williams v. First Presbyterian Soc.*, 1 Ohio St. 478. In New Jersey, survivorship is provided for by statute "unless it shall be otherwise expressed in said will," where the trust is conferred upon executors: *Rutherford Land & Improvement Co. v. Sauntrock*, 60 N. J. Eq. 471, 46 Atl. 648.

In *Shortz v. Unangst* (Pa.), 3 Watts & S. 45, real estate had been conveyed to two trustees "to have and to hold . . . unto their heirs and assigns forever, in trust, nevertheless," for the use of certain religious organizations, "and upon this further trust and confidence, that they, . . . and the survivor of them, their heirs and assigns," should perform the trusts therein named. The court said: "But the power to convey passes by the grant to Brown and Gress, their heirs and assigns; and Gress, being the survivor, could, in the absence of any proceedings to control him, assign to another trustee."

Where the trustees "were authorized" to fill vacancies by appointment, and failed to do so, since the instrument did not make such appointment mandatory, "the right of survivorship, therefore, continued as to them as it had done at common law." The statute in this state "excepted trust estates in its enactments against joint tenancy":

Philadelphia etc. R. R. Co. v. Lehigh Nav. Co., 36 Pa. 204. And although "the act of 1849 does authorize the orphans' court of Philadelphia, when the will has there been admitted to probate, an application of a party in interest, with the consent of the continuing executor, to appoint a trustee or trustees, in the place of those dying or ceasing to act, with the same powers as those in whose stead they were appointed, yet this action is not essentially necessary to a proper exercise of the power given to the executors by the testator. Unless such appointment be actually made, the surviving executor may exercise the whole power under the act of 1834": Philadelphia Trust etc. Co. v. Lippincott, 106 Pa. 295.

A power conferred upon executors, coupled with a trust, survives, "and may be executed by one executor. The test of such a power being coupled with a trust is that a third party has such an interest as will enable him to call on the executors to execute the trust": Bredenburg v. Bardin, 36 S. C. 197, 15 S. E. 372. And although there is great discretionary power conferred upon the executors in trust, if "the will does not expressly point to a joint exercise of it, even a single surviving executor may exercise it": Dick v. Harby, 48 S. C. 516, 26 S. E. 900; Davis v. Christian, 15 Gratt. (Va.) 11. Although the power conferred upon the trustee is in many respects discretionary, yet, if the duties imposed are of such an imperative character (as, for instance, the support of minors) that a court of equity will enforce them, the principle of survivorship applies: Hughes v. Williams, 99 Va. 312, 38 S. E. 138. The common-law principle of survivorship was expressly upheld in Williams v. Otey, 8 Humph. 563, 47 Am. Dec. 632.

The failure of surviving trustees to appoint a successor to a deceased trustee, where there was merely an authority to do so conferred by the will, was immaterial, since the direction to appoint was not "positive and imperative"; and the survivors, under such circumstances, had full authority to complete execution of the trust duties: Belmont v. O'Brien, 12 N. Y. 394. The right of survivorship was again sustained by the supreme court of New York in Steinhardt v. Cunningham, 55 Hun, 375, 8 N. Y. Supp. 627, where the beneficiaries of the trust endeavored to have a title, obtained under a foreclosure decree, declared invalid: Conover v. Hoffman, 14 N. Y. Super. Ct. (1 Bosw.) 214; Wildey v. Robinson, 85 Hun, 362, 32 N. Y. Supp. 1018. In the last case cited is given a review of the statutes regulating trust matters in New York. Combs v. O'Neal, 1 McArthur (D. C.), 405, cites and follows the rule laid down in Peter v. Beverly, 10 Pet. 532, 9 L. ed. 522, and Bank of the United States v. Beverly, 1 How. 134, 11 L. ed. 75.

3. Exceptions.—Although an examination of the foregoing cases reveals the fact that the common-law principle of survivorship of trustees is generally followed by the courts of the United States, and the several states thereof, yet there are some exceptions to be noted. If it appears that the trustor intended there should not be less than a certain number, where such intent is clear and imperative, it has been held that the right of survivorship does not exist; but, gen-

erally, this intent must be couched in words of such conclusive character that the liberal construction which the common law imposes would be absolutely untenable. In other words, these exceptions are not favored by the courts.

In *Tarrant v. Backus*, 63 Conn. 277, 28 Atl. 46, a testator named two trustees, and provided for the appointment of successors, in case of death of one or both of those named. His use of the plural in every reference to their powers was "some indication" of his intention that there should always be two trustees. The court so construed the instrument, since all the parties concerned desired it so, and no harm could result from such construction.

Dixon v. Homer, 66 Mass. (12 Cush.) 41, was decided under a statute which provided that the trustees should hold in joint tenancy.

The court said: "Then, by force of law, the property shall vest in the survivor. Yet the same Revised Statutes, made at the same time, provide that on the decease of such a trustee, the judge of probate shall appoint a new one, clearly proving that the survivorship of the property to one was not contemplated as a substitute for the appointment of another trustee. Such provision therefore, in terms, that the property shall go to the survivor, can be no evidence of the intent of the testator, even if such intent could prevail, that there should be but one trustee after the death of one." Although this exception to the general rule is an extreme one, it is in harmony with *Massachusetts General Hospital v. Armory*, 12 Pick. 445; *Bradford v. Monks*, 132 Mass. 405. But *National Webster Bank v. Eldridge*, 115 Mass. 424, seems to be at variance with the above case, and to incline toward the common-law rule.

Where a testator named three trustees and provided for the appointment of new trustees on joint application of the surviving trustee and the beneficiaries, since it seemed to be the testator's intention that that there should be three, "for he himself appointed that number," the court made the appointment of successors to the deceased trustees, without the survivor's consent: *Griswold v. Sackett*, 21 R. I. 206, 42 Atl. 868.

And although the testator directed that the survivors should nominate and the court appoint successors, it refused to confirm the nomination of the son of a retired trustee, on the ground that he was not in a position to act independently, and to exercise his own judgment during his father's life: *In re Lafferty's Estate*, 9 Pa. Dist. Rep. 385. But in *Philadelphia Trust etc. Co. v. Lippincott*, 106 Pa. 295, the court adhered to the common-law rule despite the provision in the will, "if any of my executors shall die, or decline the executorship, it shall be the duty of the acting executors to appoint another in the place of the executor so dying or declining." The statute here provided for a survivorship, "when the testator has not directed otherwise."

If trust powers are conferred upon trustees jointly, "with full power to convey jointly, and not singly," the survivor may not act alone, "for section 2642 of the code does not prevent a testator from placing

such limitations upon the exercise of powers granted by him as he may deem fit, but merely prescribes a rule applicable in the absence of directors by the testator to the contrary": *Herriot v. Prime*, 87 Hun, 95, 33 N. Y. Supp. 970; *Kissam v. Dierkes*, 49 N. Y. 602.

There are also cases where the trust involves duties indicating such personal confidence in the trustees as a body that the courts have denied the right of survivors to continue the trust after the decease of part of them. Such a case was *Dillard v. Dillard*, 97 Va. 434, 34 S. E. 60. The court said: "It is manifest that the trust created by the fifth clause of the will is, as respects John T. Dillard, discretionary, and peculiarly one of personal confidence. It imposed on the trustees a most delicate duty. . . . The power, as respects John J. Dillard, being conferred on the three trustees by name, without words of survivorship, and being one of personal confidence, it could only be conjointly exercised by all three of them, and not by a less number. The authority, being joint, is determined by the death of one of them. If the law were otherwise, then, upon the death of one of the trustees, the two survivors could execute the powers, and upon the death of one of them the sole survivor could do so, and might dispose of the property contrary to what the other two trustees in their lifetime always opposed and prevented, and thereby frustrate the very object of the testator in intrusting its disposition to the joint judgment of all three of them, and defeat his testamentary intent. . . . The question here is whether a discretionary power jointly confided to three trustees by name, though coupled with an interest, can be executed by the survivors after the death of one of the trustees or donees of the power. . . . The discretionary power not having been exercised in favor of John T. Dillard before the death of Stephen T. Dillard, and consequently not being capable of now being exercised, there remains no discretion in the trustees as to the disposition of the trust subject." In support of this decision the court cited *Cole v. Wade*, 16 Ves. 27, 10 R. R. 129, *Brown v. Hobson*, 3 A. K. Marsh. 380, 13 Am. Dec. 187, and *Read v. Patterson*, 44 N. J. Eq. 211, 6 Am. St. Rep. 877, 14 Atl. 490, although the last two relate to the right of the court to interfere with or regulate such special authority.

Where a testator provided "that if one or more of his trustees should die before the trust is fully accomplished, then others should be appointed by the survivors, who jointly with them should finish the execution of the trust," the court said: "This, then, is emphatically a case in which one of the trustees only was not competent to act." But since in this case it was not proven that the other trustees were dead, what the decision would have been on the question of survivorship, with such proof before them, is merely a matter of inference from the words above quoted: *Roberts v. Stanton*, 2 Munf. 129, 5 Am. Dec. 463.

c. Right of the Survivors to Execute.—It will appear from examination of the foregoing cases cited under b, 1 and 2 that, as a general rule, on the death of less than all of several trustees, the title having

devolved upon the survivor or survivors, they have full and complete authority to continue the execution of the trust.

There are, however, certain instances, as shown by the citations under "Exceptions," subdivision 3, where the wording of the trust instrument, or certain statutory provisions, will not admit of such construction, in which cases it devolves upon the court to appoint successors to the deceased trustees: *Tarrant v. Backus*, 63 Conn. 277, 28 Atl. 46; *Dixon v. Homer*, 66 Mass. (12 Cush.) 41; *Herriott v. Prime*, 87 Hun, 95, 33 N. Y. Supp. 970. And the surviving trustee was not permitted to continue in the execution of the trust, in *Dillard v. Dillard*, 97 Va. 434, 34 S. E. 60, for the reason that the duties of the trustees were of such a discretionary character as to indicate special confidence in the trustees as a body. The trust ceased on death of two of the trustees. This is an exception to the general rule that "Courts of equity will not suffer a trust to fail for want of a trustee."

II. On Death of a Sole or Last Surviving Trustee.

a. The Devolution of Title.

1. **At Common Law.**—"Nothing is more clear than that a trust devolves with the legal title upon the heir at law of a deceased trustee. 'If a feoffee die, his heir shall be subject to the trust,' was stated in a case as ancient as the 14th of Henry VII: *Fitzherbert v. Cook*, Lord Ellesmere's Office of Chancellor, p. 94. 'I take it,' says Chief Justice Wilmot, 'to be a first fundamental principle of equity that the trust follows the legal estate wheresoever it goes, except it comes into the hands of a purchaser for valuable consideration without notice. I never heard any distinction made, nor has any case been cited to prove that a trust fit and proper to be executed against a trustee should be suffered to fall to the ground and remain unexecuted against an heir at law where there was no trustee. The lapse of the legal estate has never the least influence upon the trusts to which it is subject': *Attorney General v. Lady Downing*, Wilm. Op. 21. It is needless to quote more of this great opinion. There are other parts of it illustrative of the same doctrine: See further, *Lord Glenville v. Blyth*, 16 Ves. 231; and our own statute of trusts, prescribing that a trust estate shall not descend to an heir: 2 N. Y. Rev. Stats., 4th ed., p. 141, sec. 80. Now, if the heir of a trustee takes the land clothed with and subject to the trust, there is no incapacity to execute it, and he may be called upon to do so. The terms of the grant in trust deeds confer in almost every case in terms the like power upon heirs and assigns as upon the trustee; and hence the frequency of powers reserved to appoint a new trustee upon the death or incapacity of those named. This dispenses with the necessity of a resort to the court of chancery: *Willis on Trustees*, 144, 145; *Lewin on Trusts and Trustees*, 465, 597; *Devy v. Peace*, Tam. 77. There is no doubt of the right of the heir to refuse the office, and no doubt of the right of this court, whenever a trust exists and the trustee fails, to appoint one to execute it: *Denyer v. Druce*, Tam. 37; *Attorney General v. Stephens*, 3 Mylne &

K. 47. But without a renunciation, and before a new appointment, I apprehend the heir is invested with the trust. The case of Attorney General v. Bishop of Litchfield, 5 Ves. 824, appears to me decisive. There a presentation had been made by the heir at law of a surviving trustee, which was held valid": Berrien v. McLane, 1 Hoffm. Ch. 421.

"If a trustee is required to grant a fee, the fee must be conferred upon him. The legal title to the premises here involved rested in the trustee. Upon her death the title did not remain in abeyance. Courts of equity may be vested with the power to appoint a successor to a trustee in whom title to lands may rest, but such title cannot descend to and vest in the courts of equity. The title held by the trustee in this instance upon her death passed to her legal heirs, subject to the trust": Lawrence v. Lawrence, 181 Ill. 248, 54 N. E. 918; Mauldin v. Armistead, 14 Ala. 702; Skiles v. Switzer, 11 Ill. 533; Preachers' Aid Society v. England, 106 Ill. 125; Waggener v. Waggener, 3 T. B. Mon. (19 Ky.) 542. But the common-law rule has now been abrogated by statute, according to McDougald's Admr. v. Carey, 38 Ala. 320; Read v. Rowan, 107 Ala. 368, 18 South. 211; Whitehead v. Whitehead, 142 Ala. 162, 37 South. 929.

Even though the creator of a trust specifies that, upon the death of the appointed trustee, the trust property shall descend to his legal representatives, the term "legal representatives" must be taken in a "broad sense, so as to include all persons who stand in the place of and represent the interest of another, either by his act or by operation of law, and in such cases it includes heirs and assigns. The entire legal title, a title in fee simple, was vested in the trustee," and upon his death "passed to the heirs of the trustee": Ewing v. Shannahan, 113 Mo. 188, 20 S. W. 1065.

Where a conveyance was made to a person, "his heirs and assigns, to his and their only proper use, benefit and behoof, forever," the conveyance having been made "in trust, and for the use and purposes hereafter mentioned and declared, and none other," the court said: "We therefore hold that the deed in question, by proper construction of its terms, operated to convey the legal estate in the land to the trustee in fee," and it "therefore remained in the heirs of the former trustee": Watkins v. Specht, 7 Cold. (Tenn.) 585; Williamson v. Wickersham, 3 Cold. 52.

An authority "to sell, to improve, to invest and reinvest, to collect rents and income, to pay taxes and commissions, assessments and other annual expenses and charges, to pay net income over, and to divide the estate," was construed as a trust, of necessity vesting the legal title in the trustees; and where "the last survivor did not devise the land, by law his estate therein descended to his heir at common law, his eldest son": Zabriskie v. Morris & Essex R. R. Co., 33 N. J. Eq. 22; Wills v. Cooper, 25 N. J. L. 137. "From the best inquiry we have been able to make, and concurring as we do, that the vesting of a trust by the rules of descent at common law will best answer the ends of its creation, that out intestate acts only respect beneficial

and not confidential interests, and that the application of them to trusts would produce many difficulties and mischiefs, we feel no difficulty in declaring that the trust in this instance became vested in the eldest son of Thomas Jenks, the trustee": *Jenks' Lessee v. Backhouse*, 1 Binn. (Pa.) 91; *In re Sheet's Estate*, 215 Pa. 164, 64 Atl. 413.

In South Carolina, also, the oldest son "is his successor, in law, as such trustee, unless the court names and appoints another trustee": *Reynolds v. Reynolds*, 61 S. C. 243, 39 S. E. 391. In a later case following this rule the court said: "The office and estate created by such instrument descends to, and vests in, the heir at law of the trustee, not his heirs under the statute of distributions, which, it seems, does not apply to trust estates, but his heir at common law": *Cone v. Cone*, 61 S. C. 512, 39 S. E. 748.

The foregoing cases illustrate the devolution of title to a trust estate at common law on the death of a sole or last surviving trustee, where the trust property is in real estate.

The common-law rule as to personal property held in trust is, that the title vests in the personal representative of the deceased trustee; but not as assets, since he takes such personalty subject to the trust, and as trustee: *Dias v. Baunell's Exr.*, 24 Wend. (N. Y.) 9; *De Peyster v. Clendinning*, 8 Paige, 295.

Under statutory provisions in New York, devolving a trust upon the supreme court, the court's authority extends to a trust of personal as well as real estate: *Curtis v. Smith*, 60 Barb. 9; *Royce v. Adams*, 123 N. Y. 402, 25 N. E. 386, affirming 57 Hun, 415, 10 N. Y. Supp. 821. The decisions in *Schenck v. Schenck*, 16 N. J. Eq. 174, and *Gulick v. Bruere*, 42 N. J. Eq. 639, 9 Atl. 719, follow the common-law rule, so far as it relates to personalty.

The rule in Georgia is that the executor of the deceased trustee is his successor: *Walden v. Skinner*, 101 U. S. 577, 25 L. ed. 963; and in Florida, where an executrix who was trustee of an express trust had not been discharged as executrix at the time of her death, her executor became trustee in her stead: *Anderson v. Northrop*, 30 Fla. 612, 12 South. 318.

2. Under Statutes Against Descent to Heirs or Personal Representatives of Deceased Trustee.—As we have seen, at common law courts of equity had complete jurisdiction over trust estates, to see that the trust should be executed according to the terms of the instrument creating it, and prevent its failure for want of a trustee. Therefore, when a trust stood in danger of failing by reason of there being no one to execute it, the duty devolved upon the court to appoint a trustee. By such appointment the new trustee acquired as full a title to the trust property as one appointed by the creator of the trust. Under statutory regulations taking from heirs and personal representatives of a deceased trustee the right of succession to the trust office, the rule as to equity jurisdiction remains as at common law, although the court is more frequently called upon to exercise its appointive power than formerly.

The title always devolves upon the appointee of the court. If it were otherwise, he would have no authority to execute the trust.

What becomes of the title during the time intervening between the trustee's death and the appointment of his successor is not always possible to ascertain from the decisions, although it may sometimes be of great importance to know whether it is in abeyance, or the successor's title relates back to his predecessor's death. In *Lecroix v. Malone* (Ala.), 47 South. 725, the court took the position that the title was in abeyance for the purpose of defeating a claim of adverse possession, for entry could not be hostile and adverse until there was someone to be disseized. Since the legal title was not in the beneficiaries, so that notice to them would operate as a limitation of their rights, and the trustee dead, the court preferred to consider the title as being in abeyance. But in a later case in the same jurisdiction the court said that the title was not in abeyance, but the succeeding trustee's title related back to the death of his predecessor, "to prevent spoliation by wrongdoers who might select the period of accidental vacancies in administrations and other trustships for carrying out their schemes of plunder." The new trustee was thus put in a position where he might sue for damages resulting from a trespass committed during the vacancy in the office of trustee: *Allison v. Little*, 85 Ala. 512, 5 South. 221. The descent to the trustees' heirs or personal representative, at common law, is to prevent the title being in abeyance: *In re Sheet's Estate*, 215 Pa. 164, 64 Atl. 413.

The following cases support the right of courts of equity to name a successor to a deceased trustee, when necessary, and to clothe him with sufficient title and authority to execute the trust: *Estate of Upham*, 127 Cal. 90, 59 Pac. 315; *Fay v. Howe*, 136 Cal. 599, 69 Pac. 423; *Griffith v. State*, 2 Del. Ch. 421; *People v. Petrie*, 94 Ill. App. 652; *French v. Northern Trust Co.*, 197 Ill. 30, 64 N. E. 105; *Cruse v. Axtell*, 50 Ind. 49. Any court of general chancery power: *Kean's Guardian v. Kean* (Ky.), 19 S. W. 184; *Boreing v. Faris*, 31 Ky. Law Rep. 1265, 104 S. W. 1022. Any court with equity jurisdiction "which first assumes jurisdiction is entitled to retain the same": *Noble v. Birnie*, 65 Md. 823, 65 Atl. 823; *Herrick v. Low*, 103 Me. 353, 69 Atl. 314; *Dilworth v. Rice*, 48 Mo. 124; *Morrow v. Morrow*, 113 Mo. App. 444, 87 S. W. 590; *Weiland v. Townsend*, 33 N. J. Eq. 393; *Pedrick v. Pedrick*, 50 N. J. Eq. 479, 26 Atl. 267, affirming 48 N. J. Eq. 313, 21 Atl. 946; *Delaney v. McCormick*, 25 Hun, 574, affirmed in 88 N. Y. 174; *Kootright v. Storminger*, 49 Hun, 249, 1 N. Y. Supp. 880; *Wilbey v. Robinson*, 85 Hun, 362, 32 N. Y. Supp. 1018; *Allen v. Baskerville*, 123 N. C. 126, 31 S. E. 383; *Ex parte O'Brien*, 11 R. I. 419; *Griswold v. Sackett*, 21 R. I. 206, 42 Atl. 868; *Hayes v. Robeson* (R. I.), 69 Atl. 686; *Reynolds v. Reynolds*, 61 S. C. 243, 39 S. E. 391; *Buchanan v. Hart*, 31 Tex. 647; *Town of Montpelier v. Town of East Montpelier*, 29 Vt. 12, 67 Am. Dec. 748; *Dunscumb v. Dunscumb*, 2 Hen. & M. 11; *Colbert v. Speer*, 24 App. D. C. 187, 26 Sup. Ct. Rep. 201, 200 U. S. 130, 50 L. ed. 403.

Although the statute provides for the appointment of successors to deceased trustees by the county court, if, before the original trustee's death, the chancery court has acquired jurisdiction by the filing of an attachment in the latter court, the appointment of the successor must be made by the chancery court; and it is "the duty of the court in such cases to divest the title to the property and enforce its delivery to the new trustee." This is necessary to prevent a conflict of jurisdiction: *Mask v. Miller*, 66 Tenn. (7 Baxt.) 527.

In Alabama, when vacancies occurred in the trusteeship of certain church property, the register in chancery was invested by statute with authority to fill such vacancies on application of any party in interest: *Allison v. Little*, 85 Ala. 512, 5 South. 221. And the city court of Bessemer was sustained in the exercise of the appointive power, in *Whitehead v. Whitehead*, 142 Ala. 162, 37 South. 929. The probate court may appoint successors to deceased testamentary trustees, and although title is in the appointee, he is not empowered, by virtue of his appointment, to exercise discretionary authority vested in his predecessor. When a testator directed that "the judge of probate of this district shall appoint successors," in case of the death of one of the original trustees, he was not permitted to do so in his individual capacity: *Tarrant v. Backus*, 63 Conn. 277, 28 Atl. 46; *Appeal of Allen*, 69 Conn. 702, 38 Atl. 701; *Carr v. Corning*, 73 N. H. 362, 62 Atl. 168; *Sowers v. Cyrenius*, 39 Ohio St. 29, 48 Am. Rep. 418; and unless the testator's intent to the contrary is plain, the appointee of the probate court will be empowered to exercise any discretion conferred upon his predecessor, the discretion being apparently intended to attach to the trust: *Ex parte Schouler*, 134 Mass. 426; *Whiting v. Whiting*, 4 Gray, 236; *Gibbs v. Marsh*, 43 Mass. (2 Met.) 243; *Dixon v. Homer*, 66 Mass. (12 Cush.) 41; *Bennett v. Pierce*, 188 Mass. 186, 74 N. E. 360; *Stanwood v. Stanwood*, 179 Mass. 223, 60 N. E. 584.

The governor might appoint a successor in Illinois, in the case of an assignment of a bank, if the surviving trustees should not exercise their right to select successors: *Richeson v. Ryan*, 15 Ill. 13.

Where the title to real estate is held by a sole trustee of an express trust, and he dies, the district court of the county in which the property is situated is immediately invested with the trust, and it must appoint a successor, upon application of some person interested in the trust: *Collier v. Blake*, 14 Kan. 250. In Kentucky and Wisconsin the county court has such authority: *Kean's Guardian v. Kean* (Ky.), 19 S. W. 184; *Cole v. City of Watertown*, 119 Wis. 133, 96 N. W. 538; but in the latter, the court cannot act arbitrarily, but appoints successor subject to the approval of the parties in interest; and the circuit court, in Maryland: *Druid Park Heights Co. v. Oetlinger*, 53 Md. 46; but the contention that all the parties in interest should be made parties to the proceedings, before the court could appoint, was not approved; since any party interested, under the code, might move the court to act: *Kennard v. Bernard*, 98 Md. 513, 56 Atl. 793; *McKim v. Handy*, 4 Md. Ch. 228. The court may

confer upon its appointee, in addition to the title, the right to exercise discretionary powers named in the instrument, if they can be considered ministerial and not absolutely personal: *Safe Deposit & Trust Co. v. Sutro*, 75 Md. 361, 23 Atl. 732; *Snyder v. Safe Deposit & Trust Co.*, 93 Md. 225, 48 Atl. 719; *Robinson v. Bonaparte*, 102 Md. 63, 61 Atl. 212.

The orphans' court also has authority to fill such vacancies: *Keplinger v. Maccubbin*, 58 Md. 203; *Noble v. Birney*, 65 Md. 823, 65 Atl. 823; *Zabriskie's Exrs. v. Wetmore*, 26 N. J. Eq. 18. The statute confers upon the orphans' court the power to execute trusts, and this court may appoint the same person administrator cum testamento annexo and trustee, vesting in him, as trustee, the title to the trust estate; and whenever the deceased was clothed with arbitrary discretion, the court substitutes equitable rules for such discretionary powers: *Wieland v. Townsend*, 33 N. J. Eq. 393; *Dillingham v. Martin*, 61 N. J. Eq. 276, 49 Atl. 143. It was said, however, in *Brush v. Young*, 28 N. J. L. 237, that: "Where the offices of executor and trustee are united in the same person, and the duties are identical and inseparable, in case of vacancy the orphans' court have no jurisdiction or authority to appoint a new trustee. But where the office of trustee under the will and that of executor are distinct and separable, the substitution of a new trustee in nowise affects the office of executor. . . . The true construction of the statute seems to be, that where extraordinary powers, not necessarily pertaining to the office of executor, are given to executors named in the will, these, as well as the necessary powers of an executor, shall vest in the administrator cum testamento annexo, unless the testator has otherwise directed as to these powers." The orphans' court appointed a new trustee in this case, and the estate in fee simple, in trust for the purposes declared, was vested in the appointee.

"It is familiar law that upon the death of an original trustee the trust devolves upon the supreme court, and it has jurisdiction to appoint new trustees to execute the trust": *Royce v. Adams*, 123 N. Y. 402, 25 N. E. 386, affirming 57 Hun, 415, 10 N. Y. Supp. 821; *In re Laing*, 59 App. Div. 612, 69 N. Y. Supp. 214; *Farmers' Loan & Trust Co. v. Pendleton*, 37 Misc. Rep. 256, 75 N. Y. Supp. 294, affirmed in 90 App. Div. 607, 85 N. Y. Supp. 1130; *In re Guetal*, 97 App. Div. 530, 90 N. Y. Supp. 138; *In re Mayne*, 98 App. Div. 171, 90 N. Y. Supp. 1050; *In re Landmesser*, 101 App. Div. 110, 91 N. Y. Supp. 774; *Tonnello v. Wetmore*, 192 N. Y. 583, 85 N. E. 1116.

"But there is no authority in the statute for appointing a 'substituted trustee' by that name. . . . The trust has devolved upon the court and it has power to appoint someone as its hand and representative to execute the unexecuted parts of the trust": *In re Guetal*, 97 App. Div. 530, 90 N. Y. Supp. 138; *Jewett v. Schmidt*, 83 App. Div. 276, 82 N. Y. Supp. 49, affirming the judgment in 39 Misc. Rep. 502, 80 N. Y. Supp. 352. And ordinarily the discretion conferred upon the former trustee may be exercised by the appointee, subject, however, to the approval of the court: *Button v. Hemmens*, 92 App. Div. 40,

86 N. Y. Supp. 829; *In re Guetal*, 97 App. Div. 530, 90 N. Y. Supp. 138; *Myers v. McCullagh*, 63 App. Div. 321, 71 N. Y. Supp. 520. Nor is the court bound to follow the wishes of parties interested in appointing a trustee, although it is proper that it should listen to them and consult their interests in selecting a proper person for the position: *Coster v. Coster*, 125 App. Div. 516, 109 N. Y. Supp. 798; *Faile v. Crawford*, 30 App. Div. 536, 53 N. Y. Supp. 353. In its discretion it may select a beneficiary of a trust, but it must appear that others are interested as beneficiaries besides the trustee, for otherwise there would be no trust: *Mulry v. Mulry*, 89 Hun, 531, 35 N. Y. Supp. 618; *People v. Donohue*, 70 Hun, 317, 24 N. Y. Supp. 437; and it does not lose jurisdiction, although a trustee appointed by it has removed from the state, carrying with him the trust fund. On the death of such trustee in the foreign state, it has an undoubted right to appoint a new trustee: *Curtis v. Smith*, 60 Barb. 9. The court's appointee takes title by virtue of his appointment: *Coster v. Coster*, 125 App. Div. 516, 109 N. Y. Supp. 798; and the court will protect anyone holding title through its appointee: *Myers v. McCullagh*, 63 App. Div. 321, 71 N. Y. Supp. 520.

The authority to fill vacancies in the office of trustee is not, however, under the exclusive jurisdiction of the supreme court, since the surrogate's court is empowered by statute to appoint a successor to a sole testamentary trustee, "unless such appointment would contravene the express terms of the will"; and the supreme court has expressed the opinion that this provision does not limit its jurisdiction to the appointment of a successor to a sole testamentary trustee, but that it may appoint in other cases where vacancy occurs in the office of testamentary trustees. In other words, the supreme court and surrogate's court seem to have concurrent jurisdiction in such cases: *Royce v. Adams*, 123 N. Y. 402, 25 N. E. 386; *In re Paton*, 41 Hun, 497; *In re Chase's Estate*, 40 Misc. Rep. 616, 83 N. Y. Supp. 62.

The surrogate's court has been upheld in appointing a trustee in the place of one deceased, where all the parties concerned treated the estate as a trust, although it was not clear from the instrument that a trust was actually created by its provisions: *In re Oltman's Estate*, 53 Misc. Rep. 208, 104 N. Y. Supp. 472; *In re Morian*, 1 Con. Sur. 503, 6 N. Y. Supp. 670.

The circuit court, also, had authority to appoint a successor to act as trustee, on the death of the executor of an estate before the trust conferred upon him by will was fully executed: *In re Hecht*, 71 Hun, 62, 24 N. Y. Supp. 540.

In a case in North Carolina, property had been conveyed in trust to a church, and although religious organizations were permitted by statute to select their own trustees at will, the court took the position that this provision applied only to church property, and not to property held in trust for a church for the education of the youth of the colored race; and the clerk of the superior court acted within the authority conferred upon him by statute in appointing a successor on

the death of the last surviving trustee: *Thornton v. Harris*, 140 N. C. 498, 53 S. E. 341.

In Pennsylvania, an act of March 22, 1825, extended by an act of April 14, 1828 (Pub. Laws, 453), specifies what courts are authorized to appoint successors to deceased trustees, in order that the trust may not fail: *Haines v. Hall*, 209 Pa. 104, 58 Atl. 125; but this act does "not authorize the court of common pleas to appoint trustees on the death of a trustee, where the trust estate has descended to the heirs at law": *Appeal of Carlisle*, 9 Watts, 331; nor does it give this court a right to appoint a trustee under a will by which the trust is annexed to the office of the executors.

b. Who may Execute a Trust after Death of a Sole or Last Surviving Trustee.—At common law, upon the death of a sole or last surviving trustee, the heir might execute the trust if the subject matter was realty: *Fitzherbert v. Cook*, Lord Elsmere's Office of Chancellor, 94; *Attorney General v. Lady Downing*, Wilm. Op. 7, Amb. 550; *Attorney General v. Bishop of Litchfield*, 5 Ves. 825; *Mauldin v. Armistead*, 14 Ala. 702; *Preachers' Aid Soc. v. England*, 106 Ill. 125; *Waggener v. Waggener*, 19 Ky. (3 T. B. Mon.) 542; *Ewing v. Shannahan*, 113 Mo. 188, 20 S. W. 1065; *Watkins v. Specht*, 7 Cold. (Tenn.) 585; *Zabriskie v. Morris & Essex R. R. Co.*, 33 N. J. Eq. 22; *Wills v. Cooper*, 25 N. J. L. 137; *Berrien v. McLane*, 1 Hoff. Ch. 421; *Jenks' Lessee v. Backhouse*, 1 Binn. (Pa.) 91; *Reynolds v. Reynolds*, 61 S. C. 243, 39 S. E. 391; *Cone v. Cone*, 61 S. C. 512, 39 S. E. 748. And the personal representative, where the trust property was personalty: *Anderson v. Northrop*, 30 Fla. 612, 12 South. 318, 532; *Schenck v. Schenck*, 16 N. J. Eq. 174; *Gulick v. Bruere*, 42 N. J. Eq. 639, 9 Atl. 719; *Dias v. Bownell's Exr.*, 24 Wend. (N. Y.) 9; *De Peyster v. Clendinning*, 8 Paige, 295; *Walden v. Skinner*, 101 U. S. 577, 25 L. ed. 965.

The common-law rule, however, has generally been abrogated by statute. Under such statutes it devolves upon the court to appoint a successor, and the appointee is clothed with full authority to carry out the provisions of the trust instrument: *Allison v. Little*, 85 Ala. 512, 5 South. 221; *Fay v. Howe*, 136 Cal. 599, 69 Pac. 423; *Griffith v. State*, 2 Del. Ch. 421; *People v. Petrie*, 94 Ill. App. 652; *French v. Northern Trust Co.*, 197 Ill. 30, 64 N. E. 105; *Cruse v. Axtell*, 50 Ind. 49; *Kean's Guardian v. Kean* (Ky.), 19 S. W. 184; *Borring v. Faris*, 31 Ky. Law Rep. 1265, 104 S. W. 1022; *Herrick v. Low*, 103 Me. 353, 69 Atl. 314; *Safe Deposit & Trust Co. v. Sutro*, 75 Md. 361, 23 Atl. 732; *Ex parte Schouler*, 134 Mass. 426; *Stanwood v. Stanwood*, 179 Mass. 223, 60 N. E. 584; *Wieland v. Townsend*, 33 N. J. Eq. 393; *Royce v. Adams*, 123 N. Y. 402, 25 N. E. 386; *Tonnele v. Wetmore*, 192 N. Y. 583, 85 N. E. 1116, 124 App. Div. 686, 109 N. Y. Supp. 349; *Thornton v. Harris*, 140 N. C. 498, 53 S. E. 341; *Robinson v. Ostendorff*, 38 S. C. 66, 16 S. E. 371; *Mask v. Miller*, 66 Tenn. (7 Baxt.) 527.

III. Right of Administrator Cum Testamento Annexo.

Although it is no part of the duty of an executor or administrator to carry on the business of the deceased, he having no title to or possession of the property of the testator, except for the purpose of closing the estate and settling its affairs (Wheeler's Appeal, 70 Conn. 511, 40 Atl. 452), yet the right of the testator to unite the two offices in the same individual is generally recognized. Naturally, the question frequently arises whether or not an administrator with the will annexed succeeds to the office of trustee in such cases. If it is clear that the trust is intended by the testator to attach to the office of executor, an administrator may perform the duties of trustee: King v. Talbert, 36 Miss. 367; Dilworth v. Rice, 48 Mo. 124; Farrar v. McCue, 89 N. Y. 139, affirming 26 Hun, 477; Appeal of Olwine, 4 Watts & S. (Pa.) 492; Innes' Appeal, 4 Whart. 179; Robinson v. Ostendorff, 38 S. C. 66, 16 S. E. 371; Green v. Davidson, 63 Tenn. (4 Baxt.) 488; Mosby's Admr. v. Mosby's Admr., 9 Gratt. (Va.) 584.

The administrator with will annexed does not, however, succeed the deceased executor as trustee, by virtue of his office of representative of the deceased testator: Lucas v. Price, 4 Ala. 679; Brown v. Hobson, 10 Ky. (3 A. K. Marsh.) 380, 13 Am. Dec. 187; Gambell v. Trippe, 75 Md. 252, 32 Am. St. Rep. 388, 23 Atl. 461, 15 L. R. A. 235; Greenough v. Welles, 64 Mass. (10 Cush.) 571; Compton v. McMahan, 19 Mo. App. 494; Morrow v. Morrow, 113 Mo. App. 444, 87 S. W. 590; Brush v. Young, 28 N. J. L. 237; Dominick v. Michael, 6 N. Y. Super. Ct. (4 Sand.) 374; Roome v. Phillips, 27 N. Y. 357; In re Paton, 41 Hun, 497; Kortright v. Storminger, 49 Hun, 249, 1 N. Y. Supp. 880; Wills v. Cowper, 2 Ohio, 124; Appeal of Ebert, 9 Watts, 300.

IV. Who may Move the Appointment of a Successor.

Any person having an interest in the trust estate or the proceeds thereof may make application to the court for the appointment of a trustee, and immediately upon the naming of a successor by the court, the trust vests in the appointee: Collier v. Blake, 14 Kan. 250; Allen v. Baskerville, 123 N. C. 126, 31 S. E. 383; Haines v. Hall, 209 Pa. 104, 58 Atl. 125; an executor of a deceased trustee can maintain proceedings for appointment of successor: In re Brady's Estate, 58 Misc. Rep. 108, 110 N. Y. Supp. 755; or a creditor of one of the distributees. Guarantee Trust & Safe Deposit Co. v. Scott, 199 Pa. 471, 49 Atl. 226; but an adverse claimant has no such interest as entitles him to be heard: White River L. Co. v. Clarke (N. H.), 70 Atl. 247; and in Watkins v. Specht, 47 Tenn. (7 Cold.) 585, the heirs of the trustee and cestuis que trust must be made parties, else the appointment will be invalid.

V. Expiration of a Trust by Operation of Law.

A purely personal authority, plainly intended to be exercised by a particular person or persons, and depending upon the exercise of broad discretion on the part of the trustee or trustees named, cannot

ordinarily be exercised by others. Where this special confidence is reposed in an individual as distinct from his office, so that the execution of the trust or power in trust is made expressly dependent upon the will of the grantee, it is necessarily personal and discretionary, and does not pass to a substituted trustee: *Brown v. Hobson*, 10 Ky. (3 A. K. Marsh.) 380, 13 Am. Dec. 187; *Gambell v. Trippe*, 75 Md. 252, 32 Am. St. Rep. 388, 23 Atl. 461, 15 L. R. A. 235; *Greenaugh v. Welles*, 64 Mass. (10 Cush.) 571; *Hunt v. Holden*, 2 Mass. 168; *Smith v. Floyd*, 56 Misc. Rep. 196, 107 N. Y. Supp. 231, affirmed in 124 App. Div. 277, 108 N. Y. Supp. 775; as where a will gave to the executors "full and complete power to sell and dispose of my said real estate, at such time and in such manner and on such terms as they shall jointly consider beneficial and for the interest of my said estate, with full power to convey by deed jointly, and not singly, as I might do if living." This authority terminated on the death of either of the executors: *Herriott v. Prime*, 87 Hun, 95, 33 N. Y. Supp. 970; *Benedict v. Dunning*, 110 App. Div. 303, 97 N. Y. Supp. 259. A trust will expire by operation of law whenever there is a union of the trust and beneficial estates in the same person: *Robinson v. Ostendorff*, 38 S. C. 66, 16 S. E. 371; *Wills v. Cooper*, 25 N. J. L. 137.

MERCHANTS' AND MINERS' TRANSPORTATION COMPANY v. EICHBERG.

[109 Md. 211, 71 Atl. 993.]

CARRIERS, Bills of Lading, When Deemed Parts of Contract of.—When the letters passing between a carrier and a shipper set forth merely the rates at which the goods will be carried and the time within which any claim for damages will be settled, it must be assumed that the well-known usage and custom of issuing bills of lading was within the contemplation of the parties, and such bills of lading, when issued, must be regarded as parts of the contract. (p. 528.)

CARRIERS, Negligence, Contract Creating a Presumption Against.—A provision in a bill of lading that negligence shall not be presumed against any carrier must be given full force, and the shipper must therefore assume the burden of proving not only the injury, but the negligence that caused it. (p. 529.)

CARRIER, Power of to Contract as to Burden of Proof of Negligence.—Though a carrier may not contract against its own negligence, it may contract so as to put the burden of proving the negligence upon the shipper. (p. 529.)

CARRIERS—Reduced Rates, Acceptance of by Shipper, What Amounts to.—Where a contract of carriage provides that the shippers elect to accept reduced rates for transportation on the terms contained in the bill of lading, that they shall give notice to the agent of the carrier in writing, and, on obtaining a somewhat higher rate,

that the carrier's common-law liability will attach, one who ships at reduced rates and without giving such notice is bound by the stipulation in a bill of lading providing that the shipper shall assume the burden of proving negligence on the part of the carrier. (p. 530.)

CARRIER, Waiver by of Failure to Make Claim for Damages Within a Time Specified.—If a bill of lading requires any claim for loss or damage to be made in writing within thirty days after delivery of the property, this stipulation is waived if the agent of the carrier, having full knowledge, fails to object to a claim on these grounds. (p. 530.)

CARRIERS—Measure of Damages, Stipulation Respecting. When Controlling.—If a bill of lading provides that the amount of loss or damage for which any carrier shall be liable shall be computed at the value of the property at the place and time of shipment, such stipulation is valid, and the value must be ascertained at the place and date of shipment. (p. 530.)

CARRIERS, Connecting, Action of Tort Against, When Proper.—If goods transported by connecting carriers are delivered in a damaged condition, an action of tort is properly brought against both. (p. 530.)

CARRIERS, Connecting, Dismissal as to One, When Proper.—If connecting carriers are sued for goods delivered in a damaged condition, and there is a stipulation in the bill of lading that negligence shall not be presumed against any carrier, the action is properly dismissed as to the initial carrier, if there is no evidence of its negligence. (p. 530.)

CARRIERS, Connecting, Negligence of the Last Carrier, When must be Affirmatively Proved.—If a bill of lading stipulates that negligence shall not be presumed against any carrier on goods being delivered in a damaged condition, and an action is brought against both the initial and the last carrier, the latter is entitled to an instruction to the jury to find in its favor, unless there is affirmative evidence of negligence on its part other than that the goods were received at their destination from the terminal carrier in a damaged condition. (pp. 530, 531.)

Plaintiffs' first and second prayers for instructions were both granted. They are as follows:

“Plaintiffs' First Prayer: If the jury believe from the evidence that on June 12, 1906, the plaintiffs wrote to Mr. C. S. Hoskins, freight traffic manager of the defendant, a letter, of which a copy has been offered in evidence, and that on June 25, 1906, the said C. S. Hoskins, freight traffic manager of the defendant, sent the plaintiffs the letter of June 25, 1906, which has been offered in evidence; and that subsequently thereto, at the times mentioned in the evidence, in the execution of the agreement made by said two letters, the plaintiffs delivered to the Central of Georgia Railway Company, at Atlanta, Georgia, the rolls of wrapping paper, the bundles of paper-bags, and the machinery mentioned in the evidence, in good condition to the Central of Georgia Railway Company to be transported by it and by the defendant, the Merchants' and Miners' Transportation Com-

pany, to Baltimore; and that some of the said rolls of wrapping paper and some of said bundles of paper-bags, and some of said machinery when delivered by the defendant to the plaintiffs in Baltimore, was in a damaged condition, and that a day or so after the arrival of said goods in Baltimore one of the plaintiffs and their attorney called at the office of the defendant in Baltimore and requested permission to remove said goods before paying the freight therefor, and stated that said goods were in a damaged condition, and the agent of the defendant refused to permit the removal of the goods before the freight was paid, and stated that he knew all about the goods in question, and thereupon the plaintiffs paid the freight and removed said goods; and that as the goods were removed, both a representative of the plaintiffs and a representative of the defendant made notations as to the condition of said goods; and that with reasonable diligence after receiving said goods, the plaintiffs ascertained the condition of said goods and as soon as they reasonably could had their counsel write to the defendant the letter mentioned in the evidence, dated October 6, 1906; and that subsequently thereto the correspondence mentioned in the evidence passed between the defendant and its officers and the plaintiffs and their counsel, Mr. Rosenheim, then the verdict must be for the plaintiffs. (Granted.)”

“Plaintiffs’ Second Prayer: If the verdict should be for the plaintiffs, then the jury are to allow them as damages the difference between the sum of money which was the market value in Baltimore of the goods at the time the plaintiffs received them from the Merchants’ and Miners’ Transportation Company in the damaged condition in which the goods then were, and the sum of money which would have been the market value of the same goods in Baltimore at the same time if they had been delivered to the plaintiffs in good condition. And the jury may in its discretion allow the plaintiffs interest on the sum awarded as damages from the time the said goods were delivered to them in Baltimore to the day of the verdict. (Granted.)”

The defendant’s second, eighth and ninth prayers for instructions, all of which were refused, are as follows:

“Defendant’s Second Prayer: That there is no legally sufficient evidence in this case that the goods referred to in the declaration and the evidence, or any of them, were injured or damaged while in the possession of the Merchants’ and Miners’ Transportation Company, and therefore, under the pleadings in this action, the plaintiffs are not entitled to recover against

the Merchants' and Miners' Transportation Company. (Refused.)''

“Defendant’s Eighth Prayer: If the jury shall find from the evidence that the paper and paper-bags therein referred to were delivered by the Merchants’ and Miners’ Transportation Company to the plaintiffs in substantially the same condition as they were in when it received them at Savannah, then the plaintiffs are not entitled to recover against said company on account of any alleged damage to the same. (Refused.)”

“Defendant’s Ninth Prayer: This defendant, the Merchants’ and Miners’ Transportation Company, prays the court to instruct the jury that the measure of damages for any of the goods mentioned in the evidence that they shall believe were injured by reason of the negligence or default of this defendant, is the difference between the market value of any goods so injured in Baltimore at the time of their delivery to plaintiffs and the market value of such goods, if uninjured, at such time and place, and inasmuch as the plaintiffs have offered no evidence of such market value in Baltimore of the goods mentioned at the time of their delivery to the plaintiffs and of the market value at the same time and place of such goods if uninjured. The verdict of the jury, if for the plaintiffs, must be for nominal damages only. (Refused.)”

John J. Donaldson and Charles A. Marshall, for the Merchants’ and Miners’ Transportation Company and Central of Georgia Railway Company.

William S. Bryan, Jr., and Benj. Rosenheim, for M. H. Eichberg et al.

225 WORTHINGTON, J. This is an action of tort brought in the superior court of Baltimore City by the appellees, trading as the Paper Mills Company, against the Merchants’ and Miners’ Transportation Company, and the Central of Georgia Railway Company, as joint defendants, to recover for damages alleged to have been sustained by the plaintiffs through the negligence, improper conduct, lack of skill and care, and wrongful action of the defendants, and each of them, in transporting a large quantity of wrapping paper and paper-bags, and also certain machinery from Atlanta, in the state of Georgia, to Baltimore, in the state of Maryland. The case was before this court at the October term, 1907, upon the question of the sufficiency of the service of process on the Central of Georgia Railway, one of the defendants, and some

of the facts are set out in the report of that appeal in 107 Md. 363.

The service of process having been held sufficient, the case proceeded to trial in the court below against both defendants, and a judgment in that court for nine thousand seven hundred and thirty-four dollars and seventy-six cents was obtained against the Merchants' and Miners' Transportation Company, alone, the Central of Georgia Railway Company obtaining a judgment in its favor, under an instruction of the trial court.

The unsuccessful contestants in both instances have appealed to this court.

We will first consider the appeal of the Merchants' and Miners' Transportation Company.

The learned judge in the court below, by granting the plaintiff's first prayer, practically decided that the whole contract of carriage between the parties is contained exclusively in the two letters, one of date June 12, 1906, and the other of date June 25, 1906, which passed between the plaintiffs and Mr. C. S. Hoskins, freight traffic manager of the Merchants' and Miners' Transportation Company, and which are printed in the record. But we think the true contract is to be found in these two letters, or rather in the one of date June 25, 1906, and in the bills of lading issued to ²²⁶ the plaintiffs by the Central of Georgia Railway Company, taken and considered together.

The letters set forth merely the rates at which the goods will be carried, and the time within which any claim for damages would be settled. It may well be assumed that when these letters were written, the well-known usage and custom of issuing bills of lading with the several shipments were within the contemplation of the parties. Indeed, the plaintiffs in their letter of June 12th refer to the "clean B-L of the Central of Georgia for evidence" as to the condition in which the shipments would leave Atlanta, thus clearly indicating that they had in mind the receipts usually issued by carriers when goods were accepted by them for carriage.

A similar view was held by the court of appeals of New York in the case of *Donovan v. Standard Oil Co.*, 155 N. Y. 112, 49 N. E. 678, where the court said: "This instrument [the bill of lading] must be read with the letter referred to under which the plaintiffs entered into the general arrangement, in order to ascertain the full extent of their duties and obligations as carriers."

Having decided that the bills of lading form part of the contract of carriage, it becomes our duty to construe certain portions of them, which give rise to the controversy in this case. The clause which gives rise to the most important question is contained in the eleventh section of these bills of lading, and is as follows: "Nor shall negligence be presumed against any carrier."

The question is, How does this clause affect the burden of proof? We think it must be given its full force. That is to say, the burden is upon the plaintiffs to show not only the injury, but also the negligence that caused the injury.

The common-law presumption of negligence, where damage merely is shown, is negatived by the express stipulation of the contract. It will not suffice to prove merely that the ²²⁷ goods were delivered to the carrier in good condition and received by the consignee in a damaged condition, but negligence causing the injury must be proven.

In the absence of contract, the law makes the carrier an insurer, and as the goods it carries may be injured or destroyed by many causes not due to its own negligence or want of care, the carrier is as much entitled to be paid a premium for its insurance of their safe delivery at the place of destination as for the labor and expense of conveying them there: *Riley v. Horne*, 15 Eng. Com. L. 551.

While the carrier may not contract against its own negligence (1 *Hutchinson on Carriers*, sec. 450), it may contract so as to put the burden of proving the negligence upon the plaintiff.

It was so held in the case of *New Jersey S. N. Co. v. Merchants' Bank*, 6 How. 344, 12 L. ed. 465, which was followed by our predecessors in the case of *Bankard v. Baltimore & O. R. R.*, 34 Md. 197, 6 Am. Rep. 321.

In the former case, Mr. Justice Nelson, speaking for the supreme court said: "The respondents having succeeded in restricting their liability as carriers by special agreement, the burden of proving that the loss was occasioned by the want of due care, or by gross negligence, is upon the libelants, which would be otherwise in the absence of any such restriction."

In the case at bar the contract of carriage provided that if the shippers elected not to accept the reduced rates for transportation and the conditions contained in the bills of lading, they should give notice to the agent of the receiving carrier in writing, and by paying a somewhat higher rate, the carrier's

common-law liability would attach except as limited by the laws of the United States and of the several states, so far as any such statutes applied.

The plaintiffs deliberately chose the reduced rate, and thereby assumed under the conditions of the bills of lading which they accepted the burden of proving negligence against the carriers in case any loss or injury to the goods should ²²⁸ occur in the course of the transportation, and it is not for this court to relieve them of the burden which they thus assumed.

As regards the stipulation in the bill of lading requiring any claim for loss or damage to be made in writing within thirty days after the delivery of the property, we think that such stipulation was waived by the carrier, whose agent with full knowledge raised no objection to the claim on that ground: 5 Am. & Eng. Ency. of Law, 2d ed., 322-325.

No objection is made to the granting of the plaintiff's second prayer concerning the measure of damages, except on the ground that there is not sufficient evidence to go to the jury as to the market value of the goods at Baltimore, in either an injured or uninjured condition on their arrival in that city.

We think the evidence in this respect too meager, but as there is a provision in the bill of lading to the effect that "the amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under this bill of lading," the measure of damage should be in accordance with this provision; that is, their value should have been ascertained at Atlanta, as of the days and times of shipment. It was so held by this court in the case of *McCoy v. Erie R. R. Co.*, 42 Md. 498, under a similar provision in the bill of lading in question in that case. Of course, the parties may waive this provision in the present case, if they so desire.

We think the proceedings were properly brought in tort jointly against both carriers: *Baltimore & O. R. R. Co. v. Pumphrey*, 59 Md. 399; 1 Poe Pldg., secs. 296, 526, 528; *Mershon v. Hobensack*, 22 N. J. L. 372.

As to the appeal of the Paper Mills Company from the action of the trial court in dismissing the suit as against the Central of Georgia Railway Company, we think such action was proper.

The plaintiffs had closed their case without offering any evidence whatever of negligence on the part of this defendant, and by the contract of carriage under which the goods were shipped no negligence could be presumed against it from

229 the mere fact that the goods which had been delivered to it in good condition were received at their destination from the terminal carrier in a damaged condition.

For these reasons we think there was error on the part of the learned judge in the court below in granting the plaintiffs' first and second prayers, and in refusing to grant the defendant's second, eighth and ninth prayers, and we must therefore reverse the judgment in No. 62, but as the plaintiffs may be able upon a second trial to adduce evidence of negligence, we will award the plaintiffs a new trial as to the Merchants' and Miners' Transportation Company.

Judgment in No. 62 reversed, with costs and a new trial awarded.

Judgment in No. 63 affirmed, with costs to appellee.

The Limitation of a Carrier's Liability in bills of lading is the subject of a note to Chicago etc. Ry. Co. v. Calumet etc. Farm, 88 Am. St. Rep. 74. The general rule is that a carrier cannot, by contract with a shipper, limit its liability for negligence: Baker v. Boston etc. R. R., 74 N. H. 100, 124 Am. St. Rep. 937; Southern Express Co. v. Marks, Rothenberg Co., 87 Miss. 656, 112 Am. St. Rep. 466; Eckert v. Pennsylvania R. R. Co., 211 Pa. 267, 107 Am. St. Rep. 571; Fisher v. Boston etc. R. R. Co., 99 Me. 338, 105 Am. St. Rep. 283.

The Burden of Proof as Between Connecting Carriers to show who is at fault for loss or injury is the subject of a note to Beede v. Wisconsin Cent. R. R. Co., 101 Am. St. Rep. 392. Subsequent decisions on this question are: St. Louis etc. R. R. Co. v. Pearce, 82 Ark. 353, 118 Am. St. Rep. 75; St. Louis etc. Ry. Co. v. Renfroe, 82 Ark. 143, 118 Am. St. Rep. 58; Rolfe v. Lake Shore etc. Ry. Co., 144 Mich. 169, 115 Am. St. Rep. 388; St. Louis etc. Ry. Co. v. Coolidge, 73 Ark. 112, 108 Am. St. Rep. 21.

The Liability of an Initial Carrier for the torts or negligence of connecting lines is the subject of a note to Pennsylvania Co. v. Loftis, 106 Am. St. Rep. 604.

MORGAN v. LANDSTREET.

[109 Md. 558, 72 Atl. 399.]

CORPORATIONS, Subscriptions to Stock of, When Become Due.—Where the capital stock and the number of shares are fixed by the act or certificate of incorporation, no assessment can be made on the shares of any subscriber until the whole number of shares have been taken. (p. 537.)

CORPORATION—Subscription, Only Unconditional can be Considered.—For the purpose of considering whether all the shares of stock of a corporation have been subscribed so as to make the subscribers liable on their subscription, only unconditional subscriptions, payable in cash, can be considered. (p. 538.)

CORPORATION—Subscription to Stock When the Corporation is Doing Business and the Whole Capital has not been Paid in.—The

fact that a corporation was doing business when a subscription to its capital stock was made does not deprive a subscriber of the benefit of the rule that his subscription does not become enforceable until the whole capital stock has been subscribed. (p. 541.)

CORPORATION—Subscription to Capital Stock, Estoppel Against Denying Liability, When does not Exist—Waiver.—The fact that a subscriber to the capital stock of a corporation knows it has been doing business in a small way and that he was afterward elected a director does not estop him from denying liability on his subscription until the whole of the shares are subscribed for, if he never qualified as director, nor attended a directors' or shareholders' meeting, nor participated in any business carried on by the corporation. (p. 542.)

Joseph C. France, Stuart S. Janney, A. C. Ritchie and Gibson & Smith, for the appellants.

Benjamin A. Richmond, Edgar H. Gans and J. F. C. Talbot, for the appellee.

582 PEARCE, J. This action was brought by the circuit court for Baltimore county by John H. Morgan and Frank B. Smith, receivers of the Maryland Storage Company, a corporation under the laws of Maryland, duly adjudged to be insolvent, against Fairfax S. Landstreet, to recover the sum of \$30,000, being the amount of the defendant's written subscription made June 10, 1907, for six hundred shares of the capital stock of said company of the par value of \$50 per share. The proceeding was by way of attachment against the defendant as a nonresident, who entered a voluntary appearance in the summons case. The short note contained one count for money due on account stated, and a special count on the contract of subscription. The defendant filed the two general issue pleas in assumpsit, and a third plea, "that the subscription mentioned in the plaintiffs' declaration was subject to a condition precedent, that said subscription was not to be binding on the defendant until all of the original capital stock of the said Maryland Storage Company was duly subscribed, and that **583** subscriptions were never obtained for all of said original stock, and said condition precedent never complied with, whereby the defendant's subscription never became effective or binding." The plaintiffs joined issue on the defendant's first and second pleas, and to the third plea filed two replications—first, that said subscription was not subject to the condition precedent pleaded; and, second, that the defendant, by his acts, had waived any and all defense on account of the alleged fact that all of the original capital stock of the Maryland Storage Company was not subscribed.

The defendant joined issue on the first replication to the third plea, and as to the second replication, rejoined that he

had not, by his acts, waived any defense on account of the alleged fact that all of the said original stock had not been subscribed. And the plaintiffs joined issue by way of surrejoinder on the defendant's rejoinder to the plaintiffs' second replication to the defendant's third plea. It thus appears that the fact of the subscription was admitted, and also that no part of the same has been paid, and under the pleadings two questions only were in issue—first, whether the contract of subscription was subject to the condition precedent pleaded; and, second, if so, whether such condition had been waived by the acts of the defendant.

At the close of all the testimony on both sides of the case, the defendant moved to strike out certain items of testimony which had been admitted subject to exception, and the plaintiffs moved to strike all the testimony adduced at the trial which tends to qualify the written subscription, whether contained in the defendant's own statements or in his letters offered in evidence, or in the testimony of the witnesses Timanus and Brady; also defendant's statement of what he told Timanus as to taking the last \$30,000 of stock, when he, Timanus, had secured the balance, and also what he said either to Redwood or Brady, as to any subscription to be made to this stock by the Western Maryland Railroad Company. Both these requests were refused.

The plaintiffs then offered five prayers, all of which were 584 rejected, and the defendant offered three prayers, of which the second and third were rejected and the first was granted, as follows: "The court instructs the jury that by the uncontradicted evidence in the case the stock of the Maryland Storage Company authorized by its charter was never fully subscribed, and their verdict must be for the defendant, there being no evidence in the case legally sufficient to estop the defendant from setting up the defense of partial subscription to stock," thus withdrawing the case from the jury. The defendant excepted specially to the plaintiffs' second prayer on the ground that there was no evidence that defendant subscribed to any increased capital stock of the storage company, and not its formative or original stock, and this special exception was sustained; all of these rulings being embraced in the single exception taken.

A brief statement of the history of the case will throw material light upon the situation, before going into the law applicable to the case.

The storage company was incorporated under the laws of Maryland, November 18, 1904, to carry on a forwarding and

warehouse business, there being seven directors, and the authorized stock being three thousand shares of the par value of \$50 each. Mr. Timanus was then president of the storage company, and Mr. Landstreet was then vice-president of the Western Maryland Railroad Company. This company had recently established a tide-water terminus at Port Covington, and one of the principal objects of the organization of the storage company was to secure the storage business incidental to the new tide-water terminus. This appears in Mr. Timanus' letter of July 1, 1904, to Mr. Landstreet as vice-president of the railroad company. On November 17, 1904, Timanus, learning that the railroad company was about to acquire the possession of Brown's wharf, on the north side of the harbor of Baltimore City, proposed to Landstreet to take a lease of the warehouse then on that wharf. This permitted, without further cost for building, a small active business, requiring nine or ten ⁵⁸⁵ clerks and laborers and doing a business of about \$1,800 a month. He testified they were trying to get the railroad company or Landstreet interested in the storage company. No agreement was reached in the matter of the lease until June 12, 1906, when a lease of Brown's wharf was executed for five years, containing a covenant on the part of the storage company to erect a storage-house on York street, to be completed, if possible, by January 1, 1907. At that time there was no actual subscription by Landstreet, either for the railroad company, in his own name, or for any other individual. In May, 1905, the charter was duly amended, so as to increase the number of directors from seven to nine. In July, 1906, a stockholders' meeting was called for the purpose of increasing the capital stock from \$150,000 to \$250,000, and the number of directors from nine to twelve. It appears from the minutes of that meeting that stockholders were present representing sixty-five shares of stock, that being more than two-thirds of the whole number of shares then issued, and that these voted to increase the amount of capital stock and the number of directors as above proposed. These proceedings, however, were abortive, both because the requisite notice was not properly addressed to the stockholders, and because the proposed amendment was not acknowledged and recorded as required by sections 51, 52 and 55 of article 23 of the code.

In May, 1907, Landstreet resigned as vice-president of the railroad company, and Brady, vice-president of the storage company, testifies that at that time he asked him when he would sign a subscription, as some who had subscribed

would not pay until they felt sure of his subscription, as he had resigned from the railroad company, and he said he would let him hear in a few days. Later he told Landstreet they wanted him as a director. On June 10, 1907, he signed the subscription and consented to be elected a director. At that time there were ten directors elected and serving, being one more than the charter allowed. Landstreet never qualified ⁵⁸⁶ as director, and never attended any stockholders' or directors' meeting.

At the date of his subscription, Brady testifies there were subscriptions, including Landstreet's, of about \$101,000, and no greater amount was ever subscribed.

Mr. Morgan, one of the receivers, testified from the books and papers that came into his hands as receiver that at that time \$40,000 had been paid in on subscriptions, about \$36,000 unconditional subscriptions, unpaid, including Landstreet's \$30,000, and some conditional subscriptions, unpaid, the whole amounting to about \$101,000, as stated by Brady.

On July 1, 1907, there being then only \$76,000 unconditionally subscribed, including the \$30,000 of Landstreet, the directors resolved to build the York street storage-house at a cost not to exceed \$145,000. The York street lot was subject to two mortgages aggregating \$51,000, and the building contract called for an expenditure of \$136,000. The lot sold for barely enough to cover these mortgages. Brady, in the latter part of July, 1907, tried to induce Landstreet to go to see the building, then started, but he declined to go. In September, 1907, he asked Landstreet for a payment on the subscription, and he told Brady that, under the business and financial conditions existing, they ought to hold off the work, and Brady explained they had gone too far to stop. Later, and early in October, Landstreet did go with Timanus and Brady and examine the work in progress, and he said he thought it was a good building. Brady did not then ask for any payment and did not hear Timanus ask for any; and Brady never afterward saw him on that subject.

Timanus testified that he asked Landstreet several times in the summer and fall of 1907 for payments on account, and his answer was that money was hard to get, and once, in September, 1907, he said he was not liable and would not pay it at all. He also testified that Landstreet told him that when he subscribed Brady told him that all the stock had been either subscribed or promised. Brady, however, denied this, and ⁵⁸⁷ said that he told Landstreet that his binding subscription would enable them to get many others, but did not say they

could complete the total authorized capital. Landstreet testified that when the organization of the storage company was under discussion between Timanus and himself, he said that if he would get a strong management and have the finances in unquestionable form before undertaking the enterprise, the railroad company would co-operate with him and would take the last \$30,000 of its stock of \$150,000, and that in all the negotiations throughout he acted in behalf of the railroad company, and at no time and in no way as an individual, and that it was so understood by all concerned. He states that as early as January, 1907, when informed by Brady of their plan to acquire property on the south side of the harbor, that he advised against any additional enterprises, and that after his resignation as vice-president of the railroad company he remained one of its directors, and told both Timanus and Brady they would have to take up the subscription of the railroad company with other officials, and that if the storage company complied with the previous understanding, he saw no reason why the matter should not be concluded. That shortly after this Brady came to see him and said that he had responsible men in Baltimore, mentioning a number of them, who were only waiting for the signature of the railroad company, and who would then sign subscriptions to the full amount of the authorized capital stock of the company, and urged him to sign personally for this \$30,000, which he did upon those assurances, and the further assurance that their finances were in condition to meet any undertaking entered into.

He also says that in signing he expressly stated to Brady that he was not signing his name as an individual that would engage him in any financial obligation, and that Brady replied nothing was to be paid on that subscription until business conditions would warrant it. He also says that when he visited the building in October, 1907, no reference was made to his subscription, but Messrs. Timanus and ⁵⁸⁸ Brady stated that they wished to arrange with the Western Maryland Railroad Company to take over this building, and some of the officials advised them to get him to examine it, so that he could report thereon to the executive board.

We have thus condensed the most material testimony in the case, and will now consider the propriety of the granted instruction, which constitutes the principal and controlling question in this appeal.

We could not expect, and do not understand the appellants to deny the general rule, that where the capital stock and

the number of shares are fixed by the act, or certificate, of incorporation as in the present case, no assessment can be lawfully made on the share of any subscriber until the whole number of shares has been taken. This principle was early adopted both in England and in this country, and is now firmly established as a rule of law. Two of the earliest cases in this country are *Salem Mill Dam Corp. v. Ropes*, 6 Pick. 23, and *Stoneham Branch R. Co. v. Gould*, 2 Gray, 277, in both of which the reasons for the rule were given by eminent chief judges of the supreme court of Massachusetts, Parker and Shaw. No more convincing reasons could be given than those stated by Chief Judge Shaw in *Stoneham Branch R. Co. v. Gould*, 2 Gray, 277. He says: "This is no arbitrary rule. It is founded on the plain dictate of justice and the strict principles regulating the obligation of contract. When a man subscribes for a share of stock, consisting of one thousand shares, in order to carry on some designated enterprise, he binds himself to pay one-thousandth part of the cost of such enterprise. If only five hundred are subscribed for, and he can have no assurance which he is bound to accept that the remainder will be taken, he would be held, if liable to an assessment, to pay one five-hundredth part of the enterprise, besides incurring the risk of the entire failure of the enterprise itself, and the loss of the amount advanced toward it."

This rule, with the reasons which led to it, were adopted in this state in *Hughes v. Antietam M. Co.*, 34 Md. 316, and has been laid down consistently since in *Hager v. Cleveland*, 36 ⁵⁸⁹ Md. 476; *Garling v. Baechtel*, 41 Md. 305; *Stillman v. Dougherty*, 44 Md. 380; *Morrison v. Dorsey*, 48 Md. 461; *Musgrave v. Morrison*, 54 Md. 161; and *Gettysburg Nat. Bank v. Brown*, 95 Md. 367, 93 Am. St. Rep. 339, 52 Atl. 975. In the last mentioned, the latest case upon the point in this state. Judge Page said: "These rules apply to subscriptions made before and after the company is chartered. They are founded upon the theory that the subscription is made upon the implied understanding that the entire amount of stock fixed by the charter is necessary for the successful prosecution of the business for which the company was incorporated. It is not to be supposed that a reasonably prudent person will invest in a corporation which is not to be supplied with sufficient capital with which to prosecute its affairs; and therefore it is that a presumption arises that the amount fixed in the charter shall be raised before the corporation creates any liabilities."

There are substantial differences, it is true, in this regard

between "original or formative" stock and "increased" stock, but that question does not arise here, because the attempt to increase the stock was not operative.

It is sufficient that the Maryland rule is as stated, but as indicating its soundness and universality, it may be stated that it prevails in New York, Missouri, Connecticut, New Hampshire, Wisconsin, Iowa, Georgia, California, Illinois, Maine, Tennessee, Ohio, and generally throughout the United States.

It will be observed that it is spoken of generally as an implied rule, but it may, of course, be expressed, and in this case the uncontradicted testimony of Mr. Landstreet is that he expressly agreed to take only the last \$30,000 of the whole amount of \$150,000, so that his subscription was upon the express condition that the whole residue of the stock should be taken before his subscription became binding. This condition, not having been incorporated in the written subscription, might, perhaps, not have been available as a defense, if the residue had been fully and unconditionally subscribed; but the uncontradicted evidence in this case shows that there
590 were never over \$76,000 unconditional subscriptions, and the cases are uniform that for this purpose there can be counted only unconditional subscriptions, payable in cash: *Troy & G. R. R. Co. v. Newton*, 8 Gray, 596; *Oskaloosa A. Works v. Parkhurst*, 54 Iowa, 357, 6 N. W. 547; *Brand v. Lawrenceville C. R. R.*, 77 Ga. 506, 1 S. E. 255; *California Southern Hotel Co. v. Russell*, 88 Cal. 277, 26 Pac. 105.

While the appellants, as we have said, do not deny the general rule invoked, they do contend that "if the corporation is already a going concern at the time of the subscription, and is continuing to create liabilities to the knowledge of the subscriber, and the subscriber also knows that its stock fixed in its charter is not fully subscribed," then the presumption which this court, in *Gettysburg Nat. Bank v. Brown*, 95 Md. 367, 93 Am. St. Rep. 339, 52 Atl. 975, said arises, "that the amount fixed in the charter shall be raised before the corporation creates liabilities," cannot arise, and the rule has no application. This contention seems to us to confound the general rule with the subsidiary rule, equally well settled, that this defense may be waived, or the subscriber be estopped from setting it up. The appellants cite in support of their contention what they concede to be a dictum of this court in *Musgrave v. Morrison*, 54 Md. 161, in which Judge Robinson said: "We do not mean to say that this rule applies to corporations of every kind without regard to the objects and purposes for

which they are chartered. . . . In this case, the company was chartered for the purpose of buying, selling and leasing property and also as a homestead and building association, and at the time of appellant's subscription was engaged in the prosecution of its business, and he knew at the same time that its whole capital stock had not been taken, and under these circumstances it might well be argued that his subscription was not made upon the condition that the company was not to organize until the whole number of shares had been taken." But the learned judge, nevertheless, placed the decision squarely on the ground that during three years that he was a member he not only regularly paid his weekly dues, but accepted his proportion of the profits earned, and through an attorney ⁵⁹¹ voted his stock at all meetings, whether for the election of directors or the transaction of other business, and the court expressly states that all this time he knew the whole capital stock had not been taken.

Another case cited for their contention is *Arkadelphia Cotton Mills v. Trimble*, 54 Ark. 316, 15 S. W. 776, in which the court said: "The fact was that the corporation began business as soon as the \$14,500 was subscribed, and after that Trimble agreed to take and pay for the \$500 subscribed by him. From this it is evident that there was and could be no implied condition in his agreement that the corporation should not begin business until all the capital stock was taken. The corporation was engaged in business when he subscribed. It was evident it would need money in the prosecution of its enterprise, for if it would not, there was no necessity for his subscription. He was not to be an honorary member." A little further examination of that case will show, however, that far from supporting the appellants' contention as applied to the facts of this case, it bears out the application of the general rule as inherent in the appellee's subscription, and shows it as avoidable only by waiver or estoppel. The articles of association in that case which were subscribed by Trimble contained the following provision: "The amount of capital stock of said association shall be \$50,000, of which \$14,500 have been subscribed by corporators aforesaid, and the residue may be issued and disposed of as the board of directors may from time to time order and direct"; and the court said: "No implication arises from this provision that the corporation was to postpone its enterprise until all the capital stock had been subscribed. The most reasonable inference to be drawn from it is that the \$14,500 was all the money needed for the purpose. The fact was that it began business

as soon as the \$14,500 was subscribed, and after that Trimble agreed to take his stock." These articles of association could well be construed as fixing the formative or original stock at \$14,500, with power to increase the same from time to time as the directors should see fit, up to \$50,000, and this is precisely ⁵⁹² what it is fair to presume Judge Robinson meant in *Musgrave v. Morrison*, 54 Md. 161, when he said, on page 164: "It may be obvious from the face of the charter itself that the whole capital stock is not in any manner necessary to the organization of the company, and that the subscriber knew, or had reason to know, this at the time of subscription."

We can perceive nothing in the case before us in the nature or kind of business for which the storage company was incorporated (if that can in any case be a proper subject of inquiry), nor in the time when, or the circumstances under which, the appellee made the subscription in suit which should take this case out of the general rule. It appears from the subscription blank that the capital stock was then designed to be \$250,000, presumably upon the supposition that the attempted increase from \$150,000, as fixed by the certificate, to \$250,000 was regular and effective. The original stock, however, was \$150,000, and there is no evidence, as in the *Arkansas* case, *supra*, that the charter authorized the organization of its main enterprise before the full amount was subscribed. The subscription in this case was made June 10, 1907. Prior to June 12, 1906, the company was doing a small business, principally in towing and lighterage, requiring comparatively small capital. In July, 1906, it leased Brown's wharf and began a storage business there, but at that time it contemplated the expenditure of a large amount in the erection of a modern storage warehouse, to which it bound itself in that lease in pursuance of negotiations with the appellee representing the railroad company. The erection of that warehouse, for that purpose, then became and continued to be its main enterprise. The appellee's subscription was made June 10, 1907, and the building contract, made in July, 1907, called for an expenditure of \$136,000, nearly the whole of the authorized capital. In addition to this, the storage company purchased ground on which to erect the warehouse, and mortgaged the same for \$50,000. All this was done without the concurrence of the appellee, who at the time of making the subscription advised against undertaking any construction under ⁵⁹³ existing business conditions, and continued so to advise. In considering this situation it must not be forgotten,

as said in *Hager v. Cleveland*, 36 Md. 476, that "there is a wide difference between the existence of the company as a corporate body and the liability of parties for their subscriptions to its capital stock"; and, as repeated in *Gettysburg Nat. Bank v. Brown*, 95 Md. 367, 93 Am. St. Rep. 339, 52 Atl. 976, that "this rule applies to subscriptions made before and after the company is chartered." The fact that the appellee knew that the storage company was about to involve its stockholders in this large financial undertaking is conclusive that he was entitled to the benefit of the rule he now invokes. We cannot imagine a situation in which this rule could apply with more peculiar force if the reasons so forcibly assigned by Judge Shaw in *Stoneham Branch R. Co. v. Gould*, 2 Gray, 277, and so fully approved by this and other courts, are in themselves sound and satisfactory.

But it remains to inquire whether this defense has been waived, or the appellee estopped to claim its benefit.

In considering this question it must be kept in mind that there is not only no evidence to show that Landstreet did not know all the stock was not subscribed, but that he subscribed in reliance upon Brady's assurance that it was all either actually subscribed or promised to be subscribed immediately upon his subscription being made, as indicating the co-operation of the railroad company. Technical estoppel, it may be conceded, is not required, and any acts which constitute waiver will be sufficient.

It is uncontradicted that Landstreet never qualified as a director, and never attended any directors' or stockholders' meeting, nor participated in any way in the incurring of any obligation or the transaction of any business of the company.

In *Garling v. Baechtel*, 41 Md. 305, it was held that where a stockholder attends meetings of the company, knowing the whole capital stock has not been taken, and votes for the expenditure of money for the purchase of property and materials to carry on the business of the company, he will not be ⁵⁹⁴ permitted to set up the defense that the capital stock had not all been taken. And to the same effect is *Hager v. Cleveland*, 36 Md. 476; *Stillman v. Dougherty*, 44 Md. 380. But in *Garling v. Baechtel*, 41 Md. 305, which was a suit to recover of Garling as a stockholder a debt due Baechtel by the company, Judge Robinson also said: "The mere fact that he paid his subscription, knowing that the whole capital stock had not been paid in, and that the company was incurring debts for property and material, were not such acts of partici-

pation as to estop him from setting up in this action the partial subscription of the capital stock." And this was held also in *Bray v. Farwell*, 81 N. Y. 600, in a similar case, where defendant never attended a stockholders' meeting or assented in any way to the commencement of the enterprise before all the shares were taken.

In *Ridgefield & N. Y. R. R. v. Reynolds*, 46 Conn. 375, Reynolds attended stockholders' meeting to elect directors and was himself elected a director and accepted. He was present at a meeting of directors when an assessment of forty per cent was laid, and when a report was made by the president of a contract for construction, and work actually begun; but it did not appear he participated in any action taken at the meeting. It was held none of these things constituted a waiver. Chief Justice Park said: "The case is silent as to his conduct. His simple presence is as much in accord with one supposition as the other. The burden of proof is on the appellees."

In *Masonic Temple Assn. v. Channell*, 43 Minn. 353, 45 N. W. 716, the court said: "It is to be regretted that there has been any relaxation of this rule. The acts as stockholder which will constitute a waiver are those which constitute a part of the business for which the corporation is formed, and which evince a willingness to enter upon that business with the stock already subscribed." This is a clear and plain statement of the principle upon which all such questions should be resolved.

In that case the defendant was a director, attended meetings as such, and was chairman of a committee to select a building site, and only resisted payment when the site he favored was not selected. This was held a waiver. The facts in this case do not, in our opinion, bring it within any well-considered decision under which a waiver could be found, and we think the learned judge below correctly granted the defendant's first prayer.

As this necessarily requires the affirmance of the judgment, there is no occasion to consider the other prayers, nor the disposition of the motions to strike out evidence, all of which were refused.

Judgment affirmed, with costs to the appellee above and below.

The Liability to Corporations of Subscribers to Their Capital Stock is the subject of a note to *Gettysburg Nat. Bank v. Brown*, 93 Am. St. Rep. 349.

RICHARDSON v. ANDERSON.

[109 Md. 641, 72 Atl. 485.]

ASSIGNEE for the Benefit of Creditors, Setoff not Assertable Against.—The suit of an assignee for the benefit of creditors is not subject to a setoff based on a claim acquired by the defendant by its assignment to him after the execution of the assignment to the plaintiff. (p. 545.)

AN ASSIGNEE for the Benefit of Creditors takes the property subject to all existing equities. (p. 546.)

SETOFF Against Assignee for Benefit of Creditors, What Essential to.—In order that there may be a setoff in favor of a creditor of the assignor, the debt must exist at the time of the assignment by virtue of a claim then due. (pp. 546, 548.)

ASSIGNEE for the Benefit of Creditors—Setoff in Favor of Indorser Who had not Paid When the Assignment was Made.—If the debtor of an insolvent who has made an assignment for the benefit of creditors is at the date of the assignment liable as an accommodation indorser of the assignee and is subsequently compelled to discharge his liability as such indorser, this does not create a claim in his favor which he can assert in an action against him by the assignor. (p. 548.)

EVIDENCE—Statement from Books of Account.—A statement made from books of account is not admissible where there has been no foundation laid for the books themselves. (p. 549.)

APPEAL AND ERROR—Evidence, Error in Admitting, When Rendered Harmless.—If a statement compiled from certain account-books is admitted without proper foundation, its admission becomes harmless, when it appears from other evidence that the defendant admitted such statement to be correct. (p. 549.)

TRIAL—Practice.—An Instruction to the Court Sitting as a Jury should instruct as to the law applicable to the facts, leaving it to the court sitting as a jury to find the facts necessary to entitle the party to recover. (p. 550.)

TRIAL—Practice—Instruction to the Court as to a Waiver, When Improper.—Where a court sitting as a jury instructs itself respecting the waiver or abandonment of a claim, this is improper if there is no evidence of such waiver or abandonment. (pp. 550, 551.)

THE WAIVER of a Claim Against an Assignee for the Benefit of Creditors is not Inferable from the mere failure to collect it prior to the assignment. (p. 551.)

SETOFF not Pledged, Evidence in Favor of, When Properly Considered.—Though a setoff must be specially pleaded, and evidence in its favor is not admissible unless it is pleaded, yet if evidence is received without objection, and the right to recover is not confined by the prayers of the pleadings and evidence, the jury, or the court sitting as a jury, may find itself a setoff in favor of the defendant. (p. 551.)

TRIAL PRACTICE—Prayer for Instructions Where Evidence has been Received Beyond the Issues of the Pleadings.—In considering a prayer for instructions which does not refer to the pleadings, and which is not affected by any other prayer referring to the pleadings, the court cannot consider the pleadings, but must determine the correctness of the prayer with reference to the evidence. (p. 551.)

Thomas Mackenzie and H. Findlay French, for the appellant.

W. Harry Holmes, for the appellee.

⁶⁴³ THOMAS, J. The appeal in this case brings up for review the rulings of the court below in sustaining plaintiff's, appellee's, demurrer to defendant's, appellant's, third, fourth and fifth pleas, in admitting the evidence in the first and second bills of exception, and the action of the court on the prayers, and defendant's special exception to the modification of his prayer.

The Maryland Grain Agency of Baltimore City, a corporation, on the 27th of February, 1908, made a deed of trust for the benefit of creditors to the appellee. At the time of the assignment the appellant was the manager of said agency, and the appellee shortly after the assignment employed him to make out a statement of the assets of the agency from its books. After the statement was made out, he and the appellant went over it together, "and verified it with the books" of the agency. This statement showed that the appellant was indebted to the agency for the balance due on account between them to the amount of \$1,781.41, which the appellant, according to the testimony of the appellee, said was correct, with the exception of two items, one of \$72.44 and the other of \$138, which the appellee deducted, leaving a balance of \$1,541.71, and upon failure of the appellant to pay this balance the appellee, on the 9th of April, 1908, brought suit to recover it.

The defendant in his testimony states that while he was employed as bookkeeper for the agency, in 1895, at a salary of \$100 a month, he was employed by the agency to do extra work on its books, for which it agreed to pay him whatever such extra services were worth; that the agency never paid him; that the matter was brought up several times at the meetings of the directors, but each time it was postponed for future action and settlement; that such services were worth ⁶⁴⁴ \$500; that he had never said anything to the appellee about his claim for such extra services until the morning of the trial.

Defendant's first and second pleas were, never indebted as alleged, and never promised as alleged. His third plea, for defense on equitable grounds, states that the deed under which plaintiff claims was a deed of trust for the benefit of the creditors of the said agency, dated the twenty-seventh day of

February, 1908, and that defendant holds the promissory note of said agency, dated July 1, 1907, and payable six months from date, in favor of one George H. Merryman, for \$1,100, and by him indorsed to the defendant subsequent to the execution of said deed of trust, which he is entitled to have applied as an equitable setoff against the claim of the plaintiff. His fourth plea, for defense on equitable grounds, alleges that the deed under which plaintiff claims was a deed of trust for the benefit of creditors, and that the defendant, with George H. Merryman and Wm. Clement Brooke, indorsed a promissory note for \$2,500, dated December 14, 1908, and payable four months after date, drawn by the said agency in favor of itself, which note was on said date discounted by the Third National Bank of Baltimore City for the use of said agency; that said note was not paid and was protested, and that the defendant and said Merryman were called upon to pay, and did pay, the same, and that the defendant paid one-half thereof, amounting to \$1,253.19, and that by reason thereof he is entitled to have said amount applied as an equitable setoff against the plaintiff's claim. The fifth plea, for defense on equitable grounds, states the two claims set out in the third and fourth pleas, and says that by reason thereof there is no liability on his part to the plaintiff.

The claim referred to in the third plea is a promissory note acquired by the defendant after the execution of the deed of trust, and the one set out in the third plea is on a promissory note on which he was liable as accommodation indorser before the execution of the deed of trust, but which came ⁶⁴⁵ due after the date of the deed of trust, and was paid in part by him after the institution of the suit.

The first question, then, presented by the third plea is, Can a debtor of an assignor for the benefit of creditors acquire, after the execution of the assignment, claims against the assignor, to be applied by him as a setoff to his debt due the trust estate? If this can be done, then a debtor by the purchase, for a very small consideration, depending upon the extent of the insolvency of the trust estate, of claims against the assignor, can acquire a preference in the distribution of the trust estate, to the full extent of his debt, thus taking from the creditors what they are entitled to, and preventing a pro rata distribution among them. Such a result would be unjust and inequitable, and cannot be tolerated in either law or equity: Burrill on Assignments, 5th ed., sec. 403; Waterman on Setoff, 2d ed., secs. 106, 123; 2 Am. & Eng. Ency. of

Pl. & Pr. 723, 724; *Colton v. Drovers' P. Bldg. & Loan Assn.*, 90 Md. 85, 78 Am. St. Rep. 431, 45 Atl. 23, 46 L. R. A. 388.

The proposition presented by the fourth plea is not so free of difficulty. The precise question here is, Can a defendant who, at the time of the execution of a deed of trust for the benefit of creditors, was liable as an accommodation indorser of a promissory note of the assignor, not yet due, which he is called upon to pay in part after the assignment, and after suit brought by the assignee on a claim of the assignee due at the time of the assignment, set off the amount he so paid against the claim of the plaintiff?

The rule as stated by Burrill on Assignments, fifth edition, section 403, is "that an assignee for the benefit of creditors takes the property subject to all existing equities. The equities need not exist at the inception of the debt. It is sufficient if they exist prior to the assignment. A claim acquired after the assignment cannot be set off against the assignee; nor a liability, existing but not due at the time of the assignment, even if it becomes due before the suit was commenced." But in note 7, on page 642, it is said that "where the claim in favor of the estate of the assignor is not due at the time of ⁶⁴⁶ the assignment, but the claim against the estate is due, an equitable setoff in favor of the assignor's debtor will be allowed." Or, as stated in Waterman on Setoff, section 131: "Where one claiming a setoff has a demand against the other presently payable, and the other party is insolvent, the former may claim to have the setoff made, though the demand of his adversary against him has not become payable." So in the case of *Colton v. Drovers' P. Bldg. & Loan Assn.*, 90 Md. 85, 78 Am. St. Rep. 431, 45 Atl. 23, 46 L. R. A. 388, where the association had, at the time of the appointment of receivers for the South Baltimore Bank, a deposit with the bank of \$357.23, while the bank held its promissory note, not then due, for \$1,000, the court, after a careful examination of the decisions in other states, held, in accordance with the great weight of authority, that the association was entitled to set off the amount of its deposits against the note of the bank. The reason assigned for this rule is that the right of the creditor of the insolvent to the setoff exists at the time of the assignment, and that the assignee of the insolvent takes the note in favor of his assignor, not yet due, subject to this right.

Where, on the other hand, the claim against the insolvent or assignor is not due at the time of the assignment, and the

claim in favor of the insolvent or assignor is due, the right to a setoff does not exist at the time of the assignment, and the assignee takes the debt in favor of the assignor in trust for the benefit of the creditors, against whom a setoff cannot be subsequently acquired. In other words, in order that there may be a setoff in favor of the creditor of the assignor, it must exist at the time of the assignment by virtue of a claim then due.

In an extensive note to *Fera v. Wickham*, 17 L. R. A. 456, the author says: "While the decisions are not uniform in reference to either class, there is a decided weight of authority on one side in each case, and that weight is in favor of the setoff where the immature debt is owing to the insolvent and against it where it is owing by him." In the case of *Skiles v. Houston*, 110 Pa. 254, 2 Atl. 30, where, when plaintiff's intestate ⁶⁴⁷ died, his debt to the defendant was due, and his claim against the defendant was not yet due, the court held that the defendant was entitled to set off his claim, and said: "Had the position of these parties been reversed so that Henderson's (intestate's) debt to Houston (defendant) was not due and payable at Henderson's death, but Houston's debt to Henderson was then due and payable, the application of the same principle would have prevented Houston from setting off his debt against Henderson in an action by Henderson's administrator, because, at Henderson's death, there was no right of setoff, and the right of action passed to the administrator unaffected by the right of setoff." In the case of *In re Hatch*, 155 N. Y. 401, 50 N. E. 49, 40 L. R. A. 634, the court of appeals of New York reviews at length the previous decisions in that state dealing with the right of set-off where the claims of the assignors or insolvents, or the claims of creditors of such insolvents, are not due, and holds that a creditor of the insolvent, whose claim is due at the time of the execution of an assignment for the benefit of creditors, is entitled to set off his claim against a debt from himself to the insolvent which had not matured at the time of the assignment; but where the claim of the creditor of an insolvent was not due at the time of the assignment, it cannot be set off against the claim in favor of the insolvent, due at the time of the assignment. Both of these cases are cited and relied on by this court in *Colton v. Drivers' P. Bldg. & Loan Assn.*, 90 Md. 85, 78 Am. St. Rep. 431, 45 Atl. 23, 46 L. R. A. 388. See, also, 25 Am. & Eng. Ency. of Law, 2d ed., 545, 546, and cases cited in notes.

Most of the cases holding a contrary view are the decisions to the effect that a bank has a right to apply to the payment of a debt not yet due, held by it against an insolvent, money on deposit in the bank belonging to the insolvent at the time of his assignment for the benefit of creditors. The banks are held to have a lien upon deposits in their hands, to secure debts due them by their depositors, and may, as against an attaching creditor, or the assignee of an insolvent owner of such deposits, apply such deposits to the payment of any claim they may have against such depositors, though its claim ⁶⁴⁸ may not be due at the time of such attachment or assignment: 2 Am. & Eng. Ency. of Law, 1st ed., 97; *Miller v. Farmers' etc. Bank*, 30 Md. 392; *Farmers' etc. Bank v. Franklin Bank*, 31 Md. 404; *Colton v. Drovers' P. Bldg. & Loan Assn.*, 90 Md. 85, 78 Am. St. Rep. 431, 45 Atl. 23, 46 L. R. A. 388. In some states, however, where the banks are held not to have any such lien upon the moneys of a depositor they are denied the right in a suit by the assignee of an insolvent depositor to set off against the claim of the assignee the amount of any unmatured claim held by the bank against the depositor: *Chipman v. Ninth Nat. Bank*, 120 Pa. 86, 13 Atl. 707.

In this case, at the time of the assignment, the claim of the defendant against the agency did not exist, and therefore the assignee took the claim against the defendant in favor of his assignor, free of any right to a setoff in favor of the defendant, whose claim against the assignor did not come into existence until after the assignment, and until he was required to pay assignor's note by virtue of his liability thereon as indorser: *Fidelity & Deposit Co. v. Haines*, 78 Md. 454, 28 Atl. 393, 23 L. R. A. 652.

But for the assignment he could, of course, upon payment of the note on which he was liable as indorser any time before the trial of the case, have set off the amount so paid by him against his debt due to the agency: *Clarke v. Magruder*, 2 Har. & J. 77; *Colton v. Drovers' P. Bldg. & Loan Assn.*, 90 Md. 85, 78 Am. St. Rep. 431, 45 Atl. 23, 46 L. R. A. 388. Before he paid the note, and thereby acquired a claim against the agency, however, the agency assigned its claim against him to the plaintiff, who took it for the benefit of the creditors of the agency, subject to only such equities as then existed.

Regardless of any question as to the sufficiency of the allegation of insolvency of the agency to entitle the defendant to an equitable setoff on that ground, and without considering

whether the facts set out in the fourth plea (assuming that they entitled the defendant to set off his claim) should have been pleaded as a defense on equitable grounds, we must hold, on the authorities cited, that the demurrer to the third, fourth and fifth pleas was properly sustained.

The evidence excepted to in the first exception was a statement ⁶⁴⁹ made by the defendant from the books of the agency, including his account with the agency. Without having laid any foundation for the admission of the books themselves, a statement made from the books, though shown to be correct according to them, was not admissible: *Clarke v. Magruder*, 2 Har. & J. 77; *Hoogewerff v. Flack*, 101 Md. 371, 61 Atl. 184. But when taken in connection with the evidence in the second bill of exception, to the effect that the defendant stated to plaintiff that the statement was correct except as to two items contained therein, which the plaintiff had deducted from the claim against him, the statement was admissible as an admission of the defendant (*Gittings v. Winters*, 101 Md. 194, 60 Atl. 630), and the defendant was not injured by the ruling in the first exception, while the evidence, excepted to in the second exception, to show when the statement was made, was properly admitted.

Plaintiff's first prayer is as follows: "If the court, sitting as a jury, shall find from the evidence that the defendant is indebted to the plaintiff's assignor in any sum of money, then the court, sitting as a jury, shall assess the damages in such a sum of money as the court, sitting as a jury, shall find from the evidence the defendant is actually indebted to the plaintiff's assignor, together with interest at the rate of six per cent per annum, from February 27, 1908, interest to be in the discretion of the jury."

And defendant's prayer is as follows: "The court instructs itself, sitting as a jury, that if it finds from the evidence that the defendant was employed in or about February, 1895, by the Maryland State Grange Agency of Baltimore City to do special work on certain books and accounts, as testified to, and it was agreed at the time that he should be paid for such work a reasonable and fair compensation, in addition to his regular salary, if the court so finds, and the defendant performed all the work that it was agreed he should do, and it was further agreed that the amount of the compensation therefor should be submitted to the board of directors of the said Maryland State Grange Agency of Baltimore City, to be adjusted and agreed upon between the said

agency and the ⁶⁵⁰ said defendant; and if the court further finds that the matter was referred to the said board of directors, but that up to the twenty-seventh day of February, 1908, it had failed to consider and adjust the same, but has never disputed or denied its liability therefor, and that upon said date it made a deed of trust for the benefit of creditors to the plaintiff, then the court instructs itself, sitting as a jury, that the defendant is entitled to a credit of such a sum of money as it may find a fair and reasonable compensation for the work done and performed by him, to be entered as a credit in the account current between him and the said agency." This prayer was granted by the court after modifying it by adding thereto: "unless the court, sitting as a jury, shall further find that the defendant before the institution of this suit waived or abandoned all claims for such compensation." The defendant specially excepted to this modification, on the ground that there was no evidence in the case that the defendant had ever waived or abandoned its claim for compensation for the extra work done by him, but the court overruled the exception.

By plaintiff's prayer the court, sitting as a jury, was authorized to find that the defendant was indebted to the plaintiff, without being told what facts were necessary to be found in order to ascertain whether such indebtedness existed, and the prayer not only failed to instruct the court, sitting as a jury, in regard to the law, but submitted to the court, sitting as a jury, questions of law as well as questions of fact. Moreover, the evidence shows that the account against the plaintiff was made up of a number of charges against him and a number of credits in his favor, and the prayer, without any reference to the credits to which defendant was entitled, submitted to the court, sitting as a jury, to find the amount to which the defendant was indebted to the plaintiff, with the instruction to assess the damages in such sum of money as it found from the evidence the defendant was so indebted. The court, sitting as a jury, should have been instructed as to the law applicable to the facts of the case, leaving it to the court, sitting as a jury, to find the facts necessary to entitle the plaintiff ⁶⁵¹ to recover, which this prayer fails to do: *Thomas on Prayers and Instructions*, sec. 31; *Baltimore & O. R. R. Co. v. Resley*, 7 Md. 297; *Roth v. Shupp*, 94 Md. 55, 50 Atl. 430; *Hobbs v. Batory*, 86 Md. 68, 37 Atl. 713.

There is no evidence in the record from which the court, sitting as a jury, could have found that the defendant waived

or abandoned his claim to compensation for the extra services rendered by him to the agency. The only evidence in the case bearing upon the question was the testimony of the defendant that he rendered the extra services with the understanding with the agency that he would be paid for them, and that he had repeatedly demanded payment, but that, without any denial of his right to compensation, the agency had, from time to time, postponed the adjustment of the matter. The mere fact that he had not collected his claim for such services up to the time of the assignment would not justify a finding that he had waived or abandoned the claim: 29 Am. & Eng. Ency. of Law, 2d ed., 1097, 1105.

While a setoff must be specially pleaded, and evidence in support of it is not admissible unless it is so pleaded (1 Poe, P. & P., 3d ed., sec. 613; Burch v. State, 4 Gill & J. 444; Sangston v. Maitland, 11 Gill & J. 286; 19 Ency. of Pl. & Pr. 738-742), when such evidence is produced without objection, and the right to recover is not confined by the prayers to the pleadings and evidence, the jury, or the court sitting as a jury, may find the setoff in favor of the defendant. And in considering a prayer granted which does not refer to the pleadings, and which is not affected by any other prayer referring to the pleadings, this court cannot consider the pleadings, but must determine the correctness of the prayer with reference to the evidence: South Baltimore Co. v. Muhlbach, 69 Md. 395, 16 Atl. 117, 1 L. R. A. 507; Home Friendly Society v. Roberson, 100 Md. 85, 59 Atl. 279.

As the evidence in this case did not justify the addition to defendant's prayers made by the court, there was error in granting the prayer as modified and in overruling defendant's special exception to such modification, and for such error, ⁶⁵² and the error in granting plaintiff's prayer, the judgment will be reversed and the case remanded for a new trial.

Judgment reversed with costs, and case remanded for a new trial.

Setoff and Counterclaim After Insolvency are discussed in the notes to State v. Brobston, 47 Am. St. Rep. 142; St. Paul etc. Trust Co. v. Leek, 47 Am. St. Rep. 578. In Colton v. Drivers' etc. Loan Assn., 90 Md. 85, 78 Am. St. Rep. 431, it is held that if a bank becomes insolvent, a depositor therein, indebted to it on a note in a sum greater than his deposit, is entitled, as against a receiver of the bank, to set off his deposit against the amount of the note, though it did not mature until after the receiver was appointed, and without any previous demand having been made for the deposit. And in Nix v. Ellis, 118 Ga. 345, 98 Am. St. Rep. 111, it is held that the right to

purchase claims to use as setoffs against a corporation continues up to the time of the filing of a petition for the appointment of a receiver, although the purchaser knows of the insolvency of the concern. In an action by an assignee in bankruptcy, the defendant may set off a claim against the estate of the bankrupt acquired after his insolvency, but before the defendant entered into the obligations upon which he is sued: *Frank v. Mercantile Nat. Bank*, 182 N. Y. 264, 108 Am. St. Rep. 805.

REED v. REED.

[109 Md. 690, 72 Atl. 414.]

DIVORCE, Decree of, Effect of on Property Given by Wife to Husband.—If a wife voluntarily, during coverture and without fraud or undue influence on the part of her husband, conveys her property to him, a decree of divorce subsequently granted to her does not vest in her any equitable title to such property. (p. 553.)

A GIFT from a Wife to Her Husband of Property Belonging to Her Separate Estate, in the absence of all evidence that it had been given to him to be held in trust for her use or of a promise on his part to repay it, is presumed to be intended as an absolute gift, and she has, therefore, no claim against him or his estate. (p. 553.)

GIFT from Husband to Wife, Power of Court to Cancel on Granting a Divorce.—A provision of the code of Maryland authorizing the court, in granting a divorce, to award to the wife such property or estate as she had when married, does not confer on the court power to cancel gifts made by her to him during their coverture. (p. 553.)

GIFTS from a Wife to Her Husband are Closely Inspected by the Courts on account of the danger of improper influences, and will not be allowed effect if due to such influences, but if free therefrom will be sustained. (p. 556.)

APPEAL AND ERROR—Directing Amendments to Pleadings on Appeal—If in a suit by a wife to obtain property given by her to her husband, or paid for by her and conveyed to her and him as tenants by the entireties, evidence is received outside of the pleadings tending to show that her action was due to his coercion or undue influence, the court, in remanding the cause, will direct that her bill may be amended so that the party may offer additional evidence upon the question of fraud, coercion or undue influence. (p. 556.)

TENANCY by the Entireties, Effect of a Divorce upon.—If husband and wife hold property as tenants by the entireties, the result of their divorce is that they thereafter hold it as tenants in common. (p. 556.)

John Hinkley and Thomas Foley Hisky, for the appellant.

J. Kemp Bartlett and L. B. Keene Claggett, for the appellee.

691 THOMAS, J. The appellant, in her bill of complaint in this case, filed in the circuit court for Baltimore county, alleges that she was married to the appellee on the seventh

day of September, 1894; that after her said marriage she purchased, on the twenty-second day of May, 1896, four lots of the ground near Catonsville, in Baltimore county, and paid the consideration therefor, to wit, the sum of fourteen thousand five hundred dollars, out of her separate fund and estate, and that she caused said lots to be conveyed to herself and the appellant "as tenants by entireties" by the deed, a copy of which was filed with the bill; that on the 11th of December, 1905, by the final decree ⁶⁹² of the "probate, divorce and admiralty division of the high court of justice" of England, she was absolutely divorced from the appellee, and that she "is advised that in consequence of said divorce she is entitled to have said property decreed to be hers, in her own right, free, clear and discharged of any interest therein of her former husband, from whom she has now been divorced." The prayer of the bill is that the property may be decreed to be the property of the appellant, clear of any interest of the appellee; that a trustee may be appointed, "if necessary," to convey the property to her, and that she may have such other relief as her case may require.

The bill, it is to be noted, does not charge that the property was purchased by the appellee and paid for with money belonging to the appellant, or that the conveyance of the property to her and her husband was procured by the fraud or undue influence of the appellee; but the theory on which the bill was filed is that the appellant having been divorced from the appellee, the mere fact that the property was paid for out of money belonging to the appellant is sufficient to authorize a court of equity, either under the authority of article 16, section 37 of the code, or independently of that section, to restore the property to her.

Without considering or determining whether said section, which confers upon the court granting the divorce "power to award to the wife such property or estate as she had when married," has reference only to the court decreeing the divorce, or whether courts of equity, apart from the statute, have such power, it is clear from the decisions in this state that where a wife during coverture voluntarily and without any fraud or undue influence on the part of the husband, conveys her property to him, the effect of a decree for divorce is not to vest in her an equitable title to such property. It has been repeatedly held by this court that if a wife gives to her husband property belonging to her separate estate, or permits him to apply it to his own use, or he does so with her knowledge and consent, in the absence of proof that it

693 was given to him to be held in trust for her use, or of a promise by the husband at the time to repay it, it will be presumed that it was intended as an absolute gift to him, and she has no claim therefor against him or his estate: *Edelen v. Edelen*, 11 Md. 415; *Kuhn v. Stansfield*, 28 Md. 210, 92 Am. Dec. 681; *Farmers' etc. Nat. Bank v. Jenkins*, 65 Md. 245, 3 Atl. 302; *Jenkins v. Middleton*, 68 Md. 540, 13 Atl. 155; *Taylor v. Brown*, 65 Md. 366, 4 Atl. 888.

In the case of *Tyson v. Tyson*, 54 Md. 35, the bill was for divorce and restoration to the wife of the property belonging to her when married, or the value thereof. The court below granted the divorce and awarded alimony, but omitted to award to the plaintiff certain property, and because of such omission the appeal was taken from the decree. The property which it was claimed should have been awarded to the wife consisted of a legacy to her from her father, amounting to two thousand eight hundred and seventy-three dollars and seventy-five cents, which had been paid to the husband and wife jointly by the executor of her father's estate, and for which they had executed the joint release. Her claim was resisted on the ground that the legacy had been appropriated and converted by the husband, with the knowledge and consent of the wife, and without any agreement to repay it, or to hold it for her use and benefit. The court, in construing article 16, section 37 of the code, said that it was not contemplated "to authorize the court to annul all previous dispositions made by the wife during coverture by gifts to her husband or others. . . . If the husband received and applied the fund, whether money, goods or chattels, or collected choses in action, with the wife's privity and consent, and without an agreement or promise to repay or restore it, no legal obligation rests on the husband to restore it; no right of action inures to her, and, to that extent, her rights are extinct."

A decree for divorce has no retroactive effect; per se, it does not legally restore the status quo of the parties before marriage, or annul their voluntary and legal acts during coverture.

Bishop, treating of the consequences of divorce flowing by **694** law, says: "Coming now to consider the effect of the dissolution of a valid marriage upon property rights, we must remember that the decree of divorce, so far from undoing the original marriage, expressly affirms it, and therefore does not restore the parties to their former condition, but places them in a new one. Consequently, all transfers of property

which were actually executed either in law or fact abide; for example, the personal estate of the wife reduced to possession by the husband remains his after a divorce, the same as before": 2 Bishop, 706. Again (page 731), referring to the effect of a divorce a mensa: "This divorce does not at common law, and without statutory aid, change the relation of the parties as to property."

Assuming that the code confers on the court the power of awarding the wife all the property she had during coverture, as well as that possessed prior and at the time of the marriage, that power must be qualified by the rights acquired by the husband, or others through him, claiming with her privity and consent.

If the effect of knowledge and acquiescence on the part of the wife was sufficient to destroy her right as creditor in this case, unless there was an agreement or promise of the husband to repay, it follows necessarily that the conversion of the money by the husband, with the wife's concurrence, and her conjoint act and deed, must equally destroy her right to recover it as her separate property, after divorce, after the lapse of a series of years, without any promise or agreement of the husband to return or to repay it.

There was no loan or trust created between them, but the transaction amounted to an absolute gift. The wife exercised her *jus disponendi* absolutely and without reserve.

Under the averments of the bill, viz., that she purchased and paid for the property, and that she caused it to be conveyed to herself and her husband, the appellant would not, therefore, be entitled to the relief prayed.

But a great deal of evidence was produced by the plaintiff tending to show that she was induced against her will to have ⁶⁹⁵ the property so conveyed, by the conduct and persistent demands of her husband, and by the defendant, for the purpose of showing that the conveyance was the result of her free and voluntary act; and while, as was said in *Schroeder v. Loeber*, 75 Md. 195, 23 Atl. 579, 24 Atl. 226, under article 5, section 36 of the code, where there were no exceptions in the court below to the evidence, or to the sufficiency of the averments of the bill, we may decree according to the proof, "whether the *allegata* and *probata* correspond or not," we think, as the bill was filed and the evidence was offered on the theory that the court was authorized, under section 37 of article 16 of the code, to restore the property to her, apart from any question of its having been procured by coercion or undue influence, and the attention of her counsel was not, therefore, specially

addressed to that feature of the case, that the case should be remanded in order that the bill may be amended, and the parties may have an opportunity to offer additional evidence, if they desire to do so, reflecting upon the question of fraud, coercion or undue influence in the procurement of the deed to the plaintiff and defendant as "tenants by the entireties."

In 2 Story's Equity, section 1395, the author, after stating that it is now the established doctrine in equity that a married woman may bestow her separate property upon her husband, as well as upon a stranger, says: "But, at the same time, courts of equity examine every transaction between husband and wife with anxious watchfulness and caution and dread of undue influence; and if they are required to give sanction or effect to it, they will examine the wife in court, and adopt other precautions to ascertain her unbiased will and wishes." A similar expression of the jealous care with which courts of equity guard the interests of the wife in such transactions is found in *Farmers' Exr. v. Farmer*, 39 N. J. Eq. 211, where the court held that gifts by a wife to her husband "are to be closely inspected on account of the danger of improper influence, but if they appear to have been fairly made, and to be free from coercion and undue influence, they ought to be sustained." And in the case of *Livingston* ⁶⁹⁶ v. *Hall*, 73 Md. 386, 21 Atl. 49, Chief Judge Alvey refers to the above section of Story's Equity, and says that "it has been held by courts of high authority, and upon full and careful consideration, that a gratuitous conveyance by a wife of her property to her husband will be held void, unless it affirmatively appears from the attending circumstances, or otherwise, that it was her voluntary act, free from any undue influence, exercised by her husband": See, also, *Bradish v. Gibbs*, 3 Johns. Ch. 523; *Parks v. White*, 11 Ves. 222; *Whitridge v. Barry*, 42 Md. 140.

If, therefore, the interest of the appellee in the property referred to in this case was obtained by him by coercion or undue influence brought to bear by him upon the appellant, it is the plain duty of a court of equity to grant her relief.

We fully concur in the conclusion reached by the court below, and for the reasons stated and upon the authorities cited by that court, that, as the result of the divorce, the appellant and appellee now hold the property as tenants in common. But for the reasons we have stated the decree will be reversed and the case be remanded, in order that the bill may be amended and the parties may produce additional evidence if they desire to do so.

Decree reversed and case remanded for further proceedings in accordance with views herein expressed, the costs in this court and in the court below to abide the final decree in the case.

Where a Woman Makes a Gratuitous Transfer of Property to Her Husband, it must be made to appear, in order to sustain the transfer, that it was fair and proper and that she acted freely and deliberately: *Hovorka v. Havlik*, 68 Neb. 14, 110 Am. St. Rep. 387; *Boyd v. De La Montagnie*, 73 N. Y. 498, 29 Am. Rep. 197; *Darlington's Appeal*, 86 Pa. 512, 27 Am. Rep. 726.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

SPRAGUE v. HOSIE.

[155 Mich. 30, 118 N. W. 497.]

SALE, Continuing Offer, What is not.—An offer to sell stock at a specified price is not a continuing offer. (p. 560.)

STATUTE OF FRAUDS, Goods, What are Within the Meaning of.—Shares of stock in an incorporated company, the shares having been issued, are goods within the meaning of the statute of frauds, and a contract for their sale must, therefore, satisfy the provisions of the statute applicable to the sale of other goods. (p. 561.)

STATUTE OF FRAUDS—Pleading.—A complaint which fails to show whether the contract relied on was or was not obnoxious to the statute of frauds, is, nevertheless, good. (p. 561.)

STATUTE OF FRAUDS, Pleading of, When Unnecessary.—It is not necessary in an answer to specifically plead the statute of frauds or to show that the contract did not comply with that statute. The plaintiff, having alleged a valid contract in his complaint, must prove it as against the motion or objection of the defendant. (p. 562.)

PLEADING the General Issue amounts to a denial of every material allegation of fact in the complaint. (p. 562.)

Frederic T. Harward, for the appellant.

Stellwagen & MacKay, for the appellee.

30 OSTRANDER, J. The suit is brought to recover damages alleged to have **31** been sustained by the plaintiff by reason of the refusal of defendant to perform his contract to sell plaintiff twenty shares of bank stock at one hundred and fifty-four dollars a share. The declaration contains the common counts in assumpsit and a special count in which the said contract and a breach thereof are averred. The plea is the general issue. Defendant offered no testimony. A verdict for the defendant was directed by the court, and judgment on the verdict was entered. Plaintiff is a dealer in stocks and bonds. He testified, however, that he desired to purchase this

stock for himself, and not for any client. In a letter written by him to defendant of date August 22, 1906, is the following: "I have a client who may purchase a limited amount of Michigan Savings Bank stock. . . . If you decide to offer the stock to me, please make the price to hold good until September 1st as my client is hard to find at times and it may take 2 or 3 days to hear from him."

In reply defendant of date August 30th wrote: "Replying to above, I have only 20 shares Mich. Sav. Bank stock and will sell same for 155 or 3,100.00 net. This is the best price I can make. Have refused an offer of 150; on account of vacations your letter has been neglected until now."

Of date November 5, 1906, plaintiff again wrote to defendant, saying: "If you wish to sell your 20 shares of Michigan Savings Bank stock at this time at \$149.00 per share net to you, I think I can make sale of the same"—concluding the letter as follows: "If you desire to let me offer the stock for sale at this price, please make price good for this week, as to-morrow is a holiday and it may take a day or two after that to accomplish anything."

The reply, dated November 7th, was: "I have an offer of 150 Jan. 1, 1907. In the meantime I will get a dividend of 4 to 5 per cent. Would not sell for less than 154 net at this time."

Plaintiff on November 12th again wrote defendant: ³² "Replying to your favor of the 7th inst. regarding 20 shares of Michigan Savings Bank stock, which you offered to sell at 154 net to you, if you will sell 5 shares at 153, I will take it, if I am not supplied, when I hear from you. Please advise me at once. I purchased some of this stock at a much less price since writing you and my client is willing to pay 153 for 5 shares to even up the block, if the matter is closed at once. I have no doubt I can get it for less money by looking around, but he told me to make you this offer to close the matter without delay. I do not see how you expect to get 4 to 5 per cent. dividend January 1st, as the bank is only paying 7 per cent per annum, which would make the accrued dividend about 2.60 per cent at this date."

To this defendant made no reply. The plaintiff testified that on November 17th, by telephone, he advised defendant that he would take twenty shares at one hundred and fifty-four dollars a share, and told defendant to send the certificate with draft attached to the savings bank, and that defendant said he would send the stock, but that it might be two or three days before he could do so; that immediately thereafter, on

the same day, he sent to defendant a letter confirming the offer made by telephone. This letter was not produced. A motion to strike out the testimony of the oral communication was granted, and plaintiff excepted. Later, on December 7th, plaintiff demanded the stock, saying he was ready to pay for it, but defendant refused to deliver the stock, claiming he had never bargained for its sale. Later, a tender, in the form of a cashier's check for three thousand and eighty dollars, was made to defendant and was refused. On December 7th, the market value of the stock was one hundred and eighty dollars per share, plus a dividend of three dollars and fifty cents per share. It is claimed on the part of the appellant, first, that the letters make a complete and binding contract; second, that bank stock, ownership of which is usually evidenced by certificates, is not goods, wares or merchandise within the meaning of the statute of frauds; third, that the defense that the contract, if resting in parol, was void under the statute of frauds, was waived because no notice of such defense was given with defendant's plea.

³³ 1. There was no continuing offer to sell the stock at the price of one hundred and fifty-four dollars a share. Defendant's letter of November 7th, if it can be said to contain an offer to then sell the stock, was not a continuing offer. Moreover, whether it be treated as a present or a continuing offer to sell, it was refused and was not thereafter renewed. The bargain, if one was made, rests in parol.

2. Whether stock in an incorporated company, the shares of which have been actually issued, is goods, wares, or merchandise, within the meaning of the statute of frauds (3 Comp. Laws, sec. 9516), is a question which has been answered differently in different jurisdictions. In essentials our statute is a copy of the seventeenth section of the statute of Charles II, and was adopted in this jurisdiction in 1819 from the laws of the state of New York. The English courts, to a period as late as 1839, had not apparently determined conclusively that such shares were or were not within the statute: *Mussell v. Cooke*, Pre. Ch. 533; *Crull v. Dodson*, Sel. Cas. in Ch. 41. Lord Denman in *Humble v. Mitchell*, 11 Ad. & E. 205, a case decided in 1839, held with the concurrence of his associates that "shares in a joint stock company like this [a bank] are mere choses in action, incapable of delivery, and not within the scope of the seventeenth section. A contract in writing was therefore unnecessary." It is stated in the opinion that no case had been found directly in point. *Humble v. Mitchell* has apparently

been since followed in England: See 29 Am. & Eng. Ency. Law, 2d ed., p. 961; 20 Cyc. 244; 1 Beach on Modern Law of Contracts, sec. 558. See, also, note to *Weightman v. Caldwell*, 4 Wheat. (U. S.) 85, 4 L. ed. 520. In 1838, in *Tisdale v. Harris*, 20 Pick. (Mass.) 9, the precise converse of the modern English rule was laid down; it being decided that the words "goods" and "merchandise," are broad enough in meaning to include stocks or shares in incorporated companies. The rule is affirmed in *Boardman v. Cutter*, ³⁴ 128 Mass. 388. To the same effect are *North v. Forest*, 15 Conn. 400; *Pray v. Mitchell*, 60 Me. 430; *Spear v. Bach*, 82 Wis. 192, 52 N. W. 97; *Johnson v. Mulvy*, 51 N. Y. 634. It must be admitted that at common law shares of an incorporated company occupied much the same position as promissory notes and other mere choses in action. Indeed, it is held in Massachusetts that a promissory note is within the statute: *Baldwin v. Williams*, 3 Met. (Mass.) 365. To the contrary is *Vawter v. Griffin*, 40 Ind. 593, which approves the rule of *Humble v. Mitchell*, 11 Ad. & E. 205. Such shares have, however, come to be subjects of common barter and sale, are usually evidenced by certificates which, in the absence of statute provisions, operate by assignment and delivery to transfer title to the shares as between the parties. They are in this state by statute subject to levy and sale on execution. In many other respects they are treated as something more than mere choses in action. It was said by this court in *Weston v. McDowell*, 20 Mich. 353, in considering the meaning to be given the words "goods, wares and merchandise," as employed in the common counts in assumpsit, that it has always been considered that the phrase as employed in the statute of frauds embraced animate as well as inanimate property, and that the word "goods" may well include oxen. The case is not in point here except as indicating that a broad, rather than a narrow, meaning should be given to the word "goods." That contracts for the sale and delivery of shares of stock are subject to the mischief aimed at by the statute must be admitted. We are of opinion that reason and weight of authority favor the conclusion that shares of stock in an incorporated company, the shares having been issued, are goods within the meaning of the statute of frauds. It follows that the parol contract for their sale was invalid.

3. The declaration alleged no facts to show whether the contract sued upon was or was not obnoxious to the statute. It was nevertheless a good pleading: *Dayton v. Williams*, 2 Doug. (Mich.) 31; *Harris Photographic* ³⁵ *Supply Co. v. Am. St. Rep.*, Vol. 130—36

Fisher, 81 Mich. 136, 45 N. W. 661; Stearns v. Lake Shore & M. S. Ry. Co., 112 Mich. 651, 71 N. W. 148; Kroll v. Diamond Match Co., 106 Mich. 127, 63 N. W. 983. See, also, 9 Ency. of Pl. & Pr. 700; Seaman v. O'Hara, 29 Mich. 66. The language in the statute in question here is: "No contract for the sale of any goods, wares or merchandise, for the price of fifty dollars or more, shall be valid, unless," etc.

It is clear that such a contract may be valid and enforceable, although no note or memorandum in writing of the bargain be made and signed by the party to be charged therewith. The plaintiff in his declaration asserts the existence of a valid contract and upon the motion or objection of the defendant must prove such a one. The scope of the plea of the general issue is, as a general rule, a denial of every material averment of fact in the declaration. The precise question presented was answered adversely to plaintiff's contention in Third Nat. Bank of New York v. Steel, 129 Mich. 434, 88 N. W. 1050, 64 L. R. A. 119.

It follows that the judgment must be, and it is, affirmed.

Montgomery, Hooker, Moore and McAlvay, JJ., concurred.

A Subscription for Stock in a Corporation has been held not a contract for the sale of goods, wares or merchandise, and is not within the statute of frauds: Webb v. Baltimore etc. Ry. Co., 77 Md. 92, 39 Am. St. Rep. 396. The same view is taken in Rogers v. Burr, 105 Ga. 432, 70 Am. St. Rep. 50; but the rule of this decision is departed from in the subsequent case of Hightower v. Ansley, 126 Ga. 8, 54 S. E. 939.

As to How and When the Statute of Frauds must be pleaded, see the notes to Jordan v. Greensboro Furnace Co., 78 Am. St. Rep. 648; Hotchkiss v. Ladd, 86 Am. Dec. 684.

VILLAGE OF JONESVILLE v. SOUTHERN MICHIGAN TELEPHONE COMPANY.

[155 Mich. 86, 118 N. W. 736.]

MUNICIPAL CORPORATIONS—Telephone Poles, Power of to Exclude from a Street.—A municipal corporation authorized by its charter to prevent the encumbering of its streets has power to wholly exclude the poles and wires of a telephone corporation from a block of a street, unless so doing would cut the company off from communication with persons it desires to reach and by law is obliged to serve. (p. 565.)

MUNICIPAL CORPORATIONS.—The mere fact that a route designated by a municipality for a telephone line is less convenient or involves large expense on the part of the company is of no consequence, so long as the company is not thereby prevented from

reaching all those whom it desires to serve and who desire service from it. (pp. 565, 566.)

TELEPHONE CORPORATIONS, Duty of to Conform to Municipal Regulations.—Where a municipality in the exercise of its inherent police power adopts an ordinance reasonably regulating the manner, character or place of construction of a contemplated line, the telephone company must comply with such regulation and exercise its right of entry under the general powers conferred by the state subject to them. (p. 566.)

Victor Hawkins, for the complainant.

H. P. Stewart, for the defendant.

80 BROOKE, J. Complainant in this cause filed its bill to restrain the Southern Michigan Telephone Company from setting a line of poles upon Chicago street, the main thoroughfare of the village, in the block between West and **87** Maumee streets. After a full hearing the court perpetually enjoined the defendant from the erection of poles upon Chicago street, in said village, between West and Maumee streets.

The material facts in the case are, in brief, as follows: The defendant company is organized under chapter 177 of the Compiled Laws of 1897, as amended by Act No. 16 of the Public Acts of 1899. Complainant is a municipal corporation organized under Act No. 60, Laws of 1855, and Act No. 27, Laws of 1857, as amended by Act No. 408, Laws of 1869. Chapter 5, section 2, subdivision 8, defining the powers of the common council, provides: "To prevent the encumbering of streets, sidewalks, crosswalks, lanes, alleys, bridges, or other public places in any manner whatever."

The defendant was, at the time the injunction was issued, engaged in the construction of a telephone line extending through the county of Hillsdale and several other counties in the southern part of the state, and was establishing stations in the several cities and villages along its line of construction. Among other villages which it sought to enter and establish an exchange was the village of Jonesville in the county of Hillsdale. In constructing said line it approached said village from the west, and, without undertaking to secure any ordinance permitting it to enter the village of Jonesville under proper regulation, proceeded to construct its lines through the village. Some discussion between the street commissioner, the president of the village, and the foreman in control of the construction seems to have been had. But no formal action was taken by the village until after the trouble had occurred, when the village by its council passed

a resolution providing that "no poles of any description shall be set in the streets of the village of Jonesville, nor any excavations made therefor, excepting under the direction of the council of said village." And the street committee of said council has been vested with authority to permit such excavations and the erection of poles at the places selected ⁸⁸ by them, provided same are not located on Chicago street between a point seventy-five feet east of the St. Joseph river and Maumee street. On the day on which the trouble arose, the defendant company was undertaking, against the protest of officers of the village and without any authority from the village, to erect its poles and lines upon Chicago street between West and Maumee streets. The protest of the officers not being heeded, the village authorities called out the fire department, hose was attached to a hydrant, and the workmen employed by the defendant company were driven from their work by means of a stream of water. Some of them were subsequently arrested, the cases against them being still pending. The bill of complaint in the case before us was then filed, a preliminary injunction secured, and upon full hearing the injunction above recited was made permanent.

It is the defendant's claim that the village of Jonesville has no right whatever to prohibit it from erecting its line upon any street in the village it may choose for that purpose. It claims further that when, in the construction of its line, it reached the village of Jonesville, it found there no ordinance regulating the method by which it should construct its line through said village. It therefore claims that it had the right to proceed to the erection of its line, and it avers that the character of the proposed construction was such as could not have been prevented by any reasonable regulation which might have been adopted by the village.

There is only one question raised by the record in this case. Assuming that the council of said village had a right to impose such reasonable regulations as it saw fit, as a condition precedent to the entry of the defendant company, whether or not it could, as one of such reasonable regulations, absolutely prohibit the defendant company from going upon a particular street—in this case Chicago street, between West and Maumee streets. Both parties to this controversy have cited and seem to rely upon the case of *Michigan Telephone Co. v. City of* ⁸⁹ *Benton Harbor*, 121 Mich. 512, 80 N. W. 386, 47 L. R. A. 104. In that case the court says: "Under this statute [the statute under which the defendant in this case is organized] the sole authority of the municipality is

the proper exercise of the police power, inherent in it, to protect the public from unnecessary obstructions, inconveniences and dangers, and to determine where and in what manner complainant may erect its poles and stretch its wires, so as to accomplish this result. . . . These municipalities may, under this law, prohibit the erection of these poles in places, and in a manner which will injure or incommode the public."

This precise question was under consideration in the case of *City of Marshfield v. Wisconsin Telephone Co.*, 102 Wis. 604, 78 N. W. 735, 44 L. R. A. 565, where it is said: "Here was a city of five thousand people, with waterworks, electric lights, a local exchange, and paved streets. Considerations of local pride seemed to demand that their main business street, in the business center, should be kept clear of obstructions or encumbrances. The board had an undoubted right, in the exercise of a reasonable discretion, to prohibit the encumbering of Central avenue with wires and poles."

In the case of *Village of Carthage v. Central of New York T. & T. Co.*, 185 N. Y. 448, 113 Am. St. Rep. 932, 78 N. E. 165, it is said: "The right to erect these poles and string the wires is not derived from the village authorities, but they are permitted to regulate the erection of the same; that is to say, the location of the poles and the streets to be occupied are, doubtless, within the reasonable power of the village to regulate."

This court has said (*Michigan Telephone Co. v. City of Benton Harbor*, 121 Mich. 512, 80 N. W. 386, 47 L. R. A. 104) a municipality may determine "where and in what manner complainant may erect its poles and stretch its wires, . . . and may prohibit the erection of these poles in places."

Does this power, so defined, confer upon the municipality the right to wholly exclude the poles and wires from a single block of a single street? We think it does, unless ⁹⁰ it is made to appear that by the adoption of such a regulation the telephone company is cut off from communication with persons it desires to reach and whom by law it is obliged to serve. The complainant in the case at bar urges that this one block is its main business block, and that to permit it to be encumbered with poles and wires would not only render it unsightly, but would appreciably increase the risk from fire by making it more difficult for the fire department to erect ladders and reach a conflagration. Neither of these considerations is without weight. The mere fact that the route designated by the municipality is less convenient or involves on the part of the telephone company a larger expenditure is of no

consequence so long as the company is not thereby prevented from reaching all those it desires to serve or who desire service from it. The record before us fails to disclose this condition. Where a municipality, in the exercise of its inherent police power, adopts an ordinance reasonably regulating the manner, character or place of construction of a contemplated line, the telephone company must comply with such regulations and exercise its right of entry under the general powers conferred by the state subject to them.

The decree of the court below is affirmed.

Grant, C. J., and Blair, Montgomery, and Ostrander, JJ., concurred.

As to the Power of a City to Regulate the erection and location of telephone poles in its streets, see *Village of Carthage v. Central New York Tel. & Tel. Co.*, 185 N. Y. 448, 113 Am. St. Rep. 932. According to *State v. Murphy*, 134 Mo. 548, 56 Am. St. Rep. 515, a city may require all electric wires used for the benefit of the public to be laid underground.

WARREN v. RAY.

[155 Mich. 91, 118 N. W. 741.]

SLANDER—Words not Actionable Per Se.—To call a woman a “damned old bitch” does not impute a want of chastity, and is not actionable per se. (p. 567.)

ATTORNEYS’ FEES are not Recoverable by the plaintiff in an action for slander. (p. 567.)

F. E. Wetmore, for the appellant.

Virgil A. Fitch, for the appellee.

⁹¹ BLAIR, J. This is an action for slander. The slanderous words, as set forth in the declaration, were as follows: “‘You [meaning the plaintiff] are a God damn whore. You [meaning the plaintiff] are a God damn bitch’—repeating the same with a loud voice and adding thereto other loathsome words too vile, shameful and monstrous to record.”

The defendant pleaded the general issue and gave notice “That, before the commencement of this cause, the said defendant had lost several horses by poisoning, and had had other horses and stock poisoned, and that he found the said plaintiff in and among his horses and stock ⁹² in his [defendant’s] field, at about 10 o’clock in the night-time, without any right or license to be there, and that, if the words were

uttered as set up in said declaration, they were said under the excitement of the moment, and on account of the said finding of said plaintiff among said stock of said defendant. Defendant will further give in evidence and insist in his defense that, if the said words were uttered, they were justified by the conduct of the said plaintiff, and were true."

The plaintiff put in testimony tending to fully sustain the charge of her declaration, and further testified that she had paid her attorney twenty-five dollars at the time she employed him to bring this suit. Defendant's counsel moved to strike out her testimony as to the attorney fee, but the court retained it. The plaintiff, her husband, and defendant got into an altercation over some horses, and defendant testified that plaintiff applied vile and slanderous epithets to him, in reply to which he said to her: "You will have to keep your horses away from my fence. Your horse has knocked my post off, you damned old bitch."

Defendant denied using the language testified to by plaintiff and her husband other than the epithet just quoted.

The court charged the jury, among other things, as follows:

"I will say to you, gentlemen, there is no dispute but what there was a meeting between these parties at the time mentioned in the declaration, and that certain words were used; and I will say to you, further, that the admission of parts of the words used by the defendant, by him upon the witness stand, is an admission that he made a statement derogatory to the character of the plaintiff, and that these words he admits he used did impute the want of chastity to Mrs. Warren. . . . If you find for the plaintiff, you will do as I said in regard to fixing the damages, finding such damages as would be compensation to her feelings, and such damages as she had been caused on account of this claimed slander, in the payment of cash, and bring them in separately."

⁹³ We are of the opinion that the court erred in instructing the jury that the language admitted to have been used by defendant, under the circumstances alleged by him, was slanderous *per se*: 25 Cyc. 322; 18 Am. & Eng. Ency. of Law, 2d ed., p. 938.

We are of opinion that attorney fees are not recoverable in such a case as this: 3 Comp. Laws, sec. 10,423; 18 Am. & Eng. Ency. of Law, 2d ed., p. 1117; 25 Cyc. 534; *Halstead v. Nelson*, 24 Hun (N. Y.), 395; *Irlbeck v. Bierle*, 84 Iowa, 47, 50 N. W. 36; *Illicks v. Foster*, 13 Barb. (N. Y.), 663; *Indianapolis Journal Newspaper Co. v. Pugh*, 6 Ind. App.

510, 33 N. E. 991; *Grotius v. Ross*, 24 Ind. App. 543, 57 N. E. 46.

Brand v. Hinchman, 68 Mich. 590, 13 Am. St. Rep. 362, 36 N. W. 664, and *Chesebro v. Powers*, 78 Mich. 472, 44 N. W. 290, are not in point. *Brand v. Hinchman* was an action to recover damages for malicious prosecution of an attachment suit, which, from its nature, is an exception to the general rule, and the point before us was neither raised nor passed upon. *Chesebro v. Powers* was an action to recover damages for slander of title contained in a deed and mortgage recorded by defendants and stated by them to set forth the truth as to the title. Plaintiff was compelled to file a bill in equity to remove the cloud upon her title, and the only damages claimed or suffered, and which were the necessary result of the slander, were the expenses of the chancery litigation that the plaintiff was compelled to suffer.

The judgment is reversed, and a new trial granted.

Grant, C. J., and Montgomery, Ostrander and Brooke, JJ., concurred.

What Words are Libelous Per Se is the subject of a note to Nichols v. Daily Reporter Co., 116 Am. St. Rep. 802.

GILCHRIST v. CORLISS.

[155 Mich. 126, 118 N. W. 938.]

WILLS.—In Construing Wills, the intent of the testator, when ascertained, governs. (p. 570.)

WILLS, Precatory Words in, When do not Create an Absolute Estate in the First Taker.—Precatory words in a will will not be construed to confer an absolute estate on the first taker merely because of the failure or uncertainty in the object or subject of the devise. (p. 571.)

WILLS, Construing to Avoid Intestacy Where Precatory Words are Used.—Where it appears that the purpose of precatory words is too vague to be capable of enforcement, and hence excludes a trust in the legal sense, such construction should be given, if reasonably open, as to avoid intestacy. (p. 571.)

WILLS, Devise of Bequest, When does not Vest in an Estate in Fee.—A devise and bequest of all testator's property to his wife, with a request that she at her death will at least two-thirds under the will to some trust designated by her in the city of A., and stating it to be the wish of the testator that she have and use the income from the portion of his estate willed to her as long as she lives, does not vest in her the fee except in one-third, and the remainder, on her

dying without making any disposition of it, reverts to his estate, and as to it he must be regarded as dying intestate. (p. 572.)

WILLS, Bequest, When not too Uncertain.—A bequest to "women's work in foreign fields," and to "women's work in home fields," is not incurably uncertain when it appears that the testatrix was a member of a Congregational church, which carried on work in behalf of foreign fields through the instrumentality of a corporation entitled "Women's Board of Missions of the Interior," and that there was another corporation known as "Women's Home Missionary Union of the Congregational Church of Michigan," and that decedent had been president of the local missionary society. (p. 573.)

WILLS.—A Bequest in a Will to Protestant missionary work among the poor colored people of the south will be construed as in favor of the American Missionary Association, if it is shown to be a corporation organized by the Congregational churches, of one of which the testatrix was a member, of which society she had been a subscriber in her lifetime, and she had expressed an intention to do something for the society. (p. 574.)

Charles R. Henry and Benton Hanchett, for the complainants.

Joseph H. Cobb and Alexis C. Angell, for the defendants.

127 MONTGOMERY, J. William H. Potter, late of Alpena, died testate on the first day of September, 1896. His wife, Ella J. Potter, died testate on the fourteenth day of May, 1905. The complainants are the executors named in the will of Ella J. Potter. This bill is filed to obtain a construction of the will of William H. Potter and also a determination as to the validity and effect of certain bequests made in the will of Ella J. Potter. The estate of William H. Potter amounted to some three hundred thousand dollars. His wife had an independent estate amounting to something like two hundred and fifty thousand dollars.

The will of William H. Potter, after bequeathing something like fifty thousand dollars to relatives and friends, proceeds as follows:

"To my dear wife, Ella J. Potter, I give and bequeath all the balance of my real and personal estate of every name and nature and I do appoint my said wife, Ella J. Potter, administratrix, of this my last will and testament, and it is my wish and desire that she be not required to give bonds for the faithful performance of any of the conditions of this my will, as I feel assured she will carry them out without it.

"I request that at my death, my said wife, Ella J. Potter, make her will and will at least two-thirds of what she receives under this, my will, to some charities, named and designated by her, said charities to be in the city of Alpena, Michigan, and the amount so willed to be payable at her death, as it is

my wish that she have and use all the income from that portion of my estate willed to her as long as she lives.”

¹²⁸ An attempt to comply with the request in the last clause of William H. Potter's will was made by Ella J. Potter, but it is conceded and it is apparent that it failed for want of a proper designation of the beneficiary, and the question presented upon this branch of the case is whether Ella J. Potter took an absolute indefeasible estate in all the residue of the estate of William H. Potter after the specific bequests, or whether she took an absolute estate only of one-third of such residue. In other words, whether the estate in the two-thirds vested in her heirs, or whether it vested in the heirs of William H. Potter.

It is contended on behalf of the heirs of Ella J. Potter that the case falls within *Jones v. Jones*, 25 Mich. 401, *Weir v. Michigan Stove Co.*, 44 Mich. 506, 7 N. W. 78, *Dills v. La Tour*, 136 Mich. 243, 98 N. W. 1004, *Moran v. Moran*, 143 Mich. 322, 114 Am. St. Rep. 648, 106 N. W. 206, 5 L. R. A., N. S., 323, and *Turnbull v. Johnson*, 153 Mich. 228, 116 N. W. 1009, and that on the authority of these cases it should be held that a full estate was bequeathed to Ella J. Potter with full power of disposition, and that the subsequent request in the will should be treated merely as the expression of a wish, and not as a mandatory provision. In other words, that Mr. Potter did not intend to direct as to the disposition of the estate, but only to suggest. We think that no one of the cases cited is necessarily controlling in the present case. It is to be noted of the provisions of the will, first, that it does not in terms bequeath an estate in fee simple. While, doubtless, the first clause quoted would, in the absence of subsequent limitations, be adequate to convey a full estate in fee simple, it does not in terms do so. While it would also be adequate to give full power of disposition in the absence of any limitation, it does not in terms give such power of disposition. What follows, therefore, may well be considered either as a limitation upon the estate conveyed or as a mere suggestion, if such shall be found to be the intent of the testator, and it is a cardinal rule in construing wills that the intent of the testator, when ¹²⁹ ascertained, shall govern. It is undoubtedly a circumstance tending to indicate a purpose that the whole estate shall be vested in the legatee, and that precatory words shall be regarded as a mere suggestion, rather than as a direction, when it appears that the purpose to which the request would devote the estate is so general that the provision is not capable of being enforced; but this does not

necessarily follow, for it is laid down as a rule that precatory words will not be construed to confer an absolute gift on the first taker merely because of the failure or uncertainty in the object or subject of the devise: See *Maught v. Getzen-danner*, 65 Md. 527, 57 Am. Rep. 352, 5 Atl. 471, and authorities cited; *Minot v. Attorney General*, 189 Mass. 176, 75 N. E. 149; *Abrey v. Duffield*, 149 Mich. 248, 112 N. W. 936.

The point is that the vagueness of the purpose is evidence that the intention to impress a trust is wanting. The testator in such case has reposed a larger discretion in the donee, and from this fact an inference is sometimes drawn that the precatory words are used by way of suggestion, rather than as words of command or direction. So, also, where it appears that the purpose is too vague to be capable of enforcement, and hence to exclude the trust in a legal sense, the rule that such a construction should be given, if reasonably open, as to avoid intestacy, is to be considered. These rules, however, are to be considered in connection with the rule that the intent of the testator, as gathered from the whole instrument, should control wherever no positive rule is infringed.

In this case, the intent to limit the bequest to the wife to the one-third of the testator's estate and the use of the remaining two-thirds is manifest. In my view, it is a significant fact that a disposition of the two-thirds received by Ella J. Potter was expected to be made by her will, to be made at the death of the testator, William H. Potter. It was intended that it should then be devoted to the purpose indicated, namely, some charities to be located in the city of Alpena. It is also significant that in this same ¹³⁰ clause it is provided that the amounts so willed by her should be payable at her death, and the reason why it should be so payable at her death is doubly significant, namely, "as it is my wish that she have and use all the income from that portion of my estate willed to her as long as she lives." There can be no doubt that what William H. Potter desired was that the two-thirds of the estate left after the specific bequests should be set apart and should go to certain charities to be designated by Ella J. Potter, but that the corpus of the estate should be kept intact until her death, and that she should have the use and income of the entire of it as long as she lived. We find no obstacle in the previous provisions of the will, namely, in the clause, "I give and bequeath all the balance of my real and personal estate of every name and nature to my dear wife, Ella J. Potter," to carrying into effect this intent of the testator; for, as above stated, there

is in terms no declaration that the purpose is to convey an estate in fee simple. There is no authority conferred in terms to dispose of the estate absolutely, and this authority can only arise by implication. We do not understand the cases above cited from our own reports as laying down a rule that such implication shall be permitted to stand in the way of express provisions embodied in a later clause in the will.

It is not contended but that precatory words, if the intent is manifest, may be treated as mandatory: See 20 Cent. L. J. 63; *Colton v. Colton*, 127 U. S. 300, 8 Sup. Ct. Rep. 1164, 32 L. ed. 138; *Trustees of Hillsdale College v. Wood*, 145 Mich. 257, 108 N. W. 675. But it is contended that there is a distinction between the case of an attempt by the testator by use of positive trust terms to create an express trust and where, by reason of the uncertainty in respect to the intended beneficiaries, the attempt to create the trust fails, and the case of the use of precatory words expressing a request or wish in respect to the disposition of property, and the same uncertainty exists in regard to the intended beneficiaries. It is contended that, in the first case, the courts ¹³¹ hold that the testator intended to put the property into the trust, and the title and disposition of the property is affected by such attempt to put the property in the trust. In the latter case, the use of precatory words, the courts hold that, by reason of the uncertainty of the beneficiaries, no trust was intended or attempted, and the disposition of the property is in no way affected by the use of precatory words; the precatory words only express a wish. As already indicated, this is stating the rule too strongly. It is true that a trust cannot arise under our statute (3 Comp. Laws, sec. 8839, subd. 5), unless fully expressed and clearly defined on the face of the instrument creating it; but it does not follow that, in the attempt to create a trust by the use of either positive or precatory words, the intent may not be made manifest to withdraw from the donee a title otherwise apparently conferred. We think from reading the provisions of the will together it is manifest that Mr. Potter did not intend that his wife should be at liberty to use the body of the estate, that he clearly intended to limit her to one-third and the income of the remaining two-thirds, and that the word "request," in the connection in which it is here used, is just as significant of this intent as would have been the word "will" or "direct," and should be held mandatory, and that, while there may have been a failure to create an express trust,

there was no failure in expressing a purpose to limit the bequest to Ella J. Potter in her own right. It follows that as to the two-thirds of his estate he must be said to have died intestate.

It remains to consider the effect of certain items in the will of Mrs. Potter. Item fourth reads as follows:

"To women's work in foreign fields, and to women's work in home lands (not Tank Home) I give and bequeath each society or work, the sum of five thousand dollars (\$5,000.00)."

The circuit judge held that by the bequest "to women's work in foreign fields" was meant the "Women's Board of Missions of the Interior." There was evidence offered ¹³² which shows that Mrs. Potter was a member of the Congregational church, and that this church carried on a work in behalf of women in foreign fields through the instrumentality of a corporation, under the title of the "Women's Board of Missions of the Interior." It also appeared that Mrs. Potter was a subscriber to *Mission Studies*, on the title page of which appears: "*Mission Studies. Women's Work in Foreign Lands.*" There is a corporation in Michigan known as the "Women's Home Missionary Union of the Congregational Churches of Michigan." It was in evidence that Mrs. Potter was at one time president of the local missionary society in Alpena, and that this society is an auxiliary of the Women's Home Missionary Union of the Congregational Churches of Michigan, and that the local society sends delegates to the state society. The court held that this society was the beneficiary intended by the use of the words "women's work in home lands."

It is claimed that the designation of the beneficiary was too uncertain. We do not concur in this view. In *Gilmer v. Stone*, 120 U. S. 586, 7 Sup. Ct. Rep. 689, 30 L. ed. 734, the bequest was of the remainder of the testator's estate, to be equally divided between the board of foreign and the board of home missions. This was the only designation. It was in evidence that there are various denominations having a board of foreign missions and a board of home missions. The testator, however, was shown to be a member of the Presbyterian church and a contributor to the missions established by that church, and it was held that the Board of Foreign Missions of the Presbyterian church in the United States of America and the Board of Home Missions of the Presbyterian church in the United States of America were intended by the designation made. We think the uncertainty in the present case is no greater than in that case. The evidence in that case was

of a similar character, and it was said of this testimony: "The purpose of it was to place the court, as far as possible, in the situation in which the testator stood, and ¹²³ thus bring the words employed by him into contact with the circumstances attending the execution of the will. Such proof does not contradict the terms of that instrument, nor tend to wrest the words of the testator from their natural operation. It serves only to identify the institutions described by him as 'the board of foreign and the board of home missions,' and thus the court is enabled to avail itself of the light which the circumstances, in which the testator was placed at the time he made the will, would throw upon his intention": See, also, *Cook v. Universalist General Convention*, 138 Mich. 157, 101 N. W. 217.

There was also a bequest, item tenth of the residuary clause of her will, to the Protestant missionary work among the poor colored people of the south. This amount is claimed by the American Missionary Association, which is shown also to be a corporation organized by the Congregational churches. It was shown that Mrs. Potter was a subscriber to the American Missionary, in which the work among the poor colored people of the south was described, and there was, in addition, evidence of an expression of an intention to do something for this society. The same considerations which control as to item fourth control as to this.

The decree of the circuit court will be affirmed.

Grant, C. J., and Blair, Moore and McAlvay, JJ., concurred.

In the Creation of Charities a degree of vagueness and uncertainty is indulged: *Kemmerer v. Kemmerer*, 233 Ill. 327, 122 Am. St. Rep. 169; note to *Fifield v. Van Wyck*, 64 Am. St. Rep. 756. A gift to a designated town toward the erection of buildings for the sick and poor, those without homes, constitutes a public charity: *Bowden v. Brown*, 200 Mass. 269, 128 Am. St. Rep. 419. A specific bequest for the benefit of the poor as a class, remaining uncertain only as to the selection of the beneficiaries by the trustee named, is not void: *Grant v. Saunders*, 121 Iowa, 80, 100 Am. St. Rep. 310. A bequest to the "Southern Baptist Theological Seminary at Louisville, Kentucky," and a bequest to the "Foreign Mission Board now at Richmond, Virginia," no trustees being named and no specific purposes being mentioned to which the funds are to be applied, is valid: *Snider v. Snider*, 70 S. C. 555, 106 Am. St. Rep. 754. A devise to an executor to be by him distributed "to the poor in his discretion" creates a gift sufficiently definite to be enforced: *Thompson v. Brown*, 116 Ky. 102, 105 Am. St. Rep. 194. And a devise of property in trust to establish a college for educating "as many poor white male orphans, born of reputable parents, as the income shall be adequate to maintain" is not void for indefiniteness: *Clayton v. Hallett*, 30 Colo. 231, 97 Am. St. Rep. 117.

Precatory Trusts are discussed at length in the note to *Post v. Moore*, 106 Am. St. Rep. 499.

When the Words of a Will at the Outset clearly indicate a disposition to give the entire estate absolutely to the first donee, the estate is not cut down to a less estate by subsequent or ambiguous words inferential in their intent. The first taker is presumed to be the favorite of the testator, and the tendency is to adopt such a construction as will give an estate of inheritance to the first donee. For illustrations of this rule, see *Galligan v. McDonald*, 200 Mass. 299, 128 Am. St. Rep. 421, and cases cited in the cross-reference note thereto; *Jackson v. Littell*, 213 Mo. 589, 127 Am. St. Rep. 620.

ZIMMER v. SAIER.

[155 Mich. 388, 119 N. W. 433.]

IT IS THE DUTY OF A SPECIAL ADMINISTRATOR to simply conserve and save the estate, and have it ready to be turned over to the regularly appointed administrator when he is appointed. (p. 577.)

CONTEST OF WILL.—A Special Administrator cannot Employ Counsel in a Will Contest, and the charges of an attorney employed by him do not constitute any claim against the estate. (p. 578.)

AN ADMINISTRATOR may be Allowed in His Final Account for fees incurred on an attempt to sell real property, where the heirs have agreed that he should have his fees out of the estate. (p. 578.)

O. J. Hood, for the appellants.

John J. Zimmer, F. L. Dodge and C. P. Black, pro. per.

³⁸⁸ GRANT, J. John J. Zimmer presented his final account as administrator with the will annexed of the estate of Elnora Saier, deceased. The account was allowed in the probate court, and Charles Saier and others appealed to the circuit court. There was judgment allowing the account in part, and contestants bring error. Modified and affirmed.

³⁸⁹ Elnora Saier died January 11, 1898, leaving a will executed on that day. She had executed a previous will on August 7, 1895. The will of January 11th was presented for probate. A contest between the heirs arose over this will, which found its way into this court: *Henrich v. Saier*, 124 Mich. 86, 82 N. W. 879. The judgment admitting the will to probate was reversed and new trial ordered. After that decision was handed down the parties settled, filing a stipulation, agreeing that the later will should be denied probate, and that the former will should be admitted to probate, and that no costs should be allowed. Three days after Mrs. Saier's

death Mr. Zimmer was appointed special administrator. On the same day a petition was filed by Charles Saier, praying for the probate of his mother's last will. The will was contested, and the history of that contest sufficiently appears in the case above cited. February 11, 1898, was fixed for the hearing of the petition for the probate of the will, and as well for the appointment of Mr. Zimmer as administrator. Mr. Zimmer appeared in that proceeding before the probate court as the attorney for five of the heirs who favored the will. Smith & Hood, attorneys, appeared for William Saier and the wives of William and Joseph Saier, who were legatees under the prior will. Mr. Zimmer acted as the attorney for the heirs who were in favor of the will until the termination of the suit by stipulation. The five heirs employed Mr. L. B. Gardner to assist him in that suit, for which services he charged \$400. Two attempts were made, on petition of some of the heirs, to have the administrator sell the real estate and distribute the proceeds among the heirs. The first of those proceedings failed for a defective description of the land. To the second petition some of the heirs filed objection, and denied the jurisdiction of the court. The probate court held that it had no jurisdiction. No ³⁹⁰ sale, therefore, was had. For this service the administrator claims he is entitled to receive \$194 as commission. On September 17, 1902, a petition was filed by one of the heirs, and the assignee of another, praying for the removal of Mr. Zimmer as administrator, and charging that he had not filed a proper account as administrator. He had then filed an account, to many items of which objection was taken. Upon the hearing the administrator was ordered to pay the claim of one of the petitioners, and to proceed to close up the estate and take action to that end within five days after service of a copy of the order upon him. In this final account he reported having received from the sale of the personal property and rent of the real estate \$5,167.72. His total expenditures were \$6,238.74, of which amount \$2,740.80 was for the expense of litigation, mainly attorney's fees, and a charge by him as administrator for looking after said estate for a period of five years and two months, \$645.80. Included in this account is the charge of Mr. Zimmer in the will contest for the heirs whom he represented, and fees as attorney for contesting a claim of \$600 by one Mary McPhee against the estate. His own charge in contesting the McPhee claim before the commissioner and the circuit court was \$600, and for Mr. Gardner, who was employed to assist him, \$295. The claim was allowed. These

clearly unjust claims were rejected by the court, and the two items above mentioned—\$400 to Mr. Gardner, and the \$194 for commission in proceedings to sell the real estate—are the only ones allowed, from which an appeal has been taken.

The record contains no parol evidence upon the employment of Mr. Gardner in the will contest. None of the testimony bearing upon this item, if any was taken, appears. Whether Mr. Gardner was employed in the probate court the record fails to show. It is recited in the record as follows: "It further appears that L. B. Gardner, at the request of the five above named who were in favor of the will ³⁹¹ bearing date January 11, 1898, took part as an attorney for the proponents of the will in the trial, both in the circuit court and in the supreme court, and said administrator, at the request of said five who were in favor of said will, paid said L. B. Gardner for his services aforesaid the sum of \$400 out of the funds of said estate, and said administrator with the will annexed, in his said final account so filed June 11, 1903, claimed credit for said sum of \$400 so paid to L. B. Gardner at the request of the proponents of the will bearing date January 11, 1898."

It was the duty of Mr. Zimmer, as special administrator, to simply conserve and save the estate, ready to be turned over to the regularly appointed administrator when appointed: 3 Comp. Laws, sec. 9326; *Grece v. Helm*, 91 Mich. 450, 51 N. W. 1106; *Schouler on Executors*, 3d ed., sec. 135. The will of 1898 failed to appoint an executor. Mr. Zimmer, as such special administrator, could neither employ himself nor any other attorney in the will contest. It is stated upon the record that Mr. Zimmer was employed as attorney to represent the five heirs who were in favor of the will, not the estate, and it is also conceded that Mr. Gardner was employed by and represented the same five heirs in that contest. Neither Mr. Zimmer nor Mr. Gardner represented the estate. Mr. Zimmer continued to act as special administrator, at least until he was appointed administrator with the will annexed under the probate order of April 27, 1898. The appeal from that decision suspended the order (*Schouler on Executors*, 3d ed., sec. 161), and all that any administrator, whether special or general, could do would be to conserve the estate, pending the decision as to the validity of the will, under the order of the probate court. It is undoubtedly the duty of the executor named in the will to present it for probate, and to take the necessary steps to secure its probate. That duty, however, did not devolve upon Mr. Zimmer, for he was not named

executor in the will. He had no interest in the estate, except by virtue of his employment as attorney for the proponents of the will. The heirs promptly arrayed themselves in the court, the one ³⁹² side to contest, and the other to sustain, the will. Under the condition of the estate it was then the duty of Mr. Zimmer to leave the contest to those directly interested, and confine himself strictly to conserving the estate and preserving it for those who should be held finally entitled to it: *In re Soulard's Estate*, 141 Mo. 642, 43 S. W. 617; *In re Parsons' Estate*, 65 Cal. 240, 3 Pac. 817; Schouler on Executors, 3d ed., sec. 544. He now seeks to compel adverse parties to pay for services of attorneys employed against them. This is not one of those cases where the court is justified in allowing the administrator to employ counsel in litigation which is for the benefit of the estate. Such action of the court would compel the contestants, the other heirs of the estate, to pay in part the expenses of the proponents' attorneys. I find no precedent for such a proceeding. The heirs in this case chose to have litigation (which, speaking for myself, was needless), and each party should pay their own costs.

Another complete answer to the allowance of this claim is that the stipulation discontinued one suit, disallowed one will, and provided for the probating of the other, without costs to either party. This stipulation settled all doubt, and left each party to pay their own attorneys and their own costs.

As to the \$194, the jury found in reply to a special question that it was "agreed between the administrator and all the heirs or their representatives that he should have his fees out of the estate just the same." Under this finding we see no objection to the allowance of this item. The \$400 will be eliminated from the account, and the balance of the account affirmed.

The appellants will recover costs.

Blair, C. J., Montgomery, Brooke and McAlvay, JJ., concurred.

The Office and Duties of a Special Administrator have been compared to those of a receiver. Each is appointed by the court to take charge, under its direction, of property involved in the proceedings before it, with a view to its care and preservation for the parties to whom the court eventually determines that it belongs. The powers and duties of each are special, and limited to such as are defined by statute, expressed in the order of appointment, or from time to time received for the purpose more effectually to preserve the estate intrusted to his charge: 1 Ross on Probate Law and Practice, 375,

citing *Estate of Moore*, 88 Cal. 3, 25 Pac. 915; *Estate of Ford*, 29 Mont. 283, 74 Pac. 735; *State v. District Court*, 18 Mont. 481, 46 Pac. 259.

As to Who may Contest a Will, see the note to *Selden v. Illinois T. & S. B.*, ante, p. 180.

BOVINE v. SELDEN.

[155 Mich. 556, 119 N. W. 1090.]

HOMESTEAD—Estoppel of Wife to Contest Transfer by Husband Alone.—If a husband has a contract for the purchase of a parcel of land on which he and his family reside, and which constitutes their homestead, and he and his wife agree to exchange it for real property, but she fails to join in the assignment of the contract because the scrivener who drew the assignment advised that her joinder was unnecessary, and she and her husband, without any objection on her part, remove to the property so acquired by exchange and without any intention to return to their former home, this amounts to an abandonment of the homestead, and precludes her from maintaining a suit to assert her homestead rights, and entitles the defendant to a decree vesting title in him against her claim, especially where large expenditures have been made by him in improving the property, and liens have been placed thereon in good faith by way of mortgage. (p. 581.)

Suit by Olivine Bovine against John M. Olson and others and Sarah L. Selden for specific performance of a contract and to set aside a deed. The defendant Olson, in addition to answering, interposed a counter-bill for the purpose of quieting his title. The complainant's bill was dismissed and the prayer of defendant's cross-bill granted. Complainant appealed.

Gallup & Gallup, for the complainant.

⁵⁵⁶ MOORE, J. This is an appeal from a decree in a chancery case. The questions involved were clearly stated by the trial court in a written opinion prepared by him, which reads in part as follows:

"I have such grave doubt of the equities of the complainant's claim that I am constrained to dismiss her bill of complaint. Her husband had a land contract of a lot in the city of Escanaba, upon which a house was built, and there is no doubt that on April 14, A. D. 1906, the same was a homestead, and was the homestead of complainant's husband and family, within the meaning of the ⁵⁵⁷ constitution and statutes of this state. On that day complainant's husband assigned the said contract to the defendant John Olson, in a trade with said Olson, for a farm in the township of Bark

River. Complainant did not join in this assignment, and that the assignment was void there can be no doubt. Although in her bill complainant alleged that she refused to join in such assignment, and that she never consented to it, and that the same was made against her protest, and that she was compelled under threats of her husband to remove from said premises, the evidence in the case fails to support any of said allegations, to warrant any such finding or conclusion. It does appear that her husband sought by such assignment of contract to dispose of the homestead and to trade it for a farm of two hundred and forty acres, situated in the township of Bark River, in said county, that prior to said trade she with her husband visited the farm and examined it, and that Olson and his wife visited the homestead, and the trade and exchange of property were discussed and agreed upon. Complainant did not join in the assignment of the contract, because the scrivener who drew the papers ignorantly advised that the same was not necessary.

“While complainant in her testimony seeks to make it appear that she reluctantly moved from the homestead, there is not a word of testimony that she objected or in any manner protested, or that she was compelled under threats of her husband, or in any way was compelled to remove from the place. There is nothing in the evidence to indicate that she made the least protest or objection, to Olson or anybody else, to leaving the premises with her husband and family. The trade seems to have been on Monday, and the complainant and family moved from the place near the close of the week to the farm. The actions and conduct of complainant and her family all indicated that they voluntarily moved from the home to the farm, without the least intention of ever returning to the place in Escanaba.

“In so far as the conduct of the two families was concerned, it was a mutual arrangement of the parties, in good faith, for the exchange of homes and properties. I think that the real question in the case, under all the circumstances as disclosed by the evidence, is: Was there an abandonment of the homestead by the complainant and her husband and the family? That the assignment of the ⁵⁵⁸ contract without the joining of the complainant was void there can be no question. If the husband and family may in good faith abandon the homestead, without making any deed or conveyance, is it any the less an abandonment when they, in good faith, move from one home to another, without the intention of returning, under a deed or conveyance which is void because the wife

has, through her own or another's ignorance, failed to join in the same? It seems to me not. In determining whether or not there was an abandonment of the homestead, the court ought to consider the real intention of the parties and all of the surrounding circumstances.

"Had complainant remained in possession, or had she been forced out of possession, or had there been fraud or duress of any kind, a different question would be presented. I am satisfied that she and her husband and family moved away from the place in good faith, going to another home, without the slightest intention or thought of ever returning to the old home in Escanaba.

"It may be well to briefly examine some of the cases."

The learned judge then examined in detail many cases which were supposed to have a bearing upon the case, and concluded his opinion as follows: "To my mind there is something inequitable in the claim of the complainant. She seeks to use as a sword what was intended to be a shield. After joining with her husband and family in removing from the homestead, without the slightest intention, on the part of any of them, of ever returning to it, and after going into a new home and settling there, and without the slightest objection, notice, or protest to defendant Olson, or other interested parties, to indicate that she had an intention of returning and claiming the former home, and after conditions have changed, and after an expenditure of more than two thousand dollars in improvements on the property, and the placing thereon of liens by way of mortgages in good faith, she, after more than a year has elapsed, files her bill to assert homestead rights. I do not claim that she had alienated her homestead, but it does seem to me that she had abandoned it, and that its character as a homestead had ceased. I shall therefore dismiss her bill, but without costs, and decree that defendant Olson's homestead rights in said lot be quieted as to said complainant's claim."

⁵⁵⁹ A careful reading of the record satisfies us as to the justice of his conclusions of fact, and we think the authorities sustain his conclusions of law.

Decree is affirmed, with costs.

Blair, C. J., and Grant, Hooker and McAlvay, JJ., concurred.

The Effect of a Conveyance of a Homestead by one only of the spouses is the subject of a note to *Jerde v. Furbush*, 95 Am. St. Rep. 909. The general rule is that a deed of a homestead is ineffectual

to convey title unless executed by both husband and wife: *Lininger v. Helpenstell*, 229 Ill. 369, 120 Am. St. Rep. 264; *McDonald v. Sanford*, 88 Miss. 633, 117 Am. St. Rep. 758; *Bolen v. Lilly*, 85 Miss. 344, 107 Am. St. Rep. 291.

As to Whether a Homestead may be Defeated by Estoppel, where there has been an antecedent, ineffectual conveyance thereof, see *Adams v. Gilbert*, 67 Kan. 273, 100 Am. St. Rep. 456; *Weatherington v. Smith*, 77 Neb. 363, 124 Am. St. Rep. 855; note to *Jerde v. Furbush*, 95 Am. St. Rep. 921.

Estoppel Against Married Women is the subject of a note to *Trimble v. State*, 57 Am. St. Rep. 169. Recent cases on this question as applied to the rights of a wife in real estate are: *Lewis v. Apperson*, 103 Va. 624, 106 Am. St. Rep. 903; *Baillarge v. Clark*, 145 Cal. 589, 104 Am. St. Rep. 75; *Waldron v. Harvey*, 54 W. Va. 608, 102 Am. St. Rep. 959; *National Lumberman's Bank v. Miller*, 131 Mich. 564, 100 Am. St. Rep. 623; *Cauble v. Worsham*, 96 Tex. 86, 97 Am. St. Rep. 871.

GRIFF v. CLARK.

[155 Mich. 611, 119 N. W. 1076.]

MECHANIC'S LIEN, Denial of, Because Statement of was for an Excessive Amount.—Where the statute requires the statement of a lien to be "a just and true statement of account of the demand due over and above all legal setoffs," and a sum is claimed in the statement from sixty to seventy per cent in excess of the amount due, the bill to foreclose the lien is properly dismissed. (p. 584.)

Burritt & Burritt, for the complainant.

Larson & Galbraith, for the defendant.

⁶¹¹ BROOKE, J. The bill in this case is filed to foreclose a contractor's lien. The building was erected under a written contract entered into between the parties on the twelfth day of September, 1905. The contract price was \$1,700, subject to the privilege reserved by the defendant to make alterations in the building, she to pay for all extra labor required for such alterations. The building was substantially completed on the seventh day of December, 1905, the defendant refused to make the last payment according to the contract, and on the first day of February, 1906, complainant filed a claim of lien. One thousand dollars of the contract price was paid by the defendant, but payment of the \$700 balance, together with \$190 claimed by the complainant as extras, was refused by defendant. The findings of the circuit judge were in part as follows:

⁶¹² "The undisputed testimony in the case shows that the building was not completed according to the terms of the

written contract, that changes were made in the material used and other changes were made which decreased the cost of the building.

"The complainant insists by his testimony that the substitution of material and the changes made in the building were all with the consent of the defendant. The defendant denies this. If the changes were made with the consent of the defendant, and if the substitution of material was done with her knowledge and consent, the complainant ought to allow the difference between the cost of the material furnished and that contracted for to the defendant. He has not done so nor has he offered to do so. He insists that he is entitled to the full contract price, and that the lien upon the premises should be enforced to compel the payment of the full contract price.

"The amount charged for extras upon the building, \$190, is made up of several items. Some of the items were not extras at all as appears from the testimony, and as to some other of the items the testimony fails to show the value to be that claimed by the complainant. Where there is a difference of value, the difference may arise because the amount is estimated by two different people. I think there can be no question that some of the items charged as extras were known to the complainant at the time he filed his lien as not entitled to be included as extras.

"The written contract for the erection of the building mentions the kind of material to be used. The complainant was a contractor of experience, and also a lumberman. He did not show by a fair preponderance of the evidence that the changes in the material were made with the consent of the defendant. The weight of the testimony is decidedly with the defendant, that she did not know of the substitution of materials and did not consent to it. Hemlock was substituted for pine and bass wood for finishing pine. Some of the lumber used was not of the grade specified in the contract. In every instance where there was a substitution of material a cheaper one was used.

"The complainant insists that because the defendant has failed to show just the difference in the market price of the material used and just how many feet were substituted she must pay the full amount of the contract and ⁶¹³ her property must be subject to a lien for the full amount. The testimony in the case shows that the building as built by the contractor is worth from \$375 to \$500 less than it would be had it been completed according to the terms of the contract. The contractor knew the price of the material, but

has made no deduction whatever on account of the decreased cost, and, while it may well be that the difference in the price of the substituted material and that of the contract material might not amount to \$375, it is evident that the complainant has endeavored to enforce a lien for an amount much greater than he honestly believed to be due him."

Complainant, both in his statement of lien filed in the office of the register of deeds and his bill of complaint, claims the sum of \$890 as the amount due from the defendant over and above all the legal setoffs. Counsel for complainant makes the following claim in his brief: "The largest amount which the defendant should recover under the pleadings and proofs would be the difference in the value of the material used and that contracted for, which would be from \$75 to \$100, and the difference in the cost of labor, which would be from \$75 to \$100. This would entitle complainant to a decree for \$530 and costs."

It will be noted that the difference between this amount and the amount claimed in the lien is \$360, a sum between sixty and seventy per cent in excess of the claim made by complainant's counsel in his brief upon consideration of the record testimony. It is apparent to us that the complainant's statement of lien is not such "a just and true statement of account of the demand due him over and above all legal set-offs" as is contemplated by the statute, and we therefore hold that the circuit judge was correct in his ruling: See *Gibbs v. Hanchette*, 90 Mich. 657, 51 N. W. 691; *Lamont v. La Fevre*, 96 Mich. 175, 55 N. W. 687; *Brennan v. Miller*, 97 Mich. 182, 56 N. W. 354; *Scheibner v. Cohnen*, 108 Mich. 165, 65 N. W. 760; *J. E. Greilick Co. v. Taylor*, 143 Mich. 704, 107 N. W. 712.

Decree is affirmed.

Grant, Montgomery, Moore and McAlvay, JJ., concurred.

A Just and True Account of a Mechanic's Lien Demand is required, whether filed by an original or a subcontractor, but it need not have the definiteness of a pleading: *Mitchell Planing Mill Co. v. Allison*, 138 Mo. 50, 60 Am. St. Rep. 544.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

**BARRETT v. MINNEAPOLIS, ST. PAUL AND SAULT
STE. MARIE RAILWAY COMPANY.**

[106 Minn. 51, 117 N. W. 1047.]

RAILROAD CORPORATIONS—Party Injured and the Brakeman, When not Cotrespassers.—Action for damages which the plaintiff, a trespasser on the defendant's freight train, claimed to have sustained by being forced, by the wanton act and threat of a brakeman, to jump from the train while it was moving rapidly. Verdict for twenty-six thousand dollars. Held, the defendant was not entitled to a directed verdict on the alleged ground that the plaintiff and the brakeman were cotrespassers, nor upon the opening statement of plaintiff's counsel as to the motive which actuated the brakeman, nor because of a rule of the defendant forbidding brakemen to eject any person from a train except by direction of the conductor and in his presence (p. 588.)

JURY TRIAL—Directing Verdict from the Statement of Counsel.—A trial court has the right to act upon the facts deliberately conceded by counsel in his opening statement to the jury, and direct a verdict against the plaintiff if such conceded facts would not entitle him to a verdict; but such power must be exercised sparingly, and never without full consideration and opportunity for counsel to qualify his statement, so far as the truth will permit. (pp. 588, 589.)

TRIAL—Variance Between Complaint and Evidence.—Though the complaint against a railway company for the ejection of a trespasser from the train alleges that the brakeman had express authority, it is not indispensable to a recovery that such authority be shown. (By the editor.) (p. 589.)

JUDGMENT Notwithstanding Verdict, When will not be Ordered.—Judgment notwithstanding the verdict will not be ordered if the defect relied upon can be cured by amending the complaint. (By the editor.) (p. 589.)

A RAILROAD COMPANY Owes No Duty to a Trespasser on Its Cars except to refrain from wantonly injuring him in ejecting or forcing him from the train when it is going so rapidly as to imperil his life or endanger his person. (By the editor.) (p. 590.)

RAILWAY COMPANIES.—A Brakeman has Implied Authority to Eject a Trespasser from a freight train. (By the editor.) (p. 590.)

MASTER AND SERVANT—Liability of the Former for the Torts of the Latter.—A master is responsible for the torts of his ser-

vant, done in the course of his employment with a view to the furtherance of his master's business, and not for a purpose personal to himself, whether the same be done willfully, but within the scope of his agency, or in excess of his authority, or contrary to the express instructions of the master. (p. 590.)

NEW TRIAL, Granting for Excessive Damages for Personal Injuries.—The trial court did not err in granting a new trial on the ground that the damages were excessive. The amount awarded in this case was twenty-six thousand dollars, and the injuries suffered by the plaintiff were serious. (By the editor.) (p. 591.)

(Syllabi by the court except where stated to be by the editor.)

Edwin S. Thompson and Frederick N. Dickson, for the plaintiff.

A. H. Bright and Munn & Thygeson, for the defendant.

52 START, C. J. Personal injury action, in which the plaintiff had a verdict, in the district court of the county of Ramsey, for twenty-six thousand dollars. The defendant then made an alternative motion for judgment notwithstanding the verdict or for a new trial. The trial court made its order denying the motion for judgment and granting a new trial. Each party appealed.

The defendant's appeal presents the question whether, upon the record, it was, as a matter of strict legal right, entitled to a directed verdict; hence to judgment absolute in its favor. The record discloses evidence sufficient, if satisfactory to the jury, to sustain the finding by them of the facts following:

On August 7, 1907, the plaintiff, a young man about nineteen years old, desiring to go from Velva to Harvey, in North Dakota, without claim of right and for the purpose of stealing a ride to his destination, got into one of the defendant's box-cars, which was in and near the center of a freight train of thirty or more cars which did not carry passengers. The train started on its way, with the plaintiff in the car; but it stopped some distance beyond Velva, when the plaintiff was discovered in the box-car by one of the crew in charge of the train, a brakeman, who directed the plaintiff to "unload and stay away from the train," which he understood as an order to get out of the car, and he at once complied. After the plaintiff was out of the car and standing on the ground near the train, the brakeman asked him where he was going. The answer was, "To Harvey." The brakeman wanted twenty-five cents to carry the plaintiff, who replied that he had no money. Nothing further was said and the brakeman walked away. The plaintiff, intending again to board the car, kept

out of sight of the trainmen, including the brakeman, until the train started. ⁵³ He then attempted to board the car, and while the train was moving at the rate of some fifteen miles an hour, and he was standing in the stirrup on the side of the car and hanging on to the grab iron, the brakeman, who was on the top of the cars, saw him, and started toward him, and in an angry manner, calling him a vile name, ordered him to jump off the car or he would kick his head off. The plaintiff was frightened by this threat, and fearing that it would be executed if the order was not obeyed, and induced thereby, dropped or jumped from the moving car to the ground, whereby he was seriously injured.

The evidence as to some of these facts was radically conflicting, especially as to the speed of the train at the time; the evidence on the part of the defendant tending to show that the speed did not exceed five miles an hour. Also, as to what the brakeman said to the plaintiff when he was discovered hanging to the side of the car, the brakeman's testimony was that when he saw the plaintiff he "hollered for him to keep off—to get off"; and, further, as to the brakeman's request for twenty-five cents for carrying the plaintiff, the brakeman testified that he never made any demand of the plaintiff for any money, and unqualifiedly denied the testimony of the plaintiff that such demand was made. There was also evidence on the part of the defendant tending to show that the plaintiff's testimony as to how he was injured was not true. The weight of the evidence and the credibility of the witnesses were questions for the jury.

Counsel for the plaintiff in his opening statement to the jury stated that: "The brakeman comes around and discovers that the boy was there at the time and he was sore—not because the boy was riding, but because he was riding without paying twenty-five cents. I don't know what his intentions were." Plaintiff's counsel also, in discussing the admissibility of evidence as to what the brakeman said to plaintiff when he was first ordered off the car said, in substance, that he would show that the brakeman was simply continuously sore from the time the plaintiff refused to pay the twenty-five cents, and claimed that the proposed evidence was admissible to enable the jury "to admeasure by proper standards and to find out, as a matter of ultimate fact, whether or not that brakeman was actuated by temper and spleen and malice at the time he ejected that boy; that he was continuously ⁵⁴ sore and in temper, and that was one of the inducing causes why

he made this assault upon the boy as we claim in the complaint."

The defendant claimed nothing at the trial on account of such statements, and took no action with reference to them, except to request the court to instruct the jury that if it were a fact that the brakeman demanded the twenty-five cents, which was refused, as plaintiff claimed, and the brakeman, incensed thereby, threatened to kick plaintiff off the car, they were joint trespassers, and the verdict must be for the defendant.

1. The first contention of the defendant is that this case falls within the rule established in the case of *Brevig v. Chicago etc. Ry. Co.*, 64 Minn. 168, 66 N. W. 401, that where a person bribes a brakeman of a railway company to permit him to ride in a freight-car they are joint trespassers, and if, during the passage, such person is improperly ejected from the car by the brakeman, it is simply an assault of one trespasser upon another, for which the company is not liable; therefore the defendant in this case was entitled to an instructed verdict. There was no evidence in this case even tending to show that the plaintiff either bribed or offered to bribe the brakeman, who testified that he never asked the plaintiff for any money. It is perfectly obvious from the record that the rule invoked has no relevancy to the facts of this case. The defendant was not entitled to an instructed verdict on the ground that the plaintiff and the brakeman were cotrespassers, nor to have the question submitted to the jury in compliance with its request.

2. It is further claimed by defendant that it is entitled to a judgment notwithstanding the verdict, for the reason that the statements of counsel to which we have referred, taken in connection with the evidence, conclusively show that the brakeman, in ejecting the plaintiff, was not acting in the performance of any duty, but for the sole reason that he was sore at respondent for not having paid him twenty-five cents. A trial court has the right to act upon facts deliberately conceded by counsel in his opening statement and to direct a verdict against the plaintiff upon such concession, if such facts, if proven, would not entitle the plaintiff to a verdict. Such power, however, must be exercised sparingly, and never without full consideration and opportunity for counsel to explain and qualify his statement ⁵⁵ so far as the truth will permit: *Oscanyan v. Winchester R. Arms Co.*, 103 U. S. 261, 26 L. ed. 539; *Spicer v. Bonker*, 45 Mich. 630, 8 N. W. 518. It is clear on the face of the statements of counsel here urged that

they are not within the rule stated, and that they afford, taken in connection with the evidence, no support for the defendant's claim.

3. It is the further contention of the defendant that the brakeman had no authority to eject the plaintiff from the train; therefore the defendant is not responsible for the act of the brakeman. The defendant urges in this connection that the complaint alleges that the brakeman had express authority to eject trespassers from the train, and that the plaintiff was bound to show such authority, and that he wholly failed to do so. We are of the opinion that he was not; but were it otherwise, it would not be a reason for ordering judgment notwithstanding the verdict, for the defect, if any, can be cured by an amendment of the complaint on a new trial.

The defendant introduced in evidence its rule as to the duty of its brakeman, which provides that brakemen are expected to be vigilant and to perform their duties without special instructions from conductors, and contains specific and detailed instructions as to their duties on trains which carry passengers. Then follows this prohibition: "Brakemen will not eject any person from a train except by special direction of the conductor and in his presence." It is doubtful whether this prohibition, in view of what precedes it and its inapplicability to freight trains, can be fairly construed as prohibiting brakemen from keeping trespassing tramps off freight-cars. However this may be, the trial court called the attention of the jury to this rule and instructed them that: "A master is responsible for the torts of his servant, done with a view to the furtherance of the master's business, whether the same be done negligently or willfully, but within the scope of his agency. The fact that the servant, in committing the tort, exceeded his actual authority, or even disobeyed his express instructions, does not alter this rule. Considering these facts, and these principles of law, you will determine the question as to whether the defendant company was liable for the act of the brakeman, whatever it was. Of course, if the act was beyond the scope of his agency or authority, the defendant is not liable."

If this be a correct statement of the law applicable to this case, it ⁵⁶ follows that the defendant was not entitled to a directed verdict on the ground that the brakeman had no authority to eject the plaintiff from the car; for there was evidence tending to show that the brakeman's act here in question was done in the course of his employment, with a view to the furtherance of the defendant's business, and within the scope

of his agency. The plaintiff was a trespasser on the car, and the defendant owed him no duty except to refrain from wantonly injuring him in ejecting him from the car, and from ejecting him, or forcing him to jump, from the car when it was going so rapidly as to endanger his life or person. The brakeman in this case had implied authority to eject the plaintiff from the freight-car (*Brevig v. Chicago etc. Ry. Co.*, 64 Minn. 168, 66 N. W. 401); hence the evidence on the part of the plaintiff was sufficient, *prima facie*, to sustain a finding by the jury that the brakeman, in forcing the plaintiff off the car, was acting in furtherance of the defendant's business and within the line of his duty.

Was this *prima facie* case overthrown, and the defendant entitled to a directed verdict, by the introduction in evidence of the rule forbidding brakemen from ejecting any person from a train, except upon the condition that it be done by the special direction of the conductor and in his presence? We answer the question in the negative. In an opinion denying a motion for a rehearing in the *Brevig* case, it was stated that: "While we are of opinion that the general duties of brakemen are such that their implied authority to eject trespassers will be presumed, yet we are also of opinion that as to a trespasser, which plaintiff clearly was, this presumption may be rebutted by evidence showing that such authority was expressly withheld or its exercise forbidden; and if that fact was established, the defendant would not be liable to the plaintiff for the acts of its brakeman in ejecting him from the train. How strong or complete this evidence should be, in order to make the question one of law for the court, instead of one of fact for the jury, it is unnecessary now to consider, further than to say that, in view of the general nature of the occupation of brakemen, the evidence that authority to eject trespassers had been expressly withheld or forbidden should be clear and full, in order to overcome the presumption of the existence of such implied authority."

If this were a correct statement of the law, we would be of the ⁵⁷ opinion that the evidence in this case made the question one of fact. We do not, however, base our answer to the question upon this narrow ground, but upon the now well-settled rule of this court, whatever may be the rule in other jurisdictions, that a master is responsible for the torts of his servant, done in the course of his employment with a view to the furtherance of his master's business, and not for a purpose personal to himself, whether the same be done negligently or willfully, but within the scope of his agency, or in excess of

his authority, or contrary to the express instructions of the master. Any statement to the contrary in the Brevig case is overruled: *Smith v. Munch*, 65 Minn. 256, 68 N. W. 19; *Larson v. Fidelity Mut. Life Assn.*, 71 Minn. 101, 73 N. W. 711; *Lesch v. Great Northern Ry. Co.*, 93 Minn. 435, 101 N. W. 965; *Crandall v. Boutell*, 95 Minn. 114, 103 N. W. 890; *Merrill v. Coates*, 101 Minn. 43, 111 N. W. 836; *Anderson v. International Harvester Co.*, 104 Minn. 49, 116 N. W. 101, 16 L. R. A., N. S., 440.

We hold, upon a consideration of the record in this case, that the defendant was not entitled to a directed verdict, and that the trial court did not err in denying its motion for judgment notwithstanding the verdict.

4. This brings us to a consideration of the plaintiff's appeal from so much of the order as granted the defendant's motion for a new trial. It appears from the memorandum of the learned trial judge attached to the order that a new trial was granted on the ground that the evidence was not sufficient to sustain a finding that the plaintiff's injuries were permanent, and therefore the damages awarded were excessive. We are satisfied, from an examination of the evidence relevant to the question of damages, that the trial court did not err in granting the defendant a new trial, and so hold.

Order affirmed on both appeals.

If an Agent or Servant is Employed to perform a certain piece of work, and, while in the line of his duty, injures another, even though he exceeds his authorized powers or disobeys his instructions, his employer is liable to the person injured for the damages sustained: *Barree v. City of Cape Girardeau*, 197 Mo. 382, 114 Am. St. Rep. 763; *Deek v. Baltimore etc. R. R. Co.*, 100 Md. 168, 108 Am. St. Rep. 399; *Cobb v. Simon*, 119 Wis. 597, 100 Am. St. Rep. 909; *Bergman v. Hendrickson*, 106 Wis. 434, 80 Am. St. Rep. 47; *Burnett v. Oechsner*, 92 Tex. 588, 71 Am. St. Rep. 880. And a master is liable for the willful or malicious torts of his servants committed in the course of the latter's employment: *Columbus R. R. Co. v. Woolfolk*, 128 Ga. 631, 119 Am. St. Rep. 404; *Holler v. Ross*, 68 N. J. L. 324, 96 Am. St. Rep. 546; *McCarthy v. Timmins*, 178 Mass. 378, 86 Am. St. Rep. 490; *Nelson Business College Co. v. Lloyd*, 60 Ohio St. 448, 71 Am. St. Rep. 729; but not when they are committed without the scope of his employment: *Clancy v. Barker*, 71 Neb. 83, 115 Am. St. Rep. 559; *Anderson & Co. v. Diaz*, 77 Ark. 606, 113 Am. St. Rep. 180; *Waealer v. Great Northern Ry. Co.*, 18 S. D. 420, 112 Am. St. Rep. 794. See the discussion of these questions in the notes to *Franklin Fire Ins. Co. v. Bradford*, 88 Am. St. Rep. 779; *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 71.

The Liability of a Railway Company for the act of its engineer in expelling a trespasser from the locomotive is discussed in *Galveston etc. Ry. Co. v. Zantzinger*, 92 Tex. 365, 71 Am. St. Rep. 859; *Polatty v. Charleston etc. Ry. Co.*, 67 S. C. 391, 100 Am. St. Rep. 750; and the liability of a railway company for the act of its brakeman in expelling a trespasser from the train is discussed in *McKeon v. New York etc.*

R. R. Co., 183 Mass. 271, 97 Am. St. Rep. 437; Bjornquist v. Boston etc. R. R. Co., 185 Mass. 130, 102 Am. St. Rep. 332; Pollack v Pennsylvania R. R. Co., 210 Pa. 631, 105 Am. St. Rep. 843. According to Dixon v. Northern Pac. Ry. Co., 37 Wash. 310, 107 Am. St. Rep. 810, it is within the general authority of a brakeman on a freight train to remove trespassers who get, or attempt to get, thereon, and if, in so doing, he does not exercise care and caution, but acts wantonly or maliciously, and an injury results, the railroad company is liable without evidence showing the brakeman's authority.

STATE v. BAILEY.

[106 Minn. 138, 118 N. W. 676.]

HABEAS CORPUS, Scope of Inquiry upon.—The scope of habeas corpus when directed to an inquiry into the cause of imprisonment in judicial proceedings extends to questions affecting the jurisdiction of the court, the sufficiency in point of law of the proceedings, and the validity of the judgment or commitment under which the prisoner is restrained. It cannot be employed as a writ of quo warranto to inquire into the title of the person to the office of judge of the court whose judgment or commitment is assailed, nor as a writ of error, appeal or certiorari. (By the editor.) (p. 593.)

HABEAS CORPUS—Judgment of the Court, When the Only Subject of Inquiry.—If a prisoner is detained under a judgment rendered or commitment issued by a court of competent jurisdiction, fair on its face, nothing further than the jurisdiction of the court will be inquired into. (By the editor.) (p. 593.)

A MUNICIPAL CORPORATION, Though not Legally Organized, is a De Facto Corporation, and its acts and officers are, as to third persons, lawful and binding, and its legal existence and the right to continue to exercise its functions can be questioned only by the state in a direct proceeding. (By the editor.) (pp. 595, 596.)

OFFICER DE FACTO Where There is No Office De Jure.—There may be a de facto officer, though no de jure office exists, as in de facto municipal corporations or de facto courts. (p. 596.)

HABEAS CORPUS, Questioning the Legality of the Court.—The legal existence of a court organized and created under color of law cannot be questioned in habeas corpus sued out by a person convicted and sentenced to imprisonment in proceedings had before it. (p. 596.)

COURTS.—There may be a De Facto Court, the validity of whose acts cannot be questioned in collateral proceedings, though there is no court de jure. (By the editor.) (p. 596.)

HABEAS CORPUS, Attack upon Municipal Court by, When not Permissible.—Even though defectively organized, the organization being authorized by law, the municipal court of Bemidji is at least a de facto court and the judge and clerk thereof de facto officers, and the right of the court to exercise judicial functions can be inquired into only at the instance of the state in direct proceedings brought for that purpose. (p. 598.)

(Syllabi by the court except where stated to be by the editor.)

Frank A. Jackson, for the appellant.

Henry Funkley, for the respondent.

138 BROWN, J. Relator was convicted in the municipal court of Bemidji of petit larceny, and sentenced to imprisonment in the county jail for the term of ninety days. He thereafter sued out a writ of habeas corpus, alleging that his imprisonment was illegal and without authority of law, in that the said municipal court was never legally created or established. The writ was discharged by the court below and relator appealed.

We are confronted at the outset with the question whether the legal existence of the court in which relator was convicted and sentenced **139** may be inquired into in a proceeding of this kind. If not, then the other questions presented require no attention.

The office of the writ of habeas corpus is to afford the citizen a speedy and effective method of securing his release when illegally restrained of his liberty. Its scope, when directed to an inquiry into the cause of imprisonment in judicial proceedings, extends to questions affecting the jurisdiction of the court, the sufficiency in point of law of the proceedings, and the validity of the judgment or commitment under which the prisoner was restrained. It cannot be employed as a writ of quo warranto to inquire into the title of the person to the office of judge of the court whose judgment or commitment is assailed: 15 Am. & Eng. Ency. of Law, 2d ed., 168. Nor as a writ of error to review alleged errors committed on the trial. Nor as an appeal or writ of certiorari: State v. Kinmore, 54 Minn. 135, 40 Am. St. Rep. 305, 55 N. W. 830. At common law courts of superior jurisdiction would review on this writ commitments by inferior magistrates, and in doing so sometimes go back of the commitment, and inquire into the grounds thereof and their sufficiency. This wide scope of inquiry, however, came from the superiority of the higher court, and not from statutory authority. But the rule in many of the states has been modified or changed, and, where so modified, the writ extends as a general rule to defects appearing upon the face of the record only: Church on Habeas Corpus, sec. 234.

The rule in this state by statute is that, if the judgment be rendered or the commitment issued by a competent court and be fair upon its face, nothing further than the jurisdiction of the court will be inquired into: State v. Sheriff of Hennepin County, 24 Minn. 87; State v. Billings, 55 Minn. 467, 43 Am. St. Rep. 525, 57 N. W. 206, 794; State v. Kilbourne, 68 Minn. 320, 71 N. W. 396; State v. Norby, 69 Minn. 451, 72 N. W. 703.

Our statutes provide (Rev. Laws 1905, sec. 4586), that where, upon the return of the writ, it shall appear that the person alleged to be restrained of his liberty is held and detained by virtue of a final judgment of a competent court of civil or criminal jurisdiction, he shall be remanded to the custody of the officer. Section 4587 provides that, if it shall appear on the return of the writ that the prisoner is in custody by virtue of a process of a court "legally constituted," he can be discharged only when it ¹⁴⁰ shall be made to appear (1) that the court under which the prisoner is committed was originally without jurisdiction to render the judgment; or (2) by some act or omission subsequently occurring the prisoner is entitled to his discharge; or (3) when the process under which he is held is in matter of substance defective; or (4) when issued without authority; or (5) when the person detaining the prisoner is not the person authorized by law to detain him; or (6) where the process was wholly unauthorized by judgment or provision of law. These statutory provisions abrogate the common-law rule, and preclude the right of the court to go behind the judgment or commitment and determine the validity thereof from matters dehors the record, except in those cases where the evidence is brought up on certiorari as ancillary to the writ of habeas corpus, as in the case of *In re Snell*, 31 Minn. 110, 16 N. W. 692.

It is not contended by relator that any of the grounds for release specified in the statute are present in this case, except that the municipal court of Bemidji was not legally constituted, was not a "competent court" within the meaning of the statute, and had therefore no jurisdiction to hear, try or determine the prosecution against relator. We are of opinion that this question cannot be determined in this proceeding.

The constitution of the state expressly authorizes the legislature to create and establish such courts inferior to the supreme and district courts as public interests may from time to time require. Under this authority the legislature, by section 125, Revised Laws of 1905, provided for the organization of municipal courts in certain villages and cities of the state upon a compliance with the conditions therein prescribed. In April, 1905, the city council of Bemidji, a city coming within the terms of the statute, acting under and pursuant to its provisions, duly resolved that a municipal court be established in and for that city, the resolution to take effect and be of force on August 1st following. The proceedings of the council were in all things in conformity with the law, and the resolution was duly submitted to the city mayor for his ap-

proval or rejection. The mayor vetoed the resolution, whereupon, in the due course of events, it was again brought before the council for consideration in connection with the mayor's disapproval. It was then passed by unanimous vote of ¹⁴¹ the council over the veto. Thereafter the court was duly constituted by the appointment of a judge and clerk, as provided for by the statute under which the council acted, who qualified and entered upon the discharge of their duties. It was before this court as thus established that relator was convicted. It is his contention that the approval of the resolution of the mayor was an essential prerequisite to the organization of the court, and, he having disapproved or vetoed the same, that was the end of the matter; that the council had no power or authority to pass the resolution over his veto, hence that the court was not legally created or established. We do not pass upon the question whether the court was legally created or intimate any opinion to the effect that it was not. The question is not reached.

The question whether the legal existence of a court may be inquired into on habeas corpus proceedings has been answered by different courts both in the affirmative and the negative (21 Cyc. 301); the weight of authority, however, as we view the matter, being with those courts which hold under statutes like those of this state that the writ cannot reach that question. That the right of a person to exercise the functions of a public office, who has qualified and entered upon the discharge thereof under color of authority, though his title be not good in point of law, cannot be called in question collaterally upon habeas corpus or other indirect method, is sustained by all the courts: Note to 87 Am. St. Rep. 177; Sheehan's Case, 122 Mass. 445, 23 Am. Rep. 374; In re Manning, 76 Wis. 365, 45 N. W. 26; In re Brainerd, 56 Vt. 495; Ex parte Ward, 173 U. S. 452, 19 Sup. Ct. Rep. 459, 43 L. ed. 765; Patterson v. State, 49 N. J. L. 326, 8 Atl. 305. No reason occurs to us why the same rule should not apply to de facto municipal corporations and de facto courts.

The authorities maintaining that the legal existence of the court may thus be inquired into proceed on the theory that there can be no such thing as a de facto court: In re Norton, 64 Kan. 842, 91 Am. St. Rep. 255, 68 Pac. 639. But that doctrine is not fully supported either on principle or authority, at least it is not without exceptions. A municipal corporation, although not legally organized, is still a de facto corporation: State v. District Court of Ramsey County, 90 Minn. 118, 95 N. W. 591; St. Paul Gaslight Co. v. Village of

Sandstone, ¹⁴² 73 Minn. 225, 75 N. W. 1050; 1 Dillon on Municipal Corporations, 4th ed., 43; Cooley's Constitutional Limitations, 7th ed., 363; 20 Am. & Eng. Ency. of Law, 2d ed., 1135; *Speer v. Board of Co. Commrs. of Kearney County*, 88 Fed. 749, 32 C. C. A. 101; *City of Omaha v. City of South Omaha*, 31 Neb. 378, 47 N. W. 1113; *Miller v. Perris Irr. Dist. (C. C.)*, 85 Fed. 693. And the authorities hold that in such case the acts of the municipality and its officers are, as to third persons, lawful and binding, and the legal existence or right of a municipality to continue to exercise its functions can be questioned only by the state in direct proceedings brought for that purpose. Logically, if a corporation has only a de facto existence, the offices created by the act or proceeding creating it can have no superior legal quality. They necessarily must be de facto, for there can be no de jure office of a municipal corporation existing only in theory, and the incumbents thereof manifestly are de facto officers of a de facto corporation. Courts, in attempting to adhere to the abstract rule that there must in all cases be a de jure office, have, in cases where a de facto corporation has been held to exist, invented a theory of potential existence to take the place of the lawfully created office: *Carleton v. People*, 10 Mich. 250; *Yorty v. Paine*, 62 Wis. 154, 22 N. W. 137; *Fowler v. Bebee*, 9 Mass. 231, 6 Am. Dec. 62; *Smith v. Lynch*, 29 Ohio St. 261; *Buck v. City of Eureka*, 109 Cal. 504, 42 Pac. 243, 30 L. R. A. 409. There can, however, be no difference in point of substance between an office having a potential existence—i. e., one that might lawfully be created—and one existing in fact though not legally created. In neither case is it a de jure office. This precise question was discussed by the Missouri court of appeals in *Adams v. Lindell*, 5 Mo. App. 197, where the court reached the conclusion, as we think correctly, that the existence of a de jure office is not in all cases indispensable to the existence of a de facto officer. If this is not sound, then there can be no such thing as a de facto corporation or a de facto court; *Burt v. Winona & St. P. R. Co.*, 31 Minn. 472, 18 N. W. 285, 289.

This court has held, and we are supported by courts of high standing, that there may not only be de facto municipal corporations but de facto courts, and that the validity of their acts cannot be questioned in collateral proceedings: *St. Paul Gaslight Co. v. Village of Sandstone*, 73 Minn. 225, 75 N. W. 1050; *State v. Board of Co. Commrs. of Crow Wing County*, ¹⁴³ 66 Minn. 519, 68 N. W. 767, 69 N. W. 925, 73 N. W. 631,

35 L. R. A. 745; *State v. Village of Harris*, 102 Minn. 340, 113 N. W. 887, 13 L. R. A., N. S., 533; *Burt v. Winona & St. P. R. Co.*, 31 Minn. 472, 18 N. W. 285, 289. In the last case cited, which is analogous to the one at bar, it was held that the municipal court of Mankato, created by an unconstitutional statute, was a de facto court, and that its legal existence could not be questioned in a collateral proceeding. A similar conclusion was reached in *Trumbo v. People*, 75 Ill. 561, and in *Leach v. People*, 122 Ill. 420, 12 N. E. 726, where the status of a school district and its officers which had been illegally established was involved. It was held that the regularity of the proceedings in the formation of the school district could not be inquired into collaterally. A de facto county organization was sustained and the acts of its officers held immune from collateral attack in *Merchants' Nat. Bank v. McKinney*, 2 S. D. 106, 48 N. W. 841. See, also, *Brown v. O'Connell*, 36 Conn. 432, 4 Am. Rep. 89; *Campbell v. Commonwealth*, 96 Pa. 344; *Walcott v. Wells*, 21 Nev. 47, 37 Am. St. Rep. 478, 24 Pac. 367, 9 L. R. A. 59.

In the *Burt* case (31 Minn. 472, 18 N. W. 285, 289), this court (page 476), speaking through Chief Justice Gilfillan, said: "It would be a matter of almost intolerable inconvenience, and be productive of many instances of individual hardship and injustice, if third persons, whose interests or necessities require them to rely upon the acts of the occupants of public offices, should be required to ascertain at their peril the legal right to the offices which such occupants are permitted by the state to occupy. Taking even the narrowest definition of an officer de facto, viz., that he is one who is exercising the duties of an office under color of legal right to the office, the reasons that justify the doctrine apply with equal force to a court or office where the same may be said to exist under color of right; that is, under color of law. That there may be a de facto municipal corporation, and consequently de facto offices of the same, follows from the rule laid down in *Cooley's Constitutional Limitations*, *254: If a municipal corporation appears 'to be acting under color of law and recognized by the state as such, such a question (that is, of the legal existence of the corporation) should be raised by the state itself by quo warranto, or other direct proceeding'—and it is sustained by many authorities, holding that the question cannot be raised collaterally: *State v. Carr*, 5 N. H. 367; *People v. ¹⁴⁴ Maynard*, 15 Mich. 463; *Stuart v. School Dist.*, 30 Mich. 69; *Bird v. Perkins*, 33 Mich. 28; *President etc. v. Thompson*, 20 Ill. 197; *Kettering v. City of Jacksonville*, 50

Ill. 39; *Town of Geneva v. Cole*, 61 Ill. 397; *Kayser v. Trustees of Bremen*, 16 Mo. 88; *State v. Weatherby*, 45 Mo. 17; *City of St. Louis v. Shields*, 62 Mo. 247; 1 *Dillon on Municipal Corporations*, sec. 43 (22)."

The municipal court of Bemidji was organized under color of law, proceedings for that purpose were at most irregular, and, within the *Burt* case (31 Minn. 472, 18 N. W. 285, 289), it was a *de facto* court, and its judge and clerk *de facto* officers. Applying the general rule referred to, namely, that the title of a *de facto* officer cannot be attacked collaterally, to the *de facto* court, it follows that relator cannot be heard to complain of the manner in which the municipal court of Bemidji was established: *Ex parte Strang*, 21 Ohio St. 610; *In re Ah Lee* (D. C.), 5 Fed. 899, 6 Saw. 410; *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409. See note to *King v. Philadelphia*, 21 L. R. A. 141; *State v. Harris*, 47 La. Ann. 386, 17 South. 129. A *de facto* court is therefore a "competent court," or a "legally constituted court," within the meaning of our habeas corpus statute, for its judgments and proceedings are not open to collateral attack. This rule, of course, does not apply to a court created without color of authority or to a mere usurper: *Ex parte Strahl*, 16 Iowa, 369.

The learned trial court therefore properly discharged the writ, and its order in the premises is affirmed.

The Question Whether the Legal Existence of a Court may be inquired into on habeas corpus is discussed in the note to *Koepke v. Hill*, 87 Am. St. Rep. 177. According to *In re Norton*, 64 Kan. 842, 91 Am. St. Rep. 255, it may be shown on habeas corpus that the court under whose judgment or order the prisoner is deprived of his liberty had no legal existence or is not a court of competent jurisdiction; but according to *Ex parte Keeling*, 54 Tex. Cr. 118, post, p. 884, a person in custody for violating a city ordinance cannot, on habeas corpus, inquire into the legality of the corporate existence of the city and the election and incumbency of its officers. See, also, *McNulty v. State*, 37 Ind. App. 612, 117 Am. St. Rep. 344.

One Who Fills an Alleged Office that has no constitutional or statutory authority for its existence cannot, it is said, be recognized even as a *de facto* officer: *Herrington v. State*, 103 Ga. 318, 68 Am. St. Rep. 95. Yet it has been held that an officer commissioned under an unconstitutional statute may be regarded as a *de facto* officer: *Ex parte State*, 142 Ala. 87, 110 Am. St. Rep. 20; *Lang v. Bayonne*, 74 N. J. L. 455, 122 Am. St. Rep. 391. But according to *In re Norton*, 64 Kan. 842, 91 Am. St. Rep. 255, there cannot be a court or officer *de facto* where there can be no court or officer *de jure*.

STATE v. GERMANIA BANK.

[106 Minn. 164, 118 N. W. 683.]

RECEIVERS, Diligence Required of.—Receivers of insolvent estates are not guarantors against loss, but they are required to exercise that degree of diligence in the administration of the trust which is exercised by a man of ordinary prudence with reference to his own business affairs. (p. 606.)

RECEIVERS, Advice of Counsel as a Protection to.—Where the proper administration of the estate makes it necessary or expedient to take legal advice, and competent counsel is employed whose advice is followed in good faith, the receiver is not liable for consequent losses. (p. 606.)

RECEIVERS, Negligence, When not Shown to be Liable for.—The evidence does not sustain the charge that appellant, while acting as receiver of the insolvent bank, was guilty of such negligence as to make him responsible for losses resulting from the failure of his attorney, acting upon a mistake of law, to bring suits against certain stockholders before the expiration of the statute of limitations. (p. 606.)

(Syllabi by the court.)

Edward P. Sanborn, for the appellant.

B. H. Schriber, A. E. Horn and W. W. Cutler, for the respondents.

¹⁶⁴ LEWIS, J. Appeal from an order surcharging appellant's account with the sum of thirty-one thousand and twelve dollars and fifty cents on account of his failure to bring suit against certain stockholders before the statute of limitations expired.

¹⁶⁵ On July 26, 1899, appellant was appointed receiver of the Germania Bank of St. Paul, insolvent, under the provisions of chapter 145, page 298, Laws of 1895. On September 17, 1903, an assessment of one hundred cents on the dollar was made upon all the stock of the bank under the provisions of chapter 272, page 315, Laws of 1899. Upon appeal from that order it was decided that the stockholders of the reorganized bank were liable to the amount of their stock: *Willius v. Mann*, 91 Minn. 494, 98 N. W. 341, 867. The assessment order was modified and finally entered on May 27, 1904. The seventh report of the receiver was filed May 29, 1907, and he filed a petition praying that his accounts as rendered be allowed. Certain of the creditors filed objections to the allowance of the account, and demanded that the receiver be charged with the amount of about two hundred thousand dollars stock liability. The creditors also petitioned for the appointment of a new receiver. All these petitions came on for hearing June 22, 1907. After the evidence had been taken, and on July 10,

1907, Willius tendered his resignation. July 16, 1907, the trial court filed three orders in the premises: One, accepting the resignation of Mr. Willius as receiver; another, appointing John A. Lagerman receiver as his successor; and a third, adjusting and allowing the accounts of Mr. Willius, with those of his attorney, but providing that the order should not release him or his bond from any liability, if any existed, for any act or omission of his as receiver.

The objecting creditors appealed from the order allowing the receiver's account and the fees of his attorney. This court upheld the order, in so far as it adjusted and allowed the attorney's fees, but held that it was the duty of the trial court to determine in the same proceeding the question of the liability of the receiver upon the alleged ground of negligence: *State v. Germania Bank of St. Paul*, 103 Minn. 129, 114 N. W. 651. The trial court then proceeded to examine that question, and found that, by reason of the neglect of the receiver to bring suits against certain stockholders to enforce the stock liability prior to July 29, 1905, the estate lost thirty-one thousand and twelve dollars and fifty cents, and directed that his account be surcharged with that amount, from which order Mr. Willius appealed.

The receiver denies any negligence on his part, and explains his delay in bringing actions against the stockholders upon the ground ¹⁶⁶ that, from the inception of the receivership, the question of stockholders' liability had been exceedingly complicated, involving several different actions at law, and that in respect thereto he had been entirely guided by the advice of his counsel; that it had been taken for granted that the statute of limitations began to run from the date of the assessment; and that until so decided on March 28, 1907, in *Willius v. Albrecht*, 100 Minn. 436, 111 N. W. 387, 112 N. W. 862, his attorney and himself had no reason for supposing that the statute commenced to run from the date of the receiver's appointment—July 26, 1899.

The conclusion of the trial court was based upon the following ground: It having been definitely determined May 27, 1904, as a result of prolonged litigation, that the stockholders were liable, it then became the duty of the receiver to proceed with all reasonable diligence to enforce the liability; that a delay of fourteen months was unnecessary; that the receiver failed to give any reasonable cause, and the court traced the loss to the failure to bring the actions without reference to the statute of limitations.

As we understand it, the court was of opinion that the receiver is not in position to plead the advice of counsel; that, having unreasonably and negligently put off for the period of fourteen months a duty which the statute and the order of the court required him to perform with diligence, he must take the consequences, even though he was acting in good faith and under the advice of counsel.

During the first five years of the receivership of Mr. Willius, his proceedings were fully disclosed in his annual reports, the creditors were informed of his movements, no objections were made to the policy pursued, and his conduct met with the approval of the court. The attorney considered it advisable to restrict the number of actions, and to effect settlements with stockholders when possible. At the hearing in June, 1907, the whole matter was gone into and in the order of July 16, 1907, the trial court, after reviewing the evidence, found that the receiver had acted in good faith, but reserved the question of his liability upon the ground that the evidence was not complete, and that a proper suit should be brought to determine that question. In the memorandum attached to that order the court reviewed the history of the receivership, called attention to the complicated condition of the assets and to the prolonged litigation required to determine ¹⁶⁷ the liability of the stockholders, and approved the conduct of the attorney, fixed the amount of his fees for general advice, and also for special services in the actions conducted against the stockholders. After the cause was remanded the matter came on for further hearing upon the same evidence, and the court adhered to its former conclusion that the receiver had always acted in good faith, and that he was not chargeable with any negligence prior to May 27, 1904.

The real question now before the court is whether there is any evidence reasonably tending to indicate such a change in the policy and method of administering the trust after May 27, 1904, as to justify the order appealed from. According to the record, the same confidential relation continued between the receiver and his attorney during the subsequent period. Mr. Willius sought advice from time to time with respect to the affairs of the estate, and did not assume to take any important step without consulting his attorney. Mr. Richardson had advised him that the correct policy to pursue in recovering from the stockholders was not to assault them in large numbers, but take them one by one, using as a basis the successful decision in the Ramsey estate. Although after May 27, 1904, the receiver exercised general supervision over the

matter of collecting from the stockholders, yet he placed the entire matter of bringing such actions in the hands of his attorney. This particularly appears from the following letters:

Under date of September 29, 1904, he addressed the following communication to Mr. Richardson:

"Dear Sir: Some time ago I sent a third notice of assessment to quite a number of the new stockholders, whose liability is fixed, advising them that this would be my final notice; also calling their attention to the fact that the claim draws interest from October 17th, 1903. A few have paid in consequence thereof; some called and pleaded inability to pay, but the majority gave it no attention. It seems to be our duty to institute proceedings in these cases, at least against the responsible ones. Is this your advice, and do you wish me to send you the names. . . .

"Yours truly,

"GUSTAV WILLIUS,

"Receiver."

¹⁶⁸ On January 6, 1905, the receiver called attention to the general understanding between them, and sent this communication to his attorney:

"Dear Sir: In compliance with our understanding, I request you to advise Mr. Jacob Pfenninger at New Ulm that I have placed the claim for his liability on 120 shares of Germania Bank stock into your hands for collection, and oblige,

"Yours truly,

"GUSTAV WILLIUS,

"Receiver."

To this letter Mr. Richardson answered, under date of January 9, 1905:

"Dear Sir: Your letter of January 6th in relation to stock liability of Jacob Pfenninger, New Ulm, Minn., is received. I have written Mr. Pfenninger, to-day, and, if he does not pay, will commence suit against him.

"Yours truly,

"HARRIS RICHARDSON."

On August 17, 1905, Mr. Willius again wrote Mr. Richardson:

"Dear Sir: I inclose herein a list of reorganization stockholders having no claims against the bank and considered to be responsible. They have been notified over and over again but do not respond. It seems we ought to begin proceedings against them. Will you kindly take this matter up.

"Yours truly."

And again, on October 24, 1905:

"Harris Richardson, Esq., St. Paul,

"Dear Sir: It is necessary for us to bring suit at least against some of the stockholders without more delay. Creditors are getting impatient and claims are accumulating in the hands of speculators. A concern in this city has in the course of a few months purchased claims aggregating nearly \$25,000. As I have already mentioned to you, there is ¹⁶⁹ talk of an application to the court for an order directing me to proceed at once, or be removed; all of which would of course be very disagreeable. If you have not already prepared the papers, please do so, and oblige."

And another letter of similar import was sent to Mr. Richardson November 14, 1905:

"Dear Sir: I had another indication yesterday that the creditors are growing restless. Mr. Woodruff, of Shakopee, one of the largest claimants, criticised me very sharply and said that, unless we would take immediate steps towards the collection of the assessment, he would join in a petition to the court for an order instructing me to proceed against the stockholders without delay, or be removed. I hope you have the matter so far advanced that we can proceed and avoid such unpleasant action.
Yours truly."

On December 14, 1905, he wrote Mr. Richardson the following:

"Dear Sir: I am in receipt of another urgent letter from Mr. Crowell, relative to the assessment suits. What can I write him? Please advise me and oblige.

"Yours truly,

"GUSTAV WILLIUS,

"Receiver."

The charge is made by respondents that during the entire administration of the trust Mr. Willius was dilatory in his movements, "and did not make collections and close up the estate with that diligence which the necessities of the case demanded." We have been unable to discover any evidence of negligence on his part after May 27, 1904, with respect to other matters connected with the trust than the collection of the stockholders' liability.

The entire amount surcharged to his account was occasioned by the delay in suing the stockholders, and he is not charged with any loss resulting from negligence in any other respect. A reading of the entire record, together with the letters referred to, clearly indicates that Mr. Willius was acting in the

utmost good faith; that he ¹⁷⁰ had complete confidence in his attorney and relied upon him to protect the estate with respect to the stockholders' liability. Although he was in entire ignorance of the effect of the statute, yet he urged his attorney to commence some actions at least for the purpose of forcing collections from the stockholders. He was impressed with the fact that it was his duty to close up the estate with all reasonable diligence, and for that reason saw the necessity of pressing the suits. Why Mr. Richardson delayed bringing those actions, notwithstanding the pressure brought to bear upon him by Mr. Willius, does not very clearly appear. His own explanation is that he was still endeavoring to force settlements without suit. The trial court approved of his administration by allowing his account, and his conduct as the legal adviser of the receiver is not subject to review upon this occasion, except as it may explain the attitude of Mr. Willius. It is urged that it was the receiver's duty to discharge the attorney, and secure the services of another who would carry out his suggestions, and the charge of negligence is based mainly upon this ground. The proper time for commencing actions against the stockholders, and the best method to enforce settlements with them, were questions in which the receiver was justified in taking the advice of his attorney. Nothing had occurred up to that time at least which called for a change of attorneys. Counsel was competent and had been retained with the knowledge of the creditors and the approval of the court. Under the circumstances, the receiver could not be required to foresee that a failure to change attorneys might result in the loss of opportunity to pursue the stockholders.

Respondents also insist that, if the attorney made a mistake of judgment with reference to the statute of limitations, reliance upon his advice in that respect cannot be pleaded as a defense. We believe the proper rule to be that in those cases involving legal questions which make it necessary for a receiver to take the advice of counsel, and competent counsel is employed, and his advice is followed in good faith, that the receiver is not liable for loss resulting therefrom. Such is the general rule in this country, although there are some English cases to the contrary. In *Ellig v. Naglee*, 9 Cal. 683, it was said by Burnett, J., concurred in by Justice Field: "It is a general principle applicable to trustees that when they act with good faith, and ¹⁷¹ without any selfish motive, they are entitled to be treated by a court of equity with liberality and indulgence; and, especially, when they act under the advice of counsel. Trustees act for the benefit of others, and not

for themselves, and the fair exercise of their judgments should be a protection to them. Very supine negligence, or willful default, will render them liable; but to make them liable for mere errors of judgment would tend to discourage good and prudent men from undertaking any trust." This principle was recognized in a later case (*In re Sanderson's Estate* (Cal.), 13 Pac. 497) as follows: "If an executor delays to take steps for the collection of a debt until after the same is outlawed, and the delay is not in consequence of any mistake of law, or of advice given by his attorney, he will be liable to the estate for the loss occasioned by his negligence."

There is a line of decisions in Pennsylvania recognizing and adopting this doctrine, among which may be mentioned: Appeals of *During*, *King* and *Miller*, 13 Pa. 224, where it was held that trustees in insolvency, acting on advice of counsel and in good faith, are not held responsible for proceedings in accordance with such advice. To the same effect, see *Neff's Appeal*, 57 Pa. 91, and *Bradley's Appeal*, 89 Pa. 514, where the previous cases are cited and approved. "Trustees must of necessity seek the advice of counsel in the performance of their duties. Not to do so would, in many instances, be gross negligence. It would be a harsh rule to require trustees to seek legal advice, and then hold them responsible for an error of law committed by their counsel."

The supreme court of Ohio refers to this question in the following manner in *Miller v. Proctor*, 20 Ohio St. 442: "The maxim that every person is presumed to know the law is not always applicable to trustees; on the contrary, they may be exonerated from losses resulting from their ignorance of the law, in cases where they exercise proper diligence and precaution, and act upon the advice of counsel."

The New Jersey court of chancery applied the same principle in *Powers v. Loughridge*, 38 N. J. Eq. 396, wherein it was held that a receiver's conduct appearing to have been prudent, and that he had, by inquiry beforehand, satisfied himself of the integrity of the attorney at that time, he was not liable to the estate for the loss of a claim which was collected by the attorney, who afterward absconded without paying it over.

¹⁷² The supreme court of Tennessee likewise met the question in *James v. Wingo*, 75 Tenn. 148, and decided that executors are not required to do more than employ honest and capable attorneys, and, having done this, they are protected in pursuing their advice and trusting to their skill and capacity

in attending to the suit: See, also, *Waterman v. Alden*, 144 Ill. 90, 32 N. E. 972.

Receivers are required to exercise good faith and reasonable diligence in the administration of the trust (*In re Robbins*, 36 Minn. 66, 30 N. W. 304; *In re Cornell*, 110 N. Y. 351, 18 N. E. 142), or, as stated by the learned trial court, he is "required at least to exercise the diligence which a reasonable man of ordinary prudence would have used with reference to his own business affairs."

From a consideration of the record, the following conclusions are unavoidable; Mr. Willius has not been proven guilty of any negligence which was the cause of failure to collect from the stockholders. On the contrary, that loss was the direct result of a mistake on the part of his attorney in assuming that the statute of limitations would not expire until 1909; and, having in good faith relied on the advice of counsel as to the proper time to commence actions against the stockholders, Mr. Willius is not chargeable for the consequences.

Reversed.

The Liability for the Acts of a Receiver Sounding in Tort is the subject of a note to *Shedd v. Seefeld*, 120 Am. St. Rep. 277. An examination of this note will disclose that a receiver is bound, in caring for or managing the property or business intrusted to him, to exercise only ordinary care and diligence. He is not an insurer. The measure of his responsibility is analogous to that of an administrator or guardian.

A Receiver is Entitled to the Benefit of Counsel, as a matter of right, when the nature of the trust requires it: *Hickey v. Parrott Silver etc. Co.*, 32 Mont. 143, 108 Am. St. Rep. 510.

HAYWARD v. LARRABEE.

[106 Minn. 210, 118 N. W. 795.]

JUDGMENT, Relief from Because Obtained by Perjured Evidence.—Under section 4277, Revised Laws of 1905, providing for an action to set aside a judgment obtained by means of the perjury, subornation of perjury, or any fraudulent act, practice, or representation of the prevailing party, an action cannot be maintained upon the bare allegation that on an issue of fact, so squarely made that each party knows what the other will attempt to prove, and where neither has a right, or is under any necessity, to depend on the other to prove the fact to be as he himself claims it, there was a false or perjured testimony by the successful party or his witnesses. *Hass v. Billings*, 42 Minn. 63, followed and applied. (p. 609.)

(Syllabus by the court.)

A. E. Helmick, for the appellant.

Benton, Molyneaux & Morley, for the respondent.

210 JAGGARD, J. This was an appeal from an order sustaining a demurrer to a complaint. That pleading set forth substantially the following facts: Defendant and respondent, Larrabee, had been counsel for plaintiff in an action to recover for personal injuries against the defendant therein, who is the plaintiff and appellant, Hayward, herein. A verdict was recovered, and the decision of the trial court refusing to grant a new trial was affirmed: *Northrup v. Hayward*, 99 Minn. 299, 109 N. W. 241. Judgment was thereupon entered, and was subsequently satisfied. Larrabee thereafter asserted his lien for the one-third part of the judgment. On February 23, 1907, the satisfaction was vacated and the judgment reinstated for the amount of Larrabee's **211** lien, to wit, seven hundred and thirty-one dollars. That order was affirmed upon appeal to this court: 102 Minn. 307, 113 N. W. 701. A "material and vital issue of said [original] action and the determination thereof in said plaintiff's favor was whether said Ernst was an independent contractor, or a servant of defendant, Hayward." Ernst's testimony was "vital and material in the determination," because he was the sole witness on behalf of plaintiff as to such issue.

According to the complaint herein, both Larrabee and the plaintiff in the personal injury action knew said evidence to be false at the time it was given. Plaintiff's utmost exertions failed to discover and expose the false testimony until about the last of November, 1907, when said Ernst returned and made a voluntary confession of such false testimony fraudulently caused and practiced. The action sought to restrain Larrabee from enforcing or collecting the judgments, which he was attempting to do.

The proceeding was brought under section 4277, Revised Laws of 1905, providing, among other things, that "any judgment obtained in a court of record by means of perjury, subornation of perjury, or any fraudulent act, practice or representation of the prevailing party, may be set aside in an action brought for that purpose by the aggrieved party . . . within three years after the discovery by him of such perjury or fraud." The constitutionality of this statute has been sustained: *Spooner v. Spooner*, 26 Minn. 137, 1 N. W. 838. In *Stewart v. Duncan*, 40 Minn. 410, 42 N. W. 89, Dickinson, J., said: "This statute is in derogation of the well-established and salutary principle and policy of the common law, which for-

bids the retrial of issues once determined by a final judgment. The statute should not, therefore, be so construed as to extend its operation beyond its most obvious import." And see *Hass v. Billings*, 42 Minn. 63, 43 N. W. 797; *Watkins v. Landon*, 67 Minn. 136, 69 N. W. 711; *O'Brien v. Larson*, 71 Minn. 371, 74 N. W. 148; *Moudry v. Witzka*, 89 Minn. 300, 94 N. W. 885. In *Hass v. Billings*, 42 Minn. 63, 43 N. W. 797, Gilfillan, C. J., assigned as further reason for strict construction: "All who are familiar with the trial of causes know how ready the defeated party is, however full an opportunity he may have had to present his case, to charge that the result was brought about by false swearing and perjury of the successful party and his ²¹² witnesses. That is often the feeling of the defeated party, especially where there is a direct conflict between the testimony on one side and that on the other. Had these defendants been defeated in the first action, they might have felt and alleged that it was through perjury on the part of the defense. Should they be defeated in this action, and their former judgment be vacated by the judgment in this, they might allege that the result was reached through perjury of the opposite party; and so on, ad infinitum, as often as the matter should be tried and a judgment rendered. Where, if the statute allows an action to be brought to set aside any judgment upon the naked allegation of perjury, will be the end of litigation? When will controversies between litigious parties be finally determined? If the statute permits controversies to be in that manner perpetually kept open, it is certainly a very mischievous one. We cannot think the legislature intended to go that length." In *Moudry v. Witzka*, 89 Minn. 300, 94 N. W. 885, *Lovely, J.*, said: "We cannot believe that it was the purpose of the statute to dispense entirely with the doctrine of *res judicata*, and the wholesome rule, vital to the authority of judicial action, that forbids one who has his day in court from continually opening and reviewing questions that have been determined upon their merits."

In *Hass v. Billings*, 42 Minn. 63, 43 N. W. 797, the court did not purport to "lay down a general rule to determine what cases come within it." "It is safer [as it was there said] to determine from time to time, as each case may arise, whether the circumstances bring the case within what we deem to be its spirit and intent." And see *Brown, J.*, in *Geisberg v. O'Laughlin*, 88 Minn. 431, 93 N. W. 310.

In the opinion it is, however, held that "when an issue is squarely made in a case, so that each party knows what the other will attempt to prove, and neither has a right, or is

under any necessity, to depend on the other proving the fact to be as he himself claims it—and such appears to be this case—the mere allegation by the defeated party that there was, as to such issue, false or perjured testimony by the successful party or his witnesses will not, as we think, bring this case within the meaning of the statute.” This expression of the law was approved in *Wilkins v. Sherwood*, 55 Minn. 154, 56 N. W. 591, *Colby v. Colby*, 59 Minn. 432, 50 Am. St. Rep. 420, 61 N. W. 460, *Watkins* ²¹³ v. *Landon*, 67 Minn. 136, 69 N. W. 711, *Moudry v. Witzka*, 89 Minn. 300, 94 N. W. 885, and *Bisseberg v. Ree*, 99 Minn. 481, 109 N. W. 1115.

It remains to apply these principles to the facts in the case at bar. The point testified to by the witness whose perjury is charged was, in the language of the complaint, a material and vital issue. It was fully and fairly within the issues framed by the pleadings. The allegations of the complaint were broad enough to have required the admission of evidence upon the controversy. The answer, a general denial, availed to complete the issue. That issue was in fact directly and fully litigated. Hayward paid the plaintiff in the personal injury suit for a satisfaction. This is the third time that this litigation has been before this court in one form or another. We have concluded that, under these circumstances, the case is within the rule laid down in *Hass v. Billings*, 42 Minn. 63, 43 N. W. 797.

The order of the trial court is affirmed.

Relief from Judgments on motion is the subject of a note to *Furman v. Furman*, 60 Am. St. Rep. 633; and relief from judgments by independent proceedings in equity is the subject of a note to *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 218. On relief from judgments on the ground that they were obtained by perjury, see the note to *Pico v. Cohn*, 25 Am. St. Rep. 165, and the subsequent cases of *Secord v. Powers*, 61 Neb. 615, 87 Am. St. Rep. 474; *Barr v. Post*, 59 Neb. 361, 80 Am. St. Rep. 680; *McDougall v. Walling*, 21 Wash. 478, 75 Am. St. Rep. 849; *Colby v. Colby*, 59 Minn. 432, 50 Am. St. Rep. 420.

Am. St. Rep., Vol. 130—39

STATE v. GUERTIN.

[106 Minn. 248, 119 N. W. 43.]

CORPORATIONS—Hold-over Board of Directors, Power of to Elect New Officers.—The articles of a corporation provided that a board of directors should serve for one year, and until their successors were elected and qualified, and that the officers of the corporation should be chosen by the directors at their first meeting after their appointment or election, and hold office for one year, or until their successors are elected and qualified. Held, the stockholders having failed to elect a board of directors at the annual meeting, the hold-over directors were authorized, at a meeting called for that purpose, subsequent to the annual meeting, to elect new officers as the successors of those holding over. (p. 611.)

CORPORATIONS, Parol Evidence of Proceedings of.—The minutes of corporation meetings are prima facie evidence only of the proceedings, and parol testimony is admissible for the purpose of proving what actually occurred. (p. 611.)

MANDAMUS to Compel Delivery of Sealed Books and Papers of a Corporation.—Mandamus is the proper remedy to compel the delivery of the seal, books and papers of a corporation by a secretary, who refuses to deliver them to his successor in office, when it appears that he does not hold them under any color of right to the office. (p. 613.)

(Syllabi by the court.)

Jay W. Crane, for the appellant.

Lind, Ueland & Jerome, for the respondents.

250 LEWIS, J. Proceedings in mandamus, upon the relation of the Copper Butte Mines, a corporation organized under the laws of the territory of Arizona, and Frank Bates, as secretary thereof, against William F. ²⁵¹ Guertin, the former secretary, for the purpose of compelling Guertin to turn over to Bates the seal, stock-book, and other property of the corporation. The appeal involves three principal questions: 1. The shareholders at the annual meeting in 1908 having failed to elect a board of directors, did the holding-over board of directors have authority, at a special meeting subsequent to the annual meeting, to elect officers to succeed those who were holding over? 2. Was parol evidence admissible to prove that Bates was elected secretary at the special meeting of the directors? 3. Is the action of mandamus the proper remedy?

The articles of incorporation place the management of the business in a board of seven directors, to be selected from their number by the stockholders at the annual meeting, "and said board shall serve for one year and until their successors are elected and qualified." At the annual meeting of June 2, 1908, the stockholders failed to elect a new board of directors, for the reason that no person voted for received a

sufficient number of votes. The stockholders having failed, at the annual meeting of June 2, 1908, to elect a board of directors and new officers for the ensuing year, a meeting of the hold-over board of directors was called on the 11th of July, 1908, by order of the court, in pursuance of the statute, at which meeting new officers were elected as follows: Eugene B. Crabtree, president; William H. Lucia, vice-president; Frank Bates, secretary; and Henry A. Blume, treasurer.

The articles of incorporation provide: "And all officers shall be chosen by the directors at their first meeting after their appointment or election, and shall hold their offices for one year, or until their successors are elected and qualified." A strict construction of this provision is insisted upon. It is claimed that there is no provision for the election of officers by the directors at any other time than the first meeting after their appointment or election; that the first meeting of the hold-over board having taken place immediately after the annual meeting in 1907, at which time Guertin was elected secretary, the power of that board to elect a successor had been exhausted, and therefore Guertin held over until a new board of directors should choose his successor. We are unable to take this view. The articles of incorporation are consistent. The provision ²⁵² that all officers shall be chosen by the directors at their first meeting after their appointment or election is not mandatory. The hold-over board were possessed of the same powers as would have been enjoyed by a new board, had one been elected at the 1908 annual meeting. The officers of the board are entitled to hold office for the period of one year after election, but after that period are subject to the will of the board of directors. We are of opinion that the directors' meeting called July 11, 1908, for the purpose of electing officers, was a legal meeting, and that the directors at that time had authority to elect the successors of the officers who were then holding over.

2. Appellant insists that there is no evidence in the record that Bates was elected secretary as his successor at the July meeting, for the reason that the minutes of that meeting do not indicate such fact, but on the contrary, that the minutes indicate that the board of directors did not vote upon the question of electing a secretary. There were two sets of minutes introduced in evidence—one purporting to have been written out by appellant, acting as secretary of the meeting, either during the progress of the meeting or immediately after; and another claimed to have been subsequently written out by a stenographer under the direction of the secretary

from the minutes which he had taken. From these two sets of minutes it appears that a resolution was offered by one of the directors to proceed to an informal ballot for secretary, and that an informal ballot was taken, and that two of the directors, appellant and Jones, refused to vote; but the minutes do not show that any formal ballot was taken. Under these circumstances the trial court received the oral testimony of three of the directors, who were present at the meeting, to the effect that a formal ballot was taken, that Bates was formally voted for and declared elected, and that the minutes were incomplete and did not state all the facts. The ruling of the trial court was correct. It was apparent, upon the face of the minutes as kept and transcribed, that they were incomplete. That they did not contain all the facts relative to the election is clearly disclosed by the testimony received on behalf of appellant himself, and under such circumstances records of that character cannot be treated as conclusive evidence of what transpired. Minutes of corporation meetings are only the *prima facie* record of the proceedings: *Thompson on Corporations*, sec. 7739; *Van Hook v. Somerville Mfg. Co.*, 5 N. J. Eq. 137; *Bay View H. Assn. v. Williams*, 50 Cal. 353.

253 3. A more serious question is whether mandamus is the proper remedy. If this case amounted to a bona fide contest between two persons as to which was elected to the office of secretary of the corporation, the proper remedy was *quo warranto*; but if there was no substantial ground for the claim that no election took place on the 11th of July, 1908, then mandamus was the proper remedy at law. We have read the record with care, and have examined in detail the minutes referred to, and in our opinion they are incomplete upon their face and do not contain a record of the entire proceedings at the meeting. In the first place, what possible object could there have been in taking an informal ballot only upon the election of a president, vice-president and secretary? The meeting was called for the express purpose of electing officers. The board of directors were divided; two—Jones and Guertin—taking the position that the meeting had been illegally called and that the directors had no authority to act, and the other four, taking the contrary view and constituting a majority, were there for the purpose of carrying their will into effect to elect officers. It would require the most convincing evidence to satisfy a court that they met, took an informal ballot upon each of the officers, and adjourned without accomplishing anything. This defense is purely technical.

There is no real conflict in the evidence. Appellant has not shown that he even has color of right to retain the books and records, and under such circumstances mandamus is the only speedy and adequate remedy: *American Railway Frog Co. v. Haven*, 101 Mass. 398, 3 Am. Rep. 377; *Strong, Petitioner*, 20 Pick. 484; *State v. Davis*, 54 Mo. App. 447; *Fasnacht v. German L. Assn.*, 99 Ind. 133.

Affirmed.

On January 8, 1909, the following opinion was filed:

PER CURIAM. In an application for reargument, our attention was called to the fact that in the syllabus, and in the body of the opinion, the directors' meeting of July 11, 1908, is referred to as having been called for the express purpose of electing officers. An examination of the record shows that the object of the meeting was not expressed in the notice, and in that respect the court was mistaken. However, it is immaterial, and in no way changes the result.

Application for reargument denied.

Where an Officer is Lawfully in the Possession of an Office, under a constitutional or statutory provision to the effect that he shall hold until his successor is elected and qualified, his right to hold over continues until a qualified successor has been elected by the same electoral body as that to which he owes his election, or which, by law, is entitled to elect a successor: *Kimberlin v. State*, 130 Ind. 120, 30 Am. St. Rep. 208, and see cases cited in the cross-reference note thereto.

FARLEY v. BYERS.

[106 Minn. 260, 118 N. W. 1023.]

LANDLORD AND TENANT—*Landlord's Liability for Parts of Premises Used in Common*.—Where a porch or stairway is used in common by the different occupants of a tenement house or flat building, the landlord will be presumed to have reserved possession thereof for the benefit of all the tenants, and he is under obligation to all parties having occasion to use the premises to exercise ordinary care to keep the same in repair. (p. 614.)

(Syllabus by the court.)

C. J. Bartleson, for the appellant.

Stevens & Stevens, for the respondent.

²⁰¹ LEWIS, J. Appellant was the owner of a two-story frame building, the ground floor of which was used for two

stores, and the second floor was made into two flats, with a hallway between them, accessible by a front entrance stairway running between the stores. The hall connected with a back porch, which extended across the rear of the building and was ten or twelve feet wide, with a back stairway. This porch was used in common by the occupants of the flats, one of whom was respondent. Under her lease respondent had the privilege of using the hall, porch and stairways. While she was engaged in some of her household duties on the back porch, a board or boards in the floor broke under her feet, by reason of which she fell and sustained the injury ²⁶² upon which this action is founded. She recovered a verdict, and upon this appeal error is claimed upon the ground that, upon the conceded facts, there was no liability on the part of the landlord.

If the facts bring the case within the rule of *Harpel v. Fall*, 63 Minn. 520, 65 N. W. 913, or *Krueger v. Ferrant*, 29 Minn. 385, 43 Am. Rep. 223, 13 N. W. 158, then the landlord was not responsible. The case turns upon whether the landlord had retained possession of that part of the porch where respondent was injured for the use of all the tenants. In *Widing v. Penn Mut. Life Ins. Co.*, 95 Minn. 279, 111 Am. St. Rep. 471, 104 N. W. 239, it was held that as to persons going innocently upon a porch serving as a common means of approach to a tenement the landlord is required to exercise ordinary care to keep the same in a reasonably safe condition. In that case the person injured was not an inhabitant of one of the tenements. That portion of the premises reserved by the landlord, for the common use of tenants for the purposes of ingress and egress, remains in his possession, and the duty to keep the same in repair has reference to all parties having occasion to use them. In the absence of a covenant to the contrary, possession by the landlord will be presumed of that portion of rented premises reserved for the common use of all the tenants. In the *Widing* case the railing had become defective, and an attempt had been made to repair it. In the present case no attempt had been made to repair it, and the board had gradually become decayed; but the distinction is immaterial. If in the exercise of ordinary prudence the landlord would have discovered the decaying of the board, then he was required to remedy the condition.

Harpel v. Fall, 63 Minn. 520, 65 N. W. 913, and *Krueger v. Ferrant*, 29 Minn. 385, 43 Am. Rep. 223, 13 N. W. 158, are clearly distinguishable, in this: In those cases the landlord did not retain possession of any part of the premises, and

consequently, in the absence of covenants to repair, the tenants took the premises in the condition in which they found them. Here that part of the premises in question was never wholly surrendered, and hence the tenant did not assume dominion over it.

2. The court, over appellant's objection, received certain testimony concerning statements or admissions with reference to repairing the porch, made by appellant's agent. Testimony had been given as to another conversation between the agent and respondent, and the trial ²⁶³ court probably assumed that the conversation objected to occurred prior to the accident, but upon discovering the mistake struck out the evidence. That the result was prejudicial does not appear.

Affirmed.

Where a Landlord Rents Apartments in a Building to several families separately, but retains the possession or control of the passageways and stairways for the common use of the tenants and those having occasion to visit them, he is bound to see that reasonable care is exercised to have the passageways and stairways reasonably fit and safe for the uses which he has thus invited others to make of them: *Siggins v. McGill*, 72 N. J. L. 263, 111 Am. St. Rep. 666; *Andrews v. Williamson*, 193 Mass. 92, 118 Am. St. Rep. 452.

DYER v. SCHNEIDER.

[106 Minn. 271, 118 N. W. 1011.]

CHATTEL MORTGAGE of Future Earnings, When Void.—A chattel mortgage is void, at least against creditors without actual notice, which purports to assign, to secure a specified debt, all the future earnings of a threshing-machine, therein described, also of any other threshing-machine operated by the mortgagor, and of the crew, including men and teams, operating them, which may accrue for threshing during the then ensuing two years within three designated townships. (p. 617.)

CHATTEL MORTGAGE, Description in, When too Vague to Give Notice to Third Persons.—A mortgage of the earnings of a designated threshing outfit and of any other threshing outfit owned and operated by the mortgagor, and of the crew, including men and teams, used with such outfit, which may accrue for threshing during the ensuing two years is too vague and uncertain to afford protection to third persons dealing with the mortgagor and having no actual notice of the claim of the mortgagee. (By the editor.) (p. 617.)

(Syllabi by the court except where stated to be by the editor.)

J. D. Sullivan, for the appellant.

James E. Jenks, for the respondent.

273 **START, C. J.** Appeal by claimant from a judgment of the district court of the county of Stearns in favor of the plaintiffs, and against the garnishee, for the amount of their claim against the defendant, with costs and disbursements against the claimant.

The admitted facts upon which the judgment is based are to the effect following: The plaintiffs duly recovered judgment against the defendant and duly instituted garnishee proceedings, and at the time of the service of the garnishee summons there were funds in the hands of the garnishee, amounting to ninety-five dollars, which represented moneys earned by the defendant with the threshing outfit described in the chattel mortgage hereinafter referred to, upon which there was then due and unpaid more than ninety-five dollars. The plaintiffs' demand against the defendant was for extras furnished and labor performed by them in repairing his threshing outfit at his request. The claim of the claimant to the money in controversy was based upon an alleged chattel mortgage, executed by the defendant to it, to secure a specified debt, of all the earnings of the outfit and of the men and teams connected therewith. The mortgage purported to mortgage all the earnings of a threshing outfit, therein described, and of any other threshing outfit **274** owned or operated by the mortgagor, and of the crew, including men and teams, used with such outfits, which might accrue for threshing during the then ensuing two years within three designated townships. When the mortgage was executed there were no existing contracts under which threshing was to be done, nor were there any parties named for whom it was to be done. The mortgage purported to cover, not only the earnings of any and all threshing-machines the defendant might thereafter operate for two years, but also the earnings of all the men and teams operating the same. The mortgage was duly filed, but the plaintiff had no actual notice of the claim of the claimant. Upon these facts, the trial court held the mortgage invalid as against the creditors of the mortgagor without actual notice. The correctness of this conclusion is the only question for our decision.

This precise question has never been directly decided by this court: See *Baylor v. Butterfass*, 82 Minn. 21, 84 N. W. 640. But the reasoning of our prior decisions sustains the conclusion of the trial court. In *Steinbach v. Brant*, 79 Minn. 383, 79 Am. St. Rep. 494, 82 N. W. 651, we held that an assignment of wages to become due, without limit as to amount or time, and without acceptance by the em-

ployer, was void as to an attaching creditor without notice. In *Leitch v. Northern Pac. Ry. Co.*, 95 Minn. 35, 103 N. W. 704, we held, distinguishing the cases holding valid a mortgage on crops to be thereafter raised upon specified land, that an assignment of wages to be earned in the future under an existing contract of employment, to secure a present debt or future advances, was a valid agreement, which would take effect as the wages were earned, but that an assignment of wages to be earned under an existing contract, without limit as to amount or time, was void. In each of these cases there was an existing contract for the employment of the assignor. In the case at bar there were no existing contracts for employment, nor were any persons named or in any manner designated in the mortgage from whom future earnings were to accrue.

There can be no difference in principle between an absolute assignment of future earnings to secure a debt and a chattel mortgage of such earnings; that is, a conditional assignment. There can be no earnings of a threshing outfit, except in connection with the earnings of the men, including the mortgagor, and teams operating it; hence the ²⁷⁵ mortgage is, in effect, a mortgage of the future earnings of the mortgagor and his employés in operating a threshing-machine, if, perchance, they should ever do so. The description of the supposed personal property attempted to be assigned by this mortgage is so vague and uncertain as to afford no protection to third parties working for or extending credit to the mortgagor on the strength of his earnings in operating the machine, having no actual knowledge of the claim of the mortgagee. Again, the supposed property attempted to be mortgaged in this case had then no existence, substantial or incipient. It was, at most, a mere expectancy depending on contingencies, or, as said in *Lehigh Val. R. Co. v. Woodring*, 116 Pa. 513, 9 Atl. 58, "the mere possibility of a subsequent acquisition of property": See, also, *Sandwich Mfg. Co. v. Robinson*, 83 Iowa, 567, 49 N. W. 1031, 14 L. R. A. 126, and *Sykes v. Hannawalt*, 5 N. D. 335, 65 N. W. 682.

We therefore hold that the mortgage in question, so far as it attempted to assign the future earnings of the threshing outfit and the men and teams who might operate it, was void, at least as to creditors without actual notice.

Judgment affirmed.

Mortgages of Property not Yet in Existence are discussed in the notes to *Burrill v. Whitecomb*, 109 Am. St. Rep. 510; *Moody v. Wright*, 46 Am. Dec. 712; *Gregg v. Sanford*, 76 Am. Dec. 723; *Moore v. Byrum*, 30 Am. Rep. 63.

The Assignment of Demands Yet to Become Due is discussed in the notes to *Field v. Mayor etc. of New York*, 57 Am. Dec. 440; *Tompkins v. Dudley*, 82 Am. Dec. 349; *Harris County v. Campbell*, 2 Am. St. Rep. 472. Assignment of accounts or moneys not at the time due is further considered in the recent cases of *Cogan v. Conover Mfg. Co.*, 69 N. J. Eq. 809, 115 Am. St. Rep. 629; *Walton v. Horkan*, 112 Ga. 814, 81 Am. St. Rep. 77. As to the assignment of future earnings or wages, see *Citizens' Loan Assn. v. Boston etc. R. R.*, 196 Mass. 528, 124 Am. St. Rep. 584.

PETERSON v. O'CONNOR.

[106 Minn. 470, 119 N. W. 243.]

BROKER, Authority of to Enter into a Contract for the Sale of Real Property.—The owner of land executed a contract to a real estate agent, authorizing him to sell certain real estate within a certain period, at a certain price, and upon certain terms, and agreed to convey the property to the purchaser. Held, following *Jackson v. Badger*, 35 Minn. 52, and distinguishing *Larson v. O'Hara*, 98 Minn. 71, that the agent was authorized to enter into a contract with a prospective purchaser for the sale of the land. (p. 619.)

EVIDENCE to Impeach a Witness, What Properly Excluded.—In an action involving the question of whether a sale of land had been made by a broker, and wherein a written contract of sale was offered and received in evidence, evidence to prove that on a prior occasion such broker had testified that he had sold the land to the plaintiff and to no other person is not admissible, because nothing to which he testified could overthrow the contract which he confessedly executed. (By the editor.) (p. 620.)

(Syllabi by the court except where stated to be by the editor.)

H. P. Bengston and C. A. Fosnes, for the appellant.

W. A. McDowell, for the respondent.

⁴⁷¹ LEWIS, J. June 20, 1903, William Huebner was the owner of the real estate involved in this controversy, and on that day executed a writing, in part as follows:

"I, the undersigned, Wm. Huebner, of Montevideo, do hereby authorize H. A. Mikkelson to bargain and sell the property above described ⁴⁷² at the price stated, or any other price I may see fit to accept, and I hereby agree to convey said property on sale of same; and I further agree that the above-described property shall be left with the said H. A. Mikkelson for sale as above for the term of 1903 & 4 from date hereof, and thereafter until 30 days' notice is given of the withdrawal of said property from said H. A. Mikkelson's hands, in writing; and if said H. A. Mikkelson sells or is in

any manner instrumental in selling said property during said time I will pay him commission thereon at the rate of 10 per cent on the amount of the sale.

"Dated this 20th day of June, 1903.

"WM. HUEBNER."

It was also provided that the lowest price net should not be less than twenty-five dollars an acre. On March 12, 1904, Mikkelson entered into a written contract by the terms of which respondent, O'Connor, agreed to purchase the premises for the sum of nine thousand nine hundred dollars, to be paid in cash, with the option of deducting the encumbrances against the land. This contract was executed by respondent, and Wm. Huebner, by H. A. Mikkelson, agent, in the presence of two witnesses, and was acknowledged March 14th before a notary public by respondent, and by Mikkelson as the attorney in fact and agent of Huebner, and was recorded on the same day. After the execution of these contracts, and on the 28th or 29th of March, 1904, Huebner entered into a contract in writing by which he agreed to convey the premises to appellant. Appellant immediately entered into possession of the premises and commenced this action to determine respondent's adverse claim of title. The trial court found that Mikkelson was duly authorized under the contract of June 20, 1903, to sell the land, that he entered into a contract with respondent for the sale of the land, and that appellant had notice of such sale and all the rights of respondent thereunder at the time he entered into his contract of purchase with Huebner, and found that respondent was the equitable owner of the premises.

1. The main question is whether the contract of June 20, 1903, executed between the owner of the land and Mikkelson, constituted a mere employment of Mikkelson as an ordinary broker or real estate agent to find a purchaser, or whether it authorized Mikkelson to contract for the sale of the premises. The trial court correctly construed the agreement to be one of express authority to make a sale upon the stipulated terms, that it authorized Mikkelson to enter into a contract pursuant to such terms, and that the contract entered into was enforceable ⁴⁷³ against the owner. This construction is within the authority of *Jackson v. Badger*, 35 Minn. 52, 26 N. W. 908, and is distinguishable from *Larson v. O'Hara*, 98 Minn. 71, 116 Am. St. Rep. 342, 107 N. W. 821. In the latter case the broker was employed simply to find a purchaser for the land at a specified price. Here the agent was not only authorized to find a purchaser at a certain price upon certain terms,

but the owner agreed to convey the property to such purchaser upon such terms and price. There was no reservation on the part of the owner to complete the terms of the sale, and no intimation that the authority of the agent was limited to bringing the parties together.

2. The contract did not set out the exact number of acres, but described the property by the government description, and the price was fixed at not less than twenty-five dollars per acre. According to the government survey the total acreage amounted to three hundred and twenty-six and nine one-hundredths acres, and at the purchase price of nine thousand nine hundred dollars would average a little more than thirty dollars per acre, and the court so found. Appellant attacks this finding, claiming that it was conclusively shown by the evidence that the actual acreage was three hundred and ninety-seven and fifty-nine one-hundredths acres, which would make the price per acre a trifle under twenty-five dollars. In the first place, the evidence was not conclusive that the acreage was as much as claimed by appellant; and, in the second place, even if it were, the difference was trivial, and did not materially affect the validity of the contract as between the parties.

3. At the trial appellant offered to prove that the agent, Mikkelson, had upon a prior occasion brought an action against the owner to recover one thousand and ninety-five dollars commission, which he claimed to have earned by making the sale under which the appellant claims in this action, and that at such trial Mikkelson testified that he had sold the land to appellant, Peterson, and to no other person. The evidence was offered for the purpose of impeaching Mikkelson as a witness, and was ruled out upon the ground that it was immaterial and irrelevant. The ruling was correct. Whatever Mikkelson may have claimed as to his right to recover a commission would not determine the validity of the contract which he executed with respondent.

4. The evidence was sufficient to justify the court in finding that the contract executed by the owner to Mikkelson covered the term of 1903 and 1904, and that the figure "4" had not been fraudulently interpolated contrary to the terms of the original agreement.

Affirmed.

The Employment of a Broker to Find a Purchaser for Certain Land on prescribed terms does not authorize him to execute a contract of sale: Larson v. O'Hara, 98 Minn. 71, 116 Am. St. Rep. 342. See, however, Schultz v. Griffin, 121 N. Y. 294, 18 Am. St. Rep. 825.

DONALDSON v. HALL.

[106 Minn. 502, 119 N. W. 219.]

WILLS—Revocation, Implied, Evidence to Rebut.—Where the revocation of a will is implied from a change in the testator's circumstances, no evidence is admissible to rebut it. (By the editor.) (p. 623.)

WILLS, Revocation, Common-law Rules Respecting, Statutory Adoption of.—The common-law rule of implied revocation of wills by "changed conditions and circumstances" of the testator arising subsequent to their execution is affirmatively adopted as the law of this state by section 3665, Revised Laws of 1905. (p. 623.)

WILLS, Revocation of by a Devise and the Settlement of Property Rights.—A settlement of property rights between husband and wife, in anticipation of a divorce, by which the husband made over to the wife one-third of all his property, coupled with the fact of divorce, revoked by implication of law a will theretofore executed by the husband in and by which he devised and bequeathed to her the amount of property she so received on the settlement. (p. 627.)

(Syllabi by the court except where stated to be by the editor.)

Daly & Barnard, for the appellant.

W. C. Odell and F. R. Allen, for the respondents.

503 BROWN, J. The facts in this case, as disclosed by the findings of the trial court, are as follows: In 1893 George W. Hall, then a widower about fifty-six years of age, with several children, intermarried with Matilda Hall, appellant herein, who was about thirty years of age, and thereafter they continued to live together as husband and wife until some time in October, 1906, when a separation took place. No children were born to them. Subsequent to the marriage, in April, 1904, Hall duly made and executed his last will and testament, in and by which, after directing the payment of his just debts and funeral expenses, he granted, devised and bequeathed "unto my wife, Matilda Hall, one-third of the remainder of my property, both real and personal, which shall remain after the payment of my debts aforesaid," one-sixth of what was left to certain daughters by his former wife, and the remainder, after the payment of certain specified legacies, to his sons of the former marriage.

Thereafter, in October, 1906, Hall commenced an action for divorce, charging his wife with adultery, in which she answered, denying the charge made against her. During the pendency of this action the parties, guided by their attorneys, entered into certain negotiations for the settlement of their property rights in the event a divorce was granted in the pending action. By the arrangement then made Hall agreed

to pay his wife the sum of four thousand two hundred and twenty-five dollars in money and to convey to her certain real estate in the city of Hutchinson, and the wife agreed to convey to him a small tract of land near Stewart, their place of residence. The deeds were duly executed, and the money so agreed to be paid delivered to a third person, to be by him delivered to the parties in accordance with the terms of the settlement immediately upon the ⁵⁰⁴ entry of a decree of divorce. It was further understood and agreed, as a part of the settlement, that the wife should amend her answer in the divorce action by including therein a cross-bill for a divorce against plaintiff on the general ground of his habitual drunkenness. Thereafter her answer was duly amended accordingly. The cause was brought on for trial, and resulted in a decree of divorce based upon the allegations of defendant's cross-bill. The settlement of the property rights was then completed by the payment to the wife of the money and the delivery of the deeds of the property referred to. This was completed on May 21, 1907. Mrs. Hall claimed no alimony on the final hearing of the divorce case, and the judgment therein awarded to her no pecuniary relief, not even the costs of the action. The amount received by Mrs. Hall on the settlement amounted to practically one-third of the property then owned by Hall.

Thereafter, on June 22, 1907, thirty days after the divorce and settlement, Hall, without having made any change or modification of his will, by which he gave to "my wife, Matilda Hall," one-third of all his property, suddenly died. C. R. Donaldson was named in the will as executor, and he properly presented it to the probate court for allowance and probate. At the hearing of his petition certain of the children of deceased appeared and contested the allowance of that part of the will devising and bequeathing to Mrs. Hall one-third of testator's property, on the ground that the will in that respect was, by the settlement and adjustment of the property rights of the parties in the divorce action, revoked and annulled by implication of law. Mrs. Hall also appeared as intervener and claimed under the will. The probate court sustained the contention of contestants, holding that the provisions made for Mrs. Hall were revoked by operation of law, but admitted the balance of the will to probate. Mrs. Hall appealed to the district court, where the same conclusion was reached, and she then appealed to this court from an order of the district court denying her motion for a new trial.

The assignments of error challenge certain of the findings of the trial court and raise the single question whether the divorce and property settlement operated by implication of law to revoke the provisions made in deceased's will for his wife. Our examination of the record leads to the conclusion that all the findings of fact are sustained by the ⁵⁰⁵ evidence. It would serve no useful purpose to enter into an extended discussion of the evidence, and we therefore refrain.

We come, then, directly to the main question in the case, namely, whether Hall's will was, to the extent of the provisions therein made for his wife, revoked by implication of law.

An express revocation of a will involves an inquiry into the intention of the testator, and generally the manner and what acts will constitute a revocation in fact are expressly prescribed by statute: Page on Wills, 272; 2 Current Law, 2091; *In re Knapen's Will*, 75 Vt. 146, 98 Am. St. Rep. 808, 53 Atl. 1003; Rev. Laws 1905, sec. 3665. At common law certain changes in the condition and circumstances of the testator worked a revocation by implication, and it was formerly held that this was *prima facie* only, and open to rebuttal by proof that the testator intended his will to remain, notwithstanding the change in his circumstances. The rule, however, by all modern authorities, is that the presumption of law arising from the changed conditions is conclusive, and no evidence is admissible to rebut it: *Marston v. Roe*, 8 Ad. & E. 14; *Gay v. Gay*, 84 Ala. 38, 44, 4 South. 42; *Hoitt v. Hoitt*, 63 N. H. 475, 56 Am. Rep. 530, 3 Atl. 604; *Hudnall v. Ham*, 183 Ill. 486, 75 Am. St. Rep. 124, 56 N. E. 172, 48 L. R. A. 557; 30 Am. & Eng. Ency. of Law, 2d ed., 644, and cases cited. The rule had its origin with the ecclesiastical courts of England, and was later adopted as a part of the common law: 4 Kent's Commentaries, 524; *Brody v. Cubitt*, 1 Doug. 31. And it is the settled law in nearly all the states of this country, where not abrogated by statute: 30 Am. & Eng. Ency. of Law, 2d ed., 643.

Our statutes on the subject provide that no will shall be revoked, except in the manner there pointed out, namely, by some other writing executed by the testator with the same formalities with which the will itself is required to be executed, or by burning, obliterating or destroying the same with the intention of revoking it, or by the destruction thereof by a third person at the request of the testator and in the presence of witnesses. To these restrictions is added, "But nothing in this section shall prevent the revocation implied

by law from subsequent change in the condition or circumstances of the testator," by which the common-law rule of implied revocation is affirmatively adopted as the law of this state: Rev. Laws 1905, sec. 3665.

Counsel for appellant do not contend that the common law is not in ⁵⁰⁶ force in this state, but do claim that the facts here presented do not bring the case within the rule as properly understood and limited. There is much conflict in the adjudicated cases, both in England and in this country, as to the scope and limitations of the rule. In other words, authorities are not agreed respecting the character of the "change in the condition or circumstances of the testator" essential to give rise to the legal presumption of revocation. Some courts have restricted the rule to marriage and birth of issue in the case of a man, and mere marriage in the case of a woman: *Wogan v. Small*, 11 Serg. & R. (Pa.) 141; *Jones' Estate*, 211 Pa. 364, 107 Am. St. Rep. 581, 60 Atl. 915, 69 L. R. A. 940; Page on Wills, 280.

Chancellor Kent gives a broad and comprehensive definition of the rule in the following language: Implied revocations "are founded upon the reasonable presumption of an alteration of the testator's mind, arising from circumstances since the making of the will, producing a change in his previous obligations and duties": 4 Kent's Commentaries, 521. While cases involving a changed condition resulting from the marriage of the testator or testatrix have been before the courts most frequently, and new conditions so brought about have received the most attention, the authorities generally do not limit the application of the rule to a state of affairs thus created. To restrict the rule to such cases would narrow and unduly circumscribe its purpose. The different conditions which bring the rule into operation are fully given, and authorities cited, in a valuable note to *Graham v. Burch*, 28 Am. St. Rep. 344 (47 Minn. 171, 49 N. W. 697). It is there stated that a revocation by implication may result from a change in the property of the testator, or from a change in his family, as by marriage, or in the beneficiaries named in his will: See, also, 30 Am. & Eng. Ency. of Law, 2d ed., 644 et seq.

Of course, a change in respect to property or family relations resulting from the act of the testator should be of a nature to justify the inference, arbitrary though it be, that he intended to revoke his will, either in whole or in part, or that a moral or legal duty not only would require but prompt a change in the disposition of his property from that made in

the will. In other words, the rule, if accorded substance and merit, must serve the purpose of doing by implication what the testator should, in justice to those entitled to his bounty, have done, had his attention been directly called to the matter after the change of circumstances ⁵⁰⁷ and before his death. The rule, it is true, has not generally been extended so far. At least the tendency of the reported cases has been to restrict, rather than enlarge, its scope.

It was formerly held that the marriage of a man did not at common law revoke his will, whether executed before marriage or during the continuance of a previous marriage: *Christopher v. Christopher*, 4 Burr. 2182; *Bowers v. Bowers*, 53 Ind. 430; *Goodsell's Appeal*, 55 Conn. 171, 10 Atl. 557. But that doctrine has been modified, either by statute or decisions of the courts, both in England and the several states in this country. While within the application of the rule the marriage of a man did not of itself revoke his pre-existing will, his marriage and birth of issue did so operate: *Note to Young's Appeal*, 80 Am. Dec. 518. The marriage of a woman, however, has always been held to revoke her will, without reference to the birth of issue, and this because of her legal incapacity after marriage to dispose of her property. But this has also been changed by statute: *Kelly v. Stevenson*, 85 Minn. 247, 89 Am. St. Rep. 545, 88 N. W. 739, 56 L. R. A. 754. But, as already suggested, the courts are not in full harmony in defining the scope of the "changed conditions or circumstances" giving rise to the rule of implied revocation.

Counsel for appellant in the case at bar insist that it should be limited to such changes as arise from the marriage of the man and the subsequent birth of issue, and to that arising from the marriage of the woman with or without subsequent issue. If we adopt counsel's suggestion, and limit the rule to the instances mentioned, then the saving clause of the statute above quoted would have nothing whatever to act upon, for by section 3666, Revised Laws of 1905, it is expressly declared that the marriage of the testator, and this necessarily includes man or woman, shall revoke a previously executed will. No reference is made to the birth of issue. Simple marriage annuls a previous testamentary disposition of property. So that, if counsel's contention be sound, the clause in section 3665, reserving the common-law rule of revocation by implication, would serve no purpose. We therefore look further, and inquire whether the facts

disclosed, the divorce and property settlement, bring the case within the rule.

Very few cases are found where the precise question has been presented or decided, though it seems to be settled that a divorce alone ⁵⁰⁸ does not revoke a previously executed will: In re Brown's Estate, 139 Iowa, 219, 117 N. W. 260; Baacke v. Baacke, 50 Neb. 18, 69 N. W. 303; Charlton v. Miller, 27 Ohio St. 298, 22 Am. Rep. 307; Jones' Estate, 3 Am. & Eng. Ann. Cas. 221, and note; Card v. Alexander, 48 Conn. 492, 40 Am. Rep. 187; In re Boddington, 22 Ch. D. 597, 25 Ch. D. 685. It is probable that a divorce granted at the suit of the wife, with alimony expressly decreed to be in lieu of all her rights in the property of the husband, testamentary and otherwise, would by implication of law revoke the will of her husband in so far as it made provision for her (1 Underhill on Wills, 265), though In re Brown's Estate, 139 Iowa, 219, 117 N. W. 260, seems to hold otherwise. Lansing v. Haynes, 95 Mich. 16, 35 Am. St. Rep. 545, 54 N. W. 699, and Baacke v. Baacke, 50 Neb. 18, 69 N. W. 303, are the only cases to which our attention has been called where facts like those in the case at bar have been passed upon.

In the Michigan case it was held that when, at the time a decree of divorce is granted, the parties to the action settle and adjust their property rights by mutual agreement, without mentioning wills theretofore made by them, the decree of divorce and settlement constituted an implied revocation of the wills so theretofore made. The court there remarked that by the decree of divorce and property settlement the parties became strangers to each other, neither thereafter owing to the other either legal or moral obligations or duties, and that there was therefore a complete change in their relations, within the rule of implied revocation of wills. The Nebraska case holds to the contrary; but the decision is apparently upon the theory of a strict application of the rule, and the fact of the property settlement appears not to have been deemed of much importance. Careful reflection and consideration of the subject leads us to the rule of the Michigan court. It appears to us more in accord with the reason and basis of the law, in harmony with the elementary rule of right and wrong, conflicts with no equitable or substantial right of the woman in such case, and is opposed only by a strict adherence to some of the older views on the subject, based, however, upon the commendable purpose of sustaining the directions of a person respecting the disposition of his property, left in the form of a solemnly executed will, who by

reason of his death is no longer able to speak for himself or give further orders or directions in that behalf.

⁵⁰⁹ We recognize the importance of upholding the last wills of deceased persons, and we recognize the wisdom, also, of the rule of implied revocations by a change in the condition and circumstances of the testator. If the rule can have any proper or legitimate application in any case, it would seem to cover a case of this kind. Here the testator brought suit against his wife, charging her with adultery. He was then an old man, seventy years of age, and with a view to a severance of all relations with his wife he entered into an agreement by which she was to procure a divorce without contest by him, upon the consummation of which he made over to her in property and money practically what she would have received under the previously executed will, had he then died, and precisely what she would have received under the statute had he died intestate. He in effect withdrew his charge of infidelity and voluntarily settled upon her all she could or would have received under the will.

He died within thirty days thereafter, without having changed his will, and the wife now comes into court asking for another third of his property, leaving the remainder, or one-third, to his children by his first wife. If this is not a change of his condition and circumstances, within the meaning of the law, then the rule of implied revocation upon that ground is really without much substance or merit. His obligations to his wife, legal, moral or otherwise, wholly ceased at the time of the divorce and settlement. By the settlement he fully discharged all legal duties, and the inference that he intended the allowance in full of all future rights ought in justice and good conscience to be the legal conclusion. We so hold. Whether the fact that the testator in such a case permits his will to remain unchanged by express revocation for a number of years after the divorce and settlement would militate against the conclusion of implied revocation we need not determine. Testator in this case died within thirty days after the settlement, and his failure expressly to revoke within that time certainly creates no inference that he intended his will to continue in force.

The case of *In re Brown's Estate*, 139 Iowa, 219, 117 N. W. 260, wherein the Iowa supreme court held that a decree of divorce, with an award of alimony to the wife was not an implied revocation of the will of the husband, is not in point. The court distinguishes that from the Michigan case (95 Mich. 16, 35 Am. St. Rep. 545, 54 N. W. 699) on the ⁵¹⁰ ground

that the property settlement was not the voluntary act of the husband, and therefore no legitimate basis for an inference of an intention on his part to revoke his former will.

Order affirmed.

IMPLIED REVOCATION OF WILLS FROM CHANGE IN CONDITION AND CIRCUMSTANCES OF TESTATOR, OTHER THAN MARRIAGE OR BIRTH OF ISSUE.

- I. Scope and References to Former Notes, 628.**
- II. Origin and History of the Doctrine, 628.**
- III. General Principle Involved, 629.**
- IV. Rule Under the Statutes, 630.**
- V. Changes in Condition or Circumstances of Testator.**
 - a. In General, 631.**
 - b. Change in Testator's Family or the Beneficiaries of His Will.**
 - 1. In General, 632.**
 - 2. Adoption of Child, 632.**
 - 3. Divorce, 632.**
 - c. Change in Testator's Real Property.**
 - 1. Voluntary Alienation, 635.**
 - 2. Executory Contracts of Sale, 641.**
 - 3. Requisites and Validity of Conveyance, 643.**
 - 4. Change in Form of Property, 644.**
 - 5. Mortgage to or Reservation by Testator on Sale of Property, 646.**
 - 6. Conveyance to or Other Transaction with Devisee, 646.**
 - 7. Purchase or Perfection of Title to Devised Premises, 649.**
 - d. Involuntary Alienation, 649.**
 - e. Alienation of Personal Property.**
 - 1. In General, 650.**
 - 2. Change in Form of Personal Property, 651.**
- VI. Miscellaneous Illustrations Showing When Revocation from Subsequent Sale of Property is Implied and Extent of Revocation, 651.**

I. Scope and References to Former Notes.

The subject of our present inquiry has been heretofore somewhat treated on pages 356-358 of the note appended to *Graham v. Burch*, 28 Am. St. Rep. 344, but as the discussion was only incidental to the larger subject of implied revocation of wills generally, which was then under consideration, we propose here to supplement that note by a more extended treatment of the single question of when revocation may be implied from subsequent changes in the condition or circumstances of the testator other than marriage or birth of issue. Implied revocation from changes in the condition and circumstances of the testator by marriage and birth of issue received some attention in the note already mentioned (20 Am. St. Rep. 344), and was also the principal subject of discussion in the note appended to *Graves v. Sheldon*, 15 Am. Dec. 659, and the one appended to *Young's Appeal*, 80 Am. Dec. 513.

II. Origin and History of the Doctrine.

The doctrine that revocation of a will may be implied from certain changes in the condition and circumstances of the testator is of very

ancient origin. That it was a thoroughly established principle of the common law is too universally recognized to require more than mere mention. But it was said by the supreme court of Alabama that the doctrine was borrowed by the English courts from the civil law (*Gay v. Gay*, 84 Ala. 38, 4 South. 42), and this is doubtless correct, for Chancellor Kent, in his *Commentaries on the Common Law* (fourteenth edition, 521), says it was a general doctrine of the Roman law that under certain changes in the condition and circumstances of the testator, revocation of his will would be implied, and refers to a case in point mentioned by Cicero (*De Orat* 1, 1, c. 38) and also one mentioned in the *Pandicts*.

III. General Principle Involved.

The supreme courts of Alabama and Maryland seem to have given very close study to the different views entertained by the English courts as to the theory or principle upon which the doctrine of implied revocation by change in the condition and circumstances of the testator should rest, and we are told by these courts that the temporal courts claimed that the revocation was the consequence of a rule of law grounded on a tacit condition annexed to the execution of the will that an entire alteration of the state of circumstances under which the will was made should operate a revocation; but that the ecclesiastical courts contended that the implied revocation was founded on the presumed intention of the testator to revoke his will, arising from the change of circumstance under which it was made, and from the new social and moral duties resulting therefrom: *Gay v. Gay*, 84 Ala. 38, 4 South. 42; *Baldwin v. Spriggs*, 65 Md. 373, 5 Atl. 295.

Chancellor Kent considered the rule upheld by the ecclesiastical courts—a presumed alteration of intention—"the higher and better ground," and said this was the view upheld by Lord Mansfield in *Brady v. Cubett*, 1 Doug. 31; 4 Kent's *Commentaries*, 14th ed., 524; and on page 521 of the work mentioned this distinguished author, speaking of implied revocations, said: "They are founded upon the reasonable presumption of an alteration of the testator's mind, arising from circumstances since the making of the will, producing a change in his previous obligations and duties. . . . There is not, perhaps, any code of civilized jurisprudence in which this doctrine of implied revocation does not exist and apply when occurrence of new social relations and moral duties raises a necessary presumption of a change of intention of the testator." But notwithstanding the principle upheld by the ecclesiastical courts was sanctioned by such authority as Lord Mansfield and Chancellor Kent, the rule contended for by the temporal courts was upheld in the privy council in the later case of *Israell v. Rodon*, 2 Moore P. C. 51, where it was expressly held that the doctrine was based on a tacit condition annexed to the will when made that it should not take effect under certain changes in the condition and circumstances of the testator.

A majority of the American courts, as we shall hereafter see, seem inclined to follow the rule that the doctrine rests upon a presumed

alteration of intention of the testator, though the courts of Maryland and New Hampshire strongly lean to the view upheld by the temporal courts: *Baldwin v. Spriggs*, 65 Md. 373, 5 Atl. 295; *Hoitt v. Hoitt*, 63 N. H. 475, 56 Am. Rep. 30, 3 Atl. 604. The supreme court of Pennsylvania, though maintaining that the doctrine of implied revocation rests upon the presumed alteration of intention of the testator, rather than upon any fixed principle of law independent of the question of intention, thinks the differences of opinion that have been expressed as to the ground on which the revocation should be implied, are "differences in form rather than in substance, for they all start with a presumed change in the testator's intention from his changed situation and obligations": *In re Newlin's Estate*, 209 Pa. 456, 58 Atl. 846, 68 L. R. A. 464.

But whatever may be the differences of opinion as to the grounds upon which the doctrine of implied revocation should rest, the doctrine itself has become an ingrafted heritage from the common law in most of the states, and, as was said in the principal case (*ante*, p. 621), "is the settled law in nearly all the states of this country when not abrogated by statute"; and one of the cleverest statements of the rule given by the courts of this country is found in *Young's Appeal*, 39 Pa. 115, 80 Am. Dec. 513: "If the testator's circumstances be so altered that new moral testamentary duties have accrued to him subsequent to the date of the will, such as may be presumed to produce a change of intention, this will amount to an implied revocation. Now, it matters not whether it be said that this principle was derived from the Roman law or from our human instincts of justice, certainly it is now a legitimate element of our common law, and we would not have received it but for those instincts. The Romans received it before us, because they were before us, and because they, too, were human. This principle gives the fundamental reason of all the positive rules of law we have on this subject."

IV. Rule Under the Statutes.

As the right to dispose of property by will is purely statutory, so also the manner in which it may be revoked is a matter of statutory regulation: *In re Comassi*, 107 Cal. 1, 40 Pac. 15, 28 L. R. A. 414; *Graham v. Burch*, 47 Minn. 171, 28 Am. St. Rep. 339, 49 N. W. 697; *In re Frothingham's Will* (N. J.), 71 Atl. 695; 1 *Ross' Probate Law*, p. 45.

In the states of California, New Jersey, Rhode Island, and Vermont, and possibly some others, the statutes expressly declare what changes in the conditions and circumstances of the testator shall operate as a revocation of his will, and the effect of these statutes is to abolish the common-law rule of implied revocation: *In re Comassi*, 107 Cal. 1, 40 Pac. 15, 28 L. R. A. 414; *In re Frothingham's Will* (N. J.), 71 Atl. 695; *Rhode Island Hospital Trust Co. v. Keith*, 26 R. I. 42, 57 Atl. 1060; *Bates v. Hacking*, 28 R. I. 523, 125 Am. St. Rep. 759, 68 Atl. 622, 14 L. R. A., N. S., 937; *Graves v. Sheldon*, 2 D. Chip. (Vt.) 71, 15 Am. Dec. 653. In most of these cases the courts were content to base

their decisions purely on the ground that, the statute being clear, it was the duty of the courts to follow it, until changed by the legislature, even though hardship might result in any particular case. But the court of errors and appeals of New Jersey in the Frothingham case (71 Atl. 695), in addition to basing its ruling on the statute, took occasion to question the wisdom of the common-law doctrine of implied revocation from a change in the condition and circumstances of the testator, for it said: "That a man makes an unnatural will or allows a will to stand which by reason of changed circumstances would be an unnatural one if made at the particular time is not a reason to overthrow the testament. Hundreds of men fail, through neglect, to alter wills as their own circumstances and those of the natural objects of their bounty undergo a change; and thousands of men, for the same reason, entirely fail to make wills at all when every sense of duty and responsibility indicate that they should do so."

In some other jurisdictions the statutes are silent upon revocation by act of law, and it has been held that the common law of England as to the revocation of wills is not affected by such statutes, except where it has been repealed by them: *Phillipe v. Clevengor*, 239 Ill. 117, 87 N. E. 858; *In re Toepper's Estate*, 12 N. M. 372, 78 Pac. 53, 67 L. R. A. 315; and also in Iowa, where the statute is silent on the question of implied revocation, the common-law rule has been ingrafted upon it by court decisions: *In re Brown's Estate*, 139 Iowa, 219, 117 N. W. 260.

In still other and, perhaps, a majority of the states, the statutes, after enumerating the ways in which revocation of a will may be effected by act of party, provide that nothing therein contained "shall prevent any revocation implied by law from subsequent changes in the condition or circumstances of the testator," and it is held that the revocation implied by law within the meaning of these statutes is the implied revocation which existed at common law: *Shorten v. Judd*, 60 Kan. 73, 55 Pac. 286; *Donaldson v. Hall*, 106 Minn. 502, ante, p. 621, 119 N. W. 219, 20 L. R. A., N. S., 1073; *Baecke v. Baecke*, 50 Neb. 18, 69 N. W. 303; *Hoitt v. Hoitt*, 63 N. H. 475, 56 Am. Rep. 530, 3 Atl. 604; *In re Newlin's Estate*, 209 Pa. 456, 58 Atl. 846, 68 L. R. A. 464; *Glascott v. Bragg*, 111 Wis. 605, 87 N. W. 853, 56 L. R. A. 258.

V. Changes in Condition or Circumstances of Testator.

a. **In General.**—While, as we have seen, the statutes of many of the states recognize revocation of wills by implication of law, none of these designate or specify what subsequent change in the condition or circumstances of the testator will produce such revocation, thereby leaving it to the courts to determine from the facts of each particular case whether under the rules of law revocation is to be implied.

It was said in the note to *Graham v. Burch*, 28 Am. St. Rep. 344, on page 356 thereof, that implied revocation resulting from a change in the testator's circumstances "may be (1) from a change in his

property, or (2) from a change in his family or in the beneficiaries of his will." We will discuss them in the reverse order named.

b. Change in Testator's Family or the Beneficiaries of His Will.

1. **In General.**—In by far the greater number of cases where the question of implied revocation from a change in the testator's family or the beneficiaries of his will has been before the courts, the change resulted from marriage or birth of issue, but these changes are not within the scope of our present inquiry. The only other cases in which the courts have been called upon to consider whether a will has been revoked on account of change in the testator's family or the beneficiaries of his will are those where the change resulted from the adoption of a child or children, or from divorce, and the settlement of property rights either by the decree of divorce or by the voluntary act of the parties either before or at the time the divorce was granted.

2. **Adoption of Child.**—It was clearly shown in the former notes of this series to which we have referred that from time immemorial marriage, whether of a man or woman, if followed by the birth of issue, has been regarded as sufficient to revoke his or her will by operation of law. It is only necessary to say that it is generally held that an adopted child is not regarded as issue of the marriage, and consequently such adoption does not operate to revoke a previously executed will of the adopting parent: *In re Comassi's Estate*, 107 Cal. 1, 40 Pac. 15, 28 L. R. A. 414; *Davis v. King*, 89 N. C. 441; and this is true even when the statute declares that the person adopting and the child adopted shall sustain the legal relation of parent and child: *In re Gregory's Estate*, 15 Misc. Rep. 407, 37 N. Y. Supp. 925; or where such adopted child is under the statute entitled to receive "all the rights and interest in the estate" of the adopting parent, "by descent or otherwise, that such child would if the natural heir" of such parent: *Davis v. Fogle*, 124 Ind. 41, 23 N. E. 860, 7 L. R. A. 485.

3. **Divorce.**—As divorces in England were infrequent, we find no reported English cases where the doctrine of implied revocation from a change in the testator's circumstances was applied to divorce. In this country, however, the question has often been adjudicated, and it seems to be well-settled law that a divorce alone does not revoke a previously executed will: *Card v. Alexander*, 48 Conn. 492; *In re Brown's Estate*, 139 Iowa, 219, 117 N. W. 260; *Donaldson v. Hall*, 106 Minn. 502, ante, p. 621, 119 N. W. 219, 20 L. R. A., N. S., 1073; *Baacke v. Baacke*, 50 Neb. 18, 69 N. W. 303; *Charlton v. Miller*, 27 Ohio St. 298, 22 Am. St. Rep. 307; *In re Jones' Estate*, 211 Pa. 364, 107 Am. St. Rep. 581, 60 Atl. 915, 69 L. R. A. 940.

The reason upon which these cases rest is, that the claim is not based on the marriage relation alone, but upon the deliberate act of the testator, and was thus stated by the orphans' court of Pennsylvania in the case last cited: "The contention that the divorce absolutely severed the marriage relation is correct. If this claim was

based on that relation alone, it would be summarily dismissed. But it arises from an entirely different cause. Its basis is the deliberate, mature act of the testator, made when the end of the marriage relation had begun; an act that he continued to ratify during the months that the divorce proceedings were pending. . . . It does not follow that because the divorce made these parties as strangers to each other, so far as their marital rights were concerned, that therefore the testator's deliberate act in making this devise, which did not necessarily depend on the marriage relation, a void or lapsed devise."

The case of *Lansing v. Haynes*, 95 Mich. 16, 35 Am. St. Rep. 545, 54 N. W. 699, has been often cited as holding that divorce alone will work revocation of a will, and while there is some language in the opinion which would indicate that the court may have leaned to that view, the divorce followed a settlement of all property rights voluntarily made by the parties themselves, and this fact seems to have controlling influence on the minds of the court, as will appear in later reference to this case.

But while it may be considered as settled law that divorce alone will not revoke a will, there is sharp conflict of judicial opinion on the effect of such a decree when the property rights of the parties are determined by the decree, or voluntarily settled by acts of the parties themselves either before or at the time the decree was granted. As was said in the principal case, there are very few cases where this precise point has been decided, but the doctrine supported in the principal case, namely, that a settlement of property rights, made by the parties in anticipation of a divorce, when followed by a decree of divorce, impliedly revokes a will, finds strong support in *Lansing v. Haynes*, 95 Mich. 16, 35 Am. St. Rep. 545, 54 N. W. 699, and also in the more recent case from that state of *Worth v. Worth*, 149 Mich. 687, 113 N. W. 306.

In *Lansing v. Haynes*, 95 Mich. 16, 35 Am. St. Rep. 545, 54 N. W. 699, the husband and wife had, pending the divorce suit, agreed upon a division of the property, and the husband had executed deeds to the wife to certain of the property and obtained from her a relinquishment of all claim against his estate. It was held that a former will executed by the husband was revoked by the decree of divorce; Judge Grant, speaking for the court, saying: "It is not, in my judgment, the natural presumption that after the testator had settled with her, had conveyed to her a good share of his property, and they, by agreement, had terminated all their property, as well as their marital relations, the will executed nearly ten years before should remain in force, and operate, upon his death, as a conveyance of the remainder of his property to her, to the exclusion of his heirs. If this were so, then it would follow that if he had children living, or a dependent mother or other dependent relatives, or a second wife without issue, his duties and obligations toward them must be set aside in favor of a most harsh and unjust rule. The like result would follow where the husband had obtained a divorce from his wife on the ground of her adultery, and she had become a common prostitute; or where the wife

had obtained a divorce for a like reason, or because her husband had committed a felony, for which he was incarcerated in prison. To hold the will unrevoked under these circumstances would be repugnant to that common sense and reason upon which the law is based. I do not think the common law is so unbending as to lead to this result. "The reason of the law is the essence and soul of the law." It is doubtless the two last clauses in the language quoted that has led to this case being so often cited as holding that divorce alone will revoke a will, but this is hardly justifiable, for in another part of the decision the court referred to the case of *Charlton v. Miller*, 27 Ohio St. 298, 22 Am. Rep. 307, as holding that a divorce did not revoke a will, and said that that case differed from this in the fact that in the Ohio case there had been no settlement of property rights between the parties upon the granting of the divorce.

But the doctrine thus upheld by the principal case (*ante*, p. 621), and the two Michigan cases seems to have been opposed by the supreme court of Nebraska in *Baacke v. Baacke*, 50 Neb. 18, 69 N. W. 303, where, subsequent to the execution of the husband's will his wife obtained a divorce from him, and her property rights were settled, and it was held that the divorce did not revoke the will, the court saying: "No case has been cited, nor has the writer been able to find a single authority, which holds that a subsequent granting of a divorce to the wife of a testator, and a settlement of her property rights, work a revocation"; but added, however: "It could no more than revoke the will as to her legacy, and whether it would have that effect in this case it is not necessary now to determine, as the question is not before us." But it is well to note with respect to this case that the settlement of the property rights seems to have been made by the decree of the court, and not by any voluntary act of the parties, and that this is an important distinction to be observed in determining the effect to be given a divorce on revoking a will is clearly shown in *Brown's Estate*, 139 Iowa, 219, 117 N. W. 269. In this case, by the testator's will his wife was given all of his estate, except certain specific legacies to each of his children. Subsequent to the execution of the will the wife obtained a divorce, and by the decree of divorce was awarded a judgment against the husband for a certain amount of money, and, in addition, all the household and kitchen furniture of their homestead, and was also awarded a certain sum for the support and education of their minor child. The decree provided that "the foregoing provisions for and in behalf of the plaintiff when paid and complied with by the defendant shall be in full payment, satisfaction and discharge of all her interest in and to the property of the defendant." After the testator's death, his children brought this action to set aside the will, insisting that the devises and bequests to the wife were satisfied or adeemed by reason of the provision made for the wife in the divorce action. But it was held that they were not adeemed, because the doctrine of ademption where applicable "obtains only as respects personal property and to specific legacies," and therefore the only bequests adeemed were the

items of personal property mentioned in the decree. That they were not satisfied because "the provision made for the wife in the decree of divorce was not a voluntary gift or advancement to her. It was awarded because of the defendant's legal obligation to support his divorced wife and children, and because she, upon the divorce being granted, was not entitled to take anything under the law as his widow." The decision then refers to the case of *Lansing v. Haynes*, 95 Mich. 16, 35 Am. St. Rep. 545, 54 N. W. 699, and differentiates it from the case at bar, saying the *Lansing* case was "bottomed upon changes made in the rights and duties of the parties due to an agreement which of necessity changed property rights of both parties in such a manner as that implied revocation or an estoppel was found from the peculiar facts." But it is by no means clear that the court intended to approve the ruling in the *Lansing* case, but rather disapproves it, for it said that it was admitted in that case "that the conclusion is not sustained by authority, and is a pioneer in this field." In view, therefore, of the scarcity of decisions on the subject and the apparent opposition of the courts of Iowa and Nebraska, it would seem that the doctrine upheld by the principal case (*ante*, p. 621), though fully sustained by the Michigan cases above cited, and founded, as it seems to us, upon the soundest of reason, must still be considered an open question.

c. Change in Testator's Real Property.

1. **Voluntary Alienation.**—By the common law an absolute conveyance of lands which were specifically devised, made after the execution of the will, operated as a revocation of the devise, for in such case the devisor does not die seised, and his alienation after making the devise is conclusive evidence of intention with regard to such testamentary disposition: *Hattersley v. Bissett*, 51 N. J. Eq. 597, 40 Am. St. Rep. 532, 29 Atl. 187. This rule of the common law has been very generally sustained by the courts of this country: *Connecticut Trust & Safe Deposit Co. v. Chase*, 75 Conn. 683, 55 Atl. 171; *Duffel's Lessee v. Burton*, 4 Harr. (Del.) 290; *Howard v. Carusi*, 4 McArthur (D. C.), 260; *Epps v. Dean*, 28 Ga. 533; *Phillipe v. Clevenger*, 239 Ill. 117, 87 N. E. 858; *Raburn v. Shortridge*, 2 Blackf. (Ind.) 450; *Bowen v. Johnson*, 6 Ind. 110, 61 Am. Dec. 110, and note; *Floyd v. Floyd*, 46 Ky. (7 B. Mon.) 290; *Tanner v. Van Bibber*, 63 Ky. (2 Duvall) 550; *Emery v. Union Soc.*, 79 Me. 334, 9 Atl. 891; *In re Sprague's Estate*, 125 Mich. 357, 84 N. W. 293; *Cozzens v. Jamison*, 12 Mo. App. 452; *Hattersley v. Bissett*, 51 N. J. Eq. 597, 40 Am. St. Rep. 532, and note, 29 Atl. 187; *Minuse v. Cox*, 5 Johns. Ch. (N. Y.) 441, 9 Am. Dec. 313; *Barstow v. Goodwin*, 2 Bradf. Sur. (N. Y.) 413; *Hoffman v. Stenbing*, 49 Misc. Rep. 157, 98 N. Y. Supp. 706.

Thus where testator devises land to a church, and afterward conveys the land, rendering it impossible for the church to fulfill the conditions of the devise to it, the devise is revoked by the conveyance: *Connecticut Trust & Safe Deposit Co. v. Chase*, 75 Conn. 683, 55 Atl. 171.

And in *Re Sprague's Estate*, 125 Mich. 375, 84 N. W. 293, testatrix, after bequeathing to her seven daughters equally her household furniture, books, etc., used in connection with her homestead, bequeathed all the residue and remainder of her estate to her said daughters equally. Two years after the execution of the will testatrix conveyed all of her property, both real, personal, and mixed, to one of her daughters in trust for the seven daughters and a granddaughter, and the trust deed and the will were in perfect harmony with each other, except that the granddaughter, who was not named in the will, was a beneficiary in the trust estate, and was to share equally with the seven daughters. The trust deed conveyed the absolute title in fee to all of testator's property except an insignificant amount of the personal property, not exceeding two hundred to four hundred dollars in value—the testator merely retaining a life estate in the homestead. It was held that the trust deed revoked the will in toto, the court saying: “The intent to revoke her will and replace it by the trust deed could not be more clearly shown.”

In *Vreeland v. McClelland*, 1 Bradf. Sur. (N. Y.) 393, however, it was held that a will was not revoked by a trust deed executed by the testator on the same day the will was made to the property devised, where the will and the trust deed as to their general purport were in harmony with each other, since they may fairly be considered as parts of the same transaction.

In *McNaughton v. McNaughton*, 41 Barb. (N. Y.) 50, the testator by his will bequeathed to his wife all his personal estate. He also devised to her for life all of his real estate, and directed that on her decease the real estate should be sold and the proceeds divided among his nephews and nieces. He afterward sold part of the real estate and died seised of the securities given for the payment thereof. It was held that the sale revoked the devise as to the proceeds of the real estate pro tanto, and that the avails of the sale passed to the widow under the bequest to the personal property, and this ruling was affirmed by the court of appeals (34 N. Y. 201).

Likewise in *Re Dowd*, 58 How. Pr. (N. Y.) 107, testator bequeathed to his wife all his personal estate, and the use for life of all his real estate, and authorized his executors, together with his wife, to sell and convey his real estate, and to deposit the proceeds in a savings bank; his wife to receive from time to time, while any of the same so deposited remained, sufficient for her during her life; and if any of the proceeds of such sale remained after paying such expenses, together with her funeral expenses, and the reasonable expenses of the executors, the balance to be paid to certain religious corporations. The testator, in his lifetime, and after execution of the will, sold all his real estate and deposited the proceeds in a savings bank, such proceeds constituting his entire estate. His wife died after this sale but before the death of the testator. It was held that the devise to the corporations was revoked by the act of the testator in selling the real estate. “The subject matter of the devise,” said the court, “was wholly destroyed or changed by the voluntary act of the testator

in his lifetime." And in *Re Backus' Will*, 63 N. Y. Supp. 544, a testator after making his will executed a deed of trust to all of his property. The deed was properly subscribed, acknowledged, published and attested as required by 2 Revised Statutes, page 63, section 40, and it also contained a provision that the deed revoked any last will and testament theretofore made. It was contended, however, that as the deed did not declare that it was the last will and testament of the grantor, that it did not revoke the will under 2 Revised Statutes, pages 64, 65, sections 42, 43, 47, 48, which provide that "no will shall be revoked otherwise than by some other will in writing or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed," and that "a deed or other act of testator, by which his estate previously devised or bequeathed shall be altered, but not fully divested, shall not be deemed a revocation of the devise or bequest, unless in the statement by which such alteration is made the intention is declared that it shall operate as a revocation of such previous devise or bequest." It was held that the deed revoked the will, and further, that the will being revoked by the deed, it was no longer effective as to after-acquired property (reversing 29 Misc. Rep. 448, 61 N. Y. Supp. 1070).

In *Williams v. Claunch*, 44 Tex. Civ. App. 25, 97 S. W. 111, it was held that taking possession of a farm by a co-owner and the subsequent execution of a deed to her share thereof is a revocation of a testamentary instrument by which she had evidenced an intention to will the farm to her son in consideration of certain acts to be performed by him.

There is an old Pennsylvania case (decided in 1824)—*Wogan v. Small*, 11 Serg. & R. 141—which is opposed to applying the doctrine of implied revocation to alterations in the estate of the testator, and thinks its application should be confined strictly to changes in his family. In this case, the testator had two children, a son and daughter. He was seised of two tracts of land, equal in value. He devised one of the tracts to his son and the other to the family of his daughter, and gave a money legacy to a bastard child of his daughter. He afterward sold one of the tracts of land and incurred debts which swept away the other tract, and died leaving no more estate than was sufficient to pay his debts and the legacy to the bastard grandchild. It was held that these circumstances did not amount to an implied revocation of the will. It is true the court said it would "not say that it was impossible for a new case to occur to which it would be improper to apply the principle of implied revocation," but from the ruling in this case, and the following language used in the opinion, a disbelief in any such possibility would seem evident. "The civil law, from which this doctrine (implied revocation) is borrowed, confines it to alterations in the family of the testator. Were we to extend it, so as to inquire into the circumstances of a man's estate at the time of making his will and of his death, we should find innumerable instances in which the alteration

has been so great that a prudent man would have altered his will, and part of his family has been reduced to great distress by his not doing it. But it is better that individuals should be distressed than the freedom of disposition by last will invaded; that freedom which is one of the greatest excitements to enterprise and industry."

But whatever weight might be attached to this decision, it would seem not to have been followed by later decisions in that state; for in *Re Cooper's Estate*, 4 Pa. 88, 45 Am. Dec. 673, it was held that a sale by a testator after making his will of so great a part of the real estate devised as to render it impossible to give effect to the disposition of his will amounts to a revocation of the will. And even in the jurisdictions where the statutes have the effect of practically abolishing the common-law rule of implied revocations by a change in the condition or circumstances of the testator, the doctrine of implied revocation, either partial or total, from a sale of the devised property by the testator, is recognized upon the principle that the revocation results *ex necessitate rei*: In *re Benner's Estate*, 155 Cal. 153, 99 Pac. 715; *Hattersley v. Bissett*, 51 N. J. Eq. 597, 40 Am. St. Rep. 532, and note, 29 Atl. 187; *Prather v. Whittle*, 16 S. C. 40; *Graves v. Sheldon*, 2 D. Chip. 71, 15 Am. Dec. 653, and note. It was said in *Prather v. Whittle*, 16 S. C. 40, that "in the very nature of the case there must be such a thing as a revocation from necessity. A will is ambulatory, and when the whole estate is disposed of in the lifetime of the testator there is nothing left for the will to act upon when it speaks"; and in *Graves v. Sheldon*, 2 D. Chip. 71, 15 Am. Dec. 653, the supreme court of Vermont, speaking through Judge Aiken, referred to the fact that the statute did not provide for revocation of a will by implication of law, but in express terms declared how a revocation should take place, and then said: "I cannot admit that an alteration in the circumstances of the deviser will, in any case, amount to a revocation in law, or that an intended alteration in his estate will have that effect. It is true that the intention of the testator is to be principally regarded, but that instruction is to be inferred from such facts only as the statute authorizes us to notice. . . . Does the fact of a change in a man's circumstances afford a stronger presumption of an alteration of his intentions than the fact of his preserving his will unaltered and unrevoked does of his intentions remaining the same? I confess I am unable to see it in that light. . . . The only implied revocations, therefore, known to the laws of this state are such as result *ex necessitate rei*. . . . If A devise all his estate to B, and afterward alienate the whole to C, it is necessarily a total revocation, for there is nothing for the will to operate upon. If he devise black-acre to B, and white-acre to C, and afterward dispose of black-acre, it is a revocation *pro tanto*." But there must be an actual conveyance, for an intention of the testator, never carried out, to make a conveyance of the devised premises and then destroy the will is not sufficient to establish a revocation: *Belshaw v. Chitwood*, 141 Ind. 377, 40 N. E. 908.

And even though a conveyance be made, it will not carry a revocation of the devise made of it, when it clearly appears that it was not the intention of the testator, as in the case of a simulated transfer acknowledged by the vendee, the property returning to the testator and being in esse at his death: *Succession of Blakemore*, 43 La. Ann. 845, 9 South. 496.

But though it is firmly established by the foregoing authorities that a sale of all the devised property revokes the will in toto, and a conveyance of part of the property revokes the will pro tanto, in dealing with the subject of implied revocation from an alteration in the testator's property, the courts of this country have not gone as far as the doctrine of the common law and the rulings of the English courts. We are told by Chancellor Kent that "not only contracts to convey, but inoperative conveyances will amount to a revocation of a devise to the extent of the property intended to be affected, if there be evidence of an intention to convey, and thereby to revoke the will. A bargain and sale without enrollment, feoffment without livery of seisin, a conveyance upon a consideration which happened to fail, or a disability in the grantee to take, have all been admitted to amount to a revocation, because so intended. . . . It is further the acknowledged but very strict and technical rule of law that if the testator conveys away the estate, and then takes it back by the same instrument, or by a declaration of uses, it is a revocation, because he once parted with the estate. Either an intention to revoke, or an alteration of the estate without such an intention, will work a revocation. The law requires that the same interest which the testator had when he made the will should continue to be the same interest, and remain unaltered to his death. The least alteration in that interest is a revocation. . . . The doctrine, hard and unreasonable as it appears in some of its excrescences on this subject, and notwithstanding it has been repeatedly assailed by great weight of argument, has, nevertheless, stood its ground immovably on the strength of authority, as if it had been one of the landmarks of property. The cases have been investigated and discussed with the utmost research and ability by the courts of law and equity, and the principle again and again recognized and confirmed, that by a conveyance of the estate devised, the will was revoked, because the estate was altered, though the testator took it back by the same instrument, or by a declaration of uses. The revocation is upon the technical ground that the estate has been altered, or new modeled since the execution of the will. The rule has been carried so far, that if the testator suffered a recovery, for the very purpose of confirming the will, it was still a revocation, for there was not a continuance of the same unaltered interest": 4. Kent's Commentaries, 14th ed., p. 530.

And in speaking of the application of this doctrine by the English courts it was said by the supreme court of Massachusetts that, "this principle runs through all the cases, and is admitted by all the judges, as well those who quarrel with as those who support the doctrine of revocation to the extent to which it has been carried, and

that is, that the devisor must be seised of the same estate at the time of his death that he was seised of when he made his will, to make it a good devise"; and this court gave its assent to the English rule with the qualification, however, that the words "any alteration in the estate" should mean "a material alteration," and questioned whether it should be applied to "the conversion of an estate-tail into a fee by common recovery, the testator supposing when he made the will that he had a fee," or "of parting with an estate, though but for an instant, and taking back the same estate," or "the conveyance of an estate to another for the use of the testator, which in fact gives him the same estate he had before": *Ballard v. Carter*, 22 Mass. (5 Pick.) 112, 16 Am. Dec. 377.

The cases of *Duffel's Lessee v. Burton*, 4 Harr. (Del.) 290, *Bowen v. Johnson*, 6 Ind. 110, 61 Am. Dec. 110, *Cozzins v. Jamison*, 12 Mo. App. 452, and *Walton v. Walton*, 7 Johns. Ch. (N. Y.) 258, 11 Am. Dec. 456, also support the English rule that a devisor must be seised of the same estate at the time of his death that he was seised of when he made his will to make it a good devise, but it is said by the court of errors and appeals in the former of these four cases that the change in the estate which is necessary to produce a revocation of the will should not extend to a mere change in the manner of holding the estate; and hence it was there held that the mere termination of a tenancy in common and the holding of the same portion of the estate in severalty will not work a revocation, nor will a partition, when to effect the partition a conveyance of the land be necessary. It is manifest, too, from the language of the opinion in this case, that the court thought the technical principle of law involved in the English rule on this subject, and which it said arose "out of a high regard which the law always pays to the rights of an heir at law," by not "allowing him to be disinherited, unless by express words, and the doubt which the change in the estate devised raises in reference to what was the will of deceased in respect to that estate in its new form and extent" had been extended in favor of the heir at law to an almost unreasonable extent, for it said that the doctrine should not be extended to "any case not falling directly within the spirit of the adjudged cases."

But aside from the few cases mentioned, the rule of common law that to make a good devise the testator must die seised of the same property that he had at the time of invoking the will, this old doctrine finds little or no support, for it has been modified in most of the states by statute, and a will is construed to speak and take effect as if it had been executed immediately before the death of the testator, and therefore to include all property he owned at the date of his death unless a contrary intention appears in the will, so that a conveyance of the devised premises does not revoke the devise if subsequently the title to the land conveyed reverts in the testator and is in esse at his death: *Woodward v. Woodward*, 33 Colo. 134, 81 Pac. 322; *Woolery v. Woolery*, 48 Ind. 523; *Succession of Blakemore*, 43 La. Ann. 845, 9 South. 496; *Morey v. Sohler*, 63 N. H. 507, 56 Am.

Rep. 538, 3 Atl. 636; *Brown v. Brown*, 16 Bush (N. Y.), 560. Indeed, the reason for the technical rule of the common law upon this particular question no longer exists, for, as was said by the supreme court of Colorado in the *Woodward* case (33 Colo. 134, 81 Pac. 322): "At common law, livery of seisin was necessary to transfer real property; and, as a will was regarded as a conveyance, unless a testator had possession and could convey by livery of seisin, no property passed by his will. . . . But in this day and generation no such formality in the conveyance of real estate is required, and under our statutes all property of every kind and nature to which the testator held a legal or equitable title passes by the will. The will speaks from the time of the death of the testator, and, if he has acquired other property than that mentioned in the will, it passes by the will."

And it is not only with respect to property conveyed by the testator after execution of his will and which afterward reverts in him, or other property which is subsequently acquired by him, that the common-law rule that any alteration in the testator's estate revokes his will has been modified.

We will now note the other modifications.

2. Executory Contracts of Sale.—We have already seen that an intention of a testator never carried out, to make conveyances to the devised premises, is insufficient to establish a revocation: *Belshaw v. Chitwood*, 141 Ind. 377, 40 N. E. 908; it follows, therefore, that an executory contract of sale does not revoke a will by which the land is devised: *Hall v. Bray*, 1 N. J. L. (Cox) 212; *Nutzhorn v. Sittig*, 34 Misc. Rep. 486, 70 N. Y. Supp. 287; *McRainy's Exrs. v. Clark*, 4 N. C. 698; *McCrain's Exrs. v. Clark*, 6 N. C. 317; *In re Fuller's Estate*, 71 Vt. 73, 42 Atl. 981. Thus in *Slaughter v. Stephens*, 81 Ala. 418, 2 South. 145, upon contest of a will when it appeared that the testator, before his death, sold part of the property devised, but the greater part of the purchase money remained unpaid, it was held that, under Code of 1876, section 2287, providing that the making of a contract for the sale of land will not revoke a previous devise, unless the whole of the purchase money has been paid, in the absence of any writing evidencing testator's intention to revoke, the sale and conveyance did not constitute a revocation of the devise.

So, too, on the contest of a will, a contention that the property devised had been conveyed by deed does not avail if the deed has never been actually delivered: *Leach v. Burr*, 17 App. (D. C.) 128.

Likewise, in *Chadwick v. Tatem*, 9 Mont. 354, 23 Pac. 729, testator had devised to his wife all his personalty, and a certain portion of his realty and mining lands. After the execution of his will, he contracted for the sale of certain of the mining lands, part of the price being paid down, and the deed placed in escrow, to be delivered on payment of the balance before a certain date, otherwise to be returned to the grantor. After the death of the grantor, and within the life of the agreement, the payment was made and the deed was delivered. It was held that, under the probate practice act, sections

461, 463, which provide that an agreement for the sale of property disposed of by a will previously made does not revoke such disposal, but it passes by the will, subject to a right of specific performance, and that a conveyance or other act by which testator's interest in a thing previously disposed of by his will is altered, but not wholly divested, is not a revocation, the mining land passed as realty under the will, and the second delivery of the deed will not be allowed to take effect by relation from the time of the delivery in escrow.

In *Natzhorn v. Sittig*, 34 Misc. Rep. 486, 70 N. Y. Supp. 287, the testatrix devised six lots to six relatives and bequeathed a mortgage of forty thousand dollars to satisfy mortgages of about the same amount existing on five of the six lots. Thereafter she contracted to sell the six lots subject to the mortgage for five thousand dollars, and a lot which was mortgaged for thirty thousand dollars, but died before the contract was closed. The contract was completed by her executors under a power of sale, and they took in exchange five thousand dollars and a deed of the lot mortgaged for thirty thousand dollars running to the specific devisees. This action was brought by the executors to perform this deed in order to dispose of such lot among the residuary legatees, and to have it declared that the bequest of the forty thousand dollars, which had been paid in was revoked. It was held that the bequest and the devise to the specific devisees and legatees were not revoked by the executory contract for the sale of the lots, but such devisees and legatees were entitled to hold the lot mortgaged for thirty thousand dollars, and the executors were required to apply the forty thousand dollars paid in to the payment of the mortgage on the lot which the executors had secured; the balance thereof, as well as the five thousand dollars, to be paid to the specific devisees and legatees. The court said that the doctrine that a sale cancels a specific devise rested upon the implication to be drawn from a voluntary act of the testator, and that an utter passing away of the title from the testator impliedly revoked the devise, but since 2 Revised Statutes, page 64, sections 45-48, it had always been held that an agreement to sell, no deed being given, was not a revocation.

And in *Re Fuller's Estate*, 71 Vt. 73, 42 Atl. 981, testator, after devising to his daughter his farm, made a contract in writing for the sale of a half acre of land from the farm, for which the grantee was to pay a certain amount monthly until payment of the price and thereupon was to receive a deed. The grantee went into possession and made a few payments and died, and it was held that the contract of sale did not revoke the will pro tanto, but that at law the interest of the grantee upon failure of payment fell back into the testator's estate, and passed by the will.

It was recognized in this case, however, that the grantee had an equitable interest in the land covered by the executory contract of sale, which could be enforced by him or those claiming under him.

And while it is clearly established by this and the other cases cited that an executory contract of sale does not in law revoke a will

of the devised premises, it is equally clear that it may operate as a revocation in equity, provided the contract of sale be such as the court can, in view of well-settled principles, specifically execute: *Gaines v. Winthrop*, 2 Edw. Ch. (N. Y.) 571; *Walton v. Walton*, 7 Johns. Ch. (N. Y.) 258, 11 Am. Dec. 456; *Chambers v. Kerns*, 59 N. C. 280; *Donohoe v. Lea*, 21 Tenn. (1 Swan) 119, 55 Am. Dec. 725, where the court said it is "well established that a valid agreement, or covenant to convey, such as a court of equity would enforce specifically, will, in equity, though perhaps not at law, operate as a revocation of the estate previously devised. Such contract of sale, or covenant to convey, being binding on the testator, and entitling the parties to a specific enforcement in equity, the estate, from the time of the contract, is regarded as the property of the vendee, and, therefore, a valid contract to convey is as much a revocation in equity of the land previously devised as a legal conveyance thereof by the testator would be at law"; and to the same effect is *Blair v. Snodgrass*, 33 Tenn. (1 Sneed) 1, when the court, speaking of an executory contract for the sale of lands devised, such as could be specifically enforced in equity, said: "In the view of a court of equity the nature of the estate is changed, the realty is converted into personalty—the vendee is entitled to the land, and the vendor to the purchase money, which has become a part of his personal estate."

3. Requisites and Validity of Conveyance.—Another modification of the common-law rule that any alteration in the estate of the testator, however slight, will work a revocation of his will is, that a conveyance of land formerly devised will not revoke the devise unless such conveyance is valid and effectual to convey the premises: *McGowan v. McElroy*, 28 App. (D. C.) 188; *Aubert's Appeal*, 109 Pa. 447, 1 Atl. 336. Thus where a conveyance of land was obtained by fraud and imposition, though duly acknowledged and recorded, it did not operate as revocation of the devise of the same premises in the grantee's will: *Smithwick v. Jordan*, 15 Mass. 113; and to same effect is *Graham v. Burch*, 47 Minn. 171, 28 Am. St. Rep. 339, 49 N. W. 697.

But in *Collup v. Smith*, 89 Va. 258, 15 S. E. 584, though it is recognized that a deed to land previously devised must be a valid and binding one in order to revoke the devise, a deed which was not recorded till after the death of the testator was held sufficient to revoke the will. The court was careful to say, however, that there were no creditors or lienors whose rights had intervened or which were asserted, and it is to be inferred that the ruling might have been different had such been the case. We have observed no other case where the question involved in this case has been adjudicated, and in view of the difference of opinion that exists among the bar as to the effect of a deed withheld from record until after the death of the grantor, this decision is an important one. Here, a father executed his will in 1872, devising one-third of his real estate to his wife absolutely, and the residue to his children in equal shares. Having been harassed by lawsuits brought against him by a son in

law, he executed a deed in 1887, conveying his lands to a trustee in fee for the benefit of his wife, and this suit was brought after the father's death by the son in law, to have the deed set aside upon the ground that it was made after the land conveyed by it had been disposed of by the will of 1872, and that it was not recorded until after the grantor's death. The lower court set aside the deed and enforced the will. In holding this to be error, the supreme court said: "The deed was duly executed and acknowledged and delivered by the grantor to the grantee, during his life, as a valid and binding deed, and is effectually treated as such. It was not actually recorded until after the death of the grantor, but there are no creditors or lienors whose rights have intervened, or which are now asserted; and as between the beneficiaries under the will, the will was inoperative as to such property as was parted with during the life of the testator. It was competent for the testator during his life to revoke any part of his will; but the deed was a valid deed, not revokable by the grantee, by his will nor other will."

4. **Change in Form of Property.**—What effect a change in the form of the estate of a testator has upon his will is a question not always free from difficulty. We have already seen that a devise of land is revoked by a subsequent voluntary sale thereof by the testator, but it does not therefore follow, as has been sometimes contended, that the will is also revoked as to the proceeds of such sale which may form a part of the estate. On the contrary, the rule seems to be that as a will speaks and takes effect as from the date of the testator's death, the proceeds from the sale of land previously devised, while not going to the devisee of the land, follow the bequests of the personal property of the testator, and go to the residuary legatees and not to the heirs at law: *Warren v. Taylor*, 56 Iowa, 182, 9 N. W. 128; *Shilling v. Shilling*, 6 Gill, 171; *McNaughton v. McNaughton*, 34 N. Y. 201; *Ametrano v. Downs*, 170 N. Y. 388, 88 Am. St. Rep. 671, 63 N. E. 340, 58 L. R. A. 719; *Kent v. Mahaffey*, 10 Ohio St. 204. Thus, in *Warren v. Taylor*, 56 Iowa, 182, 9 N. W. 128, the will provided that the widow of the testator should have a life interest in certain real estate and all personal property; at her death, all the real estate and personal property to go to certain residuary legatees named; upon payment of certain specific legacies. The real estate described was sold by the testator during his lifetime and the proceeds invested. The widow succeeded to the possession of all the property, and at her death the estate largely exceeded the specific legacies. It was contended by the residuary legatees, who were also the heirs at law, that the sale of the real estate revoked the will, and that they therefore were entitled to take as heirs at law and not as residuary legatees charged with payment of the specific legacies, but it was held that although the will, by the act of the testator, ceased to be operative, or, rather, never became operative as to the real estate, this did not work a revocation of his personal estate, and that the residuary legatees named must take as such charged with the payment of the special legacies.

And in *Kent v. Mahaffey*, 10 Ohio St. 204, which in its material aspects were the same as in the case last cited, the court said: "It is also claimed by the plaintiffs that the sale and conveyance of the testator, after the making of the will and before his death, is a revocation under the statute, as far at least as relates to the real estate. This is true so far as regards a devise of the lands as lands; but the devise to the defendants, the wife dying before the testator, was of all the personal as well as the real estate. The sale changed the realty to personalty, and the defendants will take the proceeds of the real estate remaining and undisposed of at the testator's death, as personalty, a bequest of which has reference to the state and condition of the property at the death of the testator, and not at the making of the will."

In *Shilling v. Shilling*, 6 Gill. (Md.), 171, testator devised an estate for life to his wife from the crops to be raised on the farm on which he then resided. To his son N. he devised a tract of land on which the son resided, and also gave him an estate in trust for his daughter R. To his son J. he devised all the rest and residuary part of the tract or tracts of land of which the testator was in possession, and on which he then resided, and everything (personal), wheresoever found upon the premises intended to be devised; provided, that J. should grant unto the testator's widow an ample and comfortable support during her life. Three years after executing the will the testator conveyed his whole estate in trust to pay debts, and afterward to pay over to him all moneys which remained in the hands of the trustee, or to reconvey to the testator all such portions of real and personal property as might remain unsold. The trustee sold the whole estate under the deed, and paid the surplus in money, which in fact was the proceeds of the personalty, to the executor of the testator. It was held that the executor, after payment of debts, etc., was bound to pay the balance in his hands to the son J., and that the deed of trust was not a revocation of the will in reference to J.'s interest in the surplus.

So, also, in *Livingston v. Livingston*, 3 Johns. Ch. (N. Y.) 148, after making his will, the testator conveyed his share of the real estate under the will of his deceased father, and which made part of the testator's real estate devised to his children, to trustees, to pay the debts of his father, and then in trust for the devisees of his father and their representatives. It was held that this subsequent conveyance, being for the mere purpose of paying debts, was not a revocation of the will beyond that particular purpose; but the trust as to the residue is for the devisees and not for the heirs of the testator.

Likewise, neither a written engagement, unattested as a will, by a testator who has devised lands, that a third person shall have the occupancy of them for life, nor a promise by the devisee to the same effect, can contravene the operation of the devise on the testator's death: *Wood v. Cherry*, 73 N. C. 110.

And a devise of "my interest or legatee's part" in certain lands is not revoked by a purchase by the testator making that interest larger: *Scaife v. Thompson*, 15 S. C. 337.

5. Mortgage to or Reservation by Testator on Sale of Property.—

The fact that a testator, who sells land previously devised, takes a mortgage on the land to secure the price, does not prevent a revocation of the devise: *Adams v. Winne*, 7 Paige Ch. (N. Y.) 97; *Beck v. McGillis*, 9 Barb. (N. Y.) 35; *Brown v. Brown*, 16 Barb. (N. Y.) 569; *McNaughton v. McNaughton*, 34 N. Y. 201. Thus in *Adams v. Winne*, 7 Paige Ch. 97, a testator devised to his son certain portions of his real estate charged with payment of his debts, and devised other portions to his daughters, and gave the rest of his property to his four children, to be divided equally. Thereafter he conveyed one of the lots devised to the daughters and took from the purchaser a bond and mortgage for a balance of the price, and died without collecting the bond and mortgage. It was held that the sale and taking of the bond and mortgage revoked the devise of the lot to the daughters, and that the bond and mortgage were therefore a part of the testator's residuary personal estate.

But in *Parker v. Butler*, 25 N. Y. Supp. 1100, affirmed 76 Hun, 240, 27 N. Y. Supp. 805, testator devised certain lands and contracts for the purchase of lands in West Virginia to trustees for certain purposes, and provided that such property should not constitute a part of the residuary estate. After making the will, testator conveyed an interest held by him in the G. tract of land in West Virginia to certain persons, who therefor executed a declaration of trust in favor of testator, and covenanted to make such conveyances as testator should direct. It was held that the conveyance of the G. tract, and the declaration of trust executed therefor by the grantees, did not withdraw the proceeds of such tract from the devise in trust of the West Virginia lands. This decision, however, was based on the ground that it clearly appeared from the will that the testator did not intend that there should be a conversion of the lands into money by the deed and declaration of trust, and the doctrine of equitable conversion did not therefore apply, but that even if that doctrine did apply, it was clear from the provisions of the will and codicil that the testator intended that the proceeds arising from a sale of the G. lands should be distributed under the trust.

So, also, a conveyance of land in trust to pay debts, and then to revert to the grantor, is not a revocation of a previous will: *Jones v. Hartley*, 2 Whart. (Pa.) 103.

But a grant in fee, reserving rent, with a clause of re-entry, is a revocation of a previous devise of the same lands in a will made by the grantor: *Herrington v. Budd*, 5 Denio (N. Y.), 321; and to same effect is *Skerrett v. Burd*, 1 Whart. (Pa.) 246.

6. Conveyance to or Other Transaction with Devisee.—There is some conflict of opinion on the question whether a conveyance to a devisee of land previously devised to him operates as a revocation of the devise. This question was squarely before the court in *Woodward v. Woodward*, 33 Colo. 457, 81 Pac. 322. W. by his will gave and devised all the real property which he then owned or might thereafter own by any legal or equitable title to A., and subsequently and before

his death conveyed all the property which he owned at the time of the execution of the will to A., who afterward conveyed it to M. This action was brought by the sole heir at law of W. to recover the property from M., upon the ground that the conveyance from W. to A. was without consideration, and also that the land was conveyed by W. to A. in trust for the use, benefit and behoof of W., his heirs and assigns. M. answered denying the allegations as to want of consideration and the alleged trust, and also set up the will of W. Plaintiff in his replication admitted probate of the will, but claimed that it had no operation on the property in question by reason of the subsequent conveyance from the testator to A. It was held that the conveyance of the property did not operate as a revocation of the will, and that the defendant could consistently claim under both the deed and the will, and was not estopped to deny that both the deed and the will conveyed to her grantor the property. "They are not inconsistent instruments; they are not antagonistic; one is but a confirmation of the other, and she can say to the plaintiff, 'If you claim that the deeds were fraudulent, or if you claim that the property conveyed was burdened with a trust, in either event there remained in Ona H. Woodward an equitable title which he conveyed by the terms of the will.'"

Likewise in *Clingan v. Mitcheltree*, 31 Pa. 25, it was held that the execution of a deed, subsequent to the date of a will giving all the testator's property to his wife, by which the testator conveyed a portion of his real estate to a trustee for the use of his wife, would not operate as a revocation of the will.

And in *Welch's Appeal*, 28 Pa. 363, the testator devised his real estate to his son W., and then bequeathed to his daughter J. "the sum of three hundred dollars to her, her heirs and assigns, to be paid within one year after my decease by my son W., out of the profits of the real estate bequeathed to him." Thereafter in his lifetime testator contracted with his son to convey the real estate devised to him in consideration of three thousand six hundred dollars payable on delivery of the deed. A deed was afterward delivered, but no money was paid nor obligations given for the consideration, though in proceedings in the orphans' court it was found that the consideration was the support and maintenance of the grantor and his wife for life and the payment of three hundred dollars given by the will to the testator's daughter. It was held that the subsequent sale of real estate by the testator in his lifetime did not extinguish the legacy.

The case of *Gregg v. McMillan*, 54 S. C. 378, 32 S. E. 447, affords a striking illustration of the doctrine that a devise of real estate cannot be affected by any subsequent transactions between the testator and the devisee. The controversy in this case was over ninety-eight acres of land which plaintiff sought to recover from the executors of the testator. By the terms of the will the land in controversy had been devised to the plaintiff, and subsequently the testator during his life had conveyed it to her. After occupying the land for four years, and before the testator's death, plaintiff had induced the testator to

exchange the ninety-eight acres owned by her for a town lot owned by him, the transfer being consummated by an exchange of deeds between them. A judgment in favor of plaintiff for recovery of the ninety-eight acres as devisee under the will was sustained on appeal. The decision in this case is based on the fact that the land was after-acquired, and therefore subject to the will, and that the doctrine of ademption could not be applied to devises of real estate, even though the obvious intention of the testator should be thwarted.

Again, in *Woolery v. Woolery*, 48 Ind. 532, A, by his will, devised certain real estate to his two sons, B and C. Three years thereafter he and his wife conveyed the same real estate to the son B, who at the same time made his bond for the support of A and his wife during their lives. On some misunderstanding arising, B subsequently reconveyed the real estate to A, and the latter surrendered to B the bond for the support of himself and wife. There was no republication of the will of A after the reconveyance to him of the real estate. A afterward died and the will was probated. It was held that the reconveyance of the real estate to the testator left the title in him at the time of his death as it was when the will was made, and restored the operative power of the will over the subject matter, and the will not being revoked by necessary implication at or before the death of A, it was still in force.

Also, in *Havens v. Havens*, 1 Sandf. Ch. (N. Y.) 324, testator devised real estate to his brother to be in satisfaction of the latter's claim against him. After making the will he laid out a large sum in buildings upon the property, and also reduced the amount of his debt to his brother. It was held that these acts were not a revocation of the devise.

In *Rose v. Rose*, 7 Barb. (N. Y.) 174, where a father had devised a farm to his son, a subsequent conveyance of the same farm from the father to the son by deed was held to amount to a revocation of the devise.

But when land is devised to several persons in fee in undivided shares, a subsequent conveyance by the devisor to one of the devisees of a part of the same land will not revoke the devise to the grantee, but he is entitled to the land conveyed by the deed and to a share in the land remaining under the will; and this although it appears there was a mutual mistake as to the effect of the deed, both parties supposing the land conveyed to be in lieu of the share given to the grantee by the will: *Arthur v. Arthur*, 10 Barb. (N. Y.) 9. It was further held in this case, however, that while a conveyance made subsequent to a devise of land is not a revocation of a devise to other lands to the grantee, if the conveyance be of a portion of the same land it is a revocation *pro tanto*.

In *Seaton v. Lee*, 221 Ill. 282, 77 N. E. 446, testator, after making some minor bequests in his will, devised and bequeathed the residue of his estate to his brothers and sisters to be divided equally, and afterward executed a deed to one of the sisters to a part of his real estate, reserving a life estate in the grantor, and providing that

consideration for the deed should be deducted from the grantee's share of the estate, if that share should be greater than the expressed consideration. This action was brought by the other surviving legatees to set aside the deed upon the ground, among others, that the execution of the deed was an attempted revocation of the residuary clause of the will. But it was held that the deed conveyed an immediate estate in remainder to the land and was not testamentary in its character so as to amount to an attempted revocation of the will.

There are cases which strongly contend that a conveyance by the testator to a devisee of the land devised will revoke the devise, for the devisee and grantee will take by the deed and not by the will, and that even if the deed is canceled in the lifetime of the testator, the will will still be inoperative without a republication: *In re Kean's Will*, 39 Ky. (9 Dana) 25.

And in *Coulson v. Holmes*, Fed. Cas. No. 3274 (5 Saw. 279), a conveyance of property which had been previously devised to the grantee worked a revocation of the devise notwithstanding the conveyance was accompanied by a trust in favor of the devisor. This case, it will be observed, is squarely opposed to that of *Woodward v. Woodward*, 33 Colo. 457, 81 Pac. 322, and seems to make no distinction between an absolute conveyance to the devisee, which would pass all the interest of the testator, both legal and equitable, in the premises previously devised, and one which passed the fee only and left an equitable estate in the grantor which was disposed of by the will, but the decision is based on a strict adherence to the common-law rule that any alteration in the estate of the testator operates as a revocation of his will.

7. Purchase or Perfection of Title to Devised Premises.—Where a testator after making his will perfects his legal title to land of which he was in possession at the date of the will, by accepting a deed thereto, the deed is not a revocation of a devise of his right to such land, and it passes to the devisee: *Smith's Lessee v. Jones*, 4 Ohio, 115.

Likewise, if a devisor, after the execution of a will, purchases land which would be included in the general description of the land devised by the will, it is no revocation of the will in whole or in part: *Blandin v. Blandin*, 9 Vt. 210.

d. Involuntary Alienation.—The same rule which prevails in regard to the voluntary alienation by a testator of land previously devised prevails with reference to an involuntary alienation of the devised premises during the life of the testator, and an involuntary conveyance of the property revokes the will to the extent of the property conveyed. Thus where the testator devised the south half of his farm to A and the north half to B, and after making the will, but previous to his death, a portion of the south half was sold to B under a tax levy, it was held that the alienation of the part sold for taxes was a revocation pro tanto of the will, and it was further held that proof of the declarations of B to show that it was agreed between

him and the testator that the deed of the part sold should be given up to the testator was inadmissible: *Borden v. Borden*, 2 R. I. 94.

Likewise, where testatrix devised her one-half interest in real estate in fee, and afterward the land was taken under eminent domain proceedings, the condemnation revoked the devise: *Ametrano v. Downs*, 170 N. Y. 388, 88 Am. St. Rep. 671, 58 L. R. A. 719, affirming 33 Misc. Rep. 180, 62 App. Div. 405, 67 N. Y. Supp. 128, 70 N. Y. Supp. 833.

e. Alienation of Personal Property.

1. **In General.**—We have previously seen that the doctrine of revocation of wills by subsequent conveyances is predicable only on devises of real property (*In re Brown's Estate*, 139 Iowa, 219, 117 N. W. 260; *Gregg v. McMillan*, 54 S. C. 378, 32 S. E. 447); but we also saw from these cases that the doctrine is sometimes confused with the doctrine of ademption. In the former of the two cases just mentioned, Judge Deemer defined ademption to be "The extinction or satisfaction of a legacy by some act of the testator which is equivalent to a revocation of the bequest or which indicates an intention to revoke." And that it applied only to personal property and specific legacies. It necessarily follows, therefore, that the doctrine of ademption by alienation operates pro tanto only, and as the rules relating to the revocation of wills pro tanto arising from the ademption of legacies will be found treated in the note appended to *Hansbrough's Exrs. v. Hooe*, 37 Am. Dec. 667, we shall give only a few later cases showing how that doctrine has been applied with reference to the revocation of wills. Thus in *Thayer v. Paulding*, 200 Mass. 98, 85 N. E. 868, it was held that a specific legacy of a designated number of shares of corporate stock owned by a testator at the time of the execution of his will is adeemed on the testator's disposing of the same in his lifetime, or on the property ceasing to exist.

And in *Washbon v. Washbon*, 60 Hun, 576, 14 N. Y. Supp. 398, testator bequeathed to defendant S certain patents "in consideration that the said S will carry on the business of making and selling machinery under these patents for ten years after my decease, and that he will" pay one-half of the net profits of the business to a certain church, "and at the end of said ten years the said S to become the absolute owner of the patents and the business of making and selling them." Afterward testator and S entered into a partnership agreement by the terms of which they were to manufacture under the patents for a term of five years and to share the profits and losses in certain proportions, and "in case of the death of either copartner before the time hereinbefore limited for the termination of the copartnership, the firm business shall notwithstanding be continued by the survivor until the said full term of five years shall have expired, the profits and losses" to be shared in certain proportions, and at the end of the term the firm name, goodwill, and patents to become the sole property of the survivor. It was held that such provision of the will was revoked by the contract, 4 Revised Statutes, eighth edition, page 2549, section 48, providing that any act of the

testator wholly inconsistent with a previous testamentary disposition of his property shall operate as a revocation thereof.

And in *Re Forney's Estate*, 161 Pa. 209, 28 Atl. 1086, where testator, after making his will creating a trust for the administration and management of his estate, including the publication of a newspaper of which he was owner, sold the newspaper, it was held that the sale of the newspaper operated as a revocation of the will pro tanto only.

2. Change in Form of Personal Property.—In *Succession of Irwin*, 33 La. Ann. 63, it was held that, where a testator after making a will giving his debtor a claim against him, exchanges with the debtor the original evidence of the debt for the debtor's bond, or other evidence of indebtedness, the legacy is not revoked by implication; but in the later case of *Succession of Batchelor*, 48 La. Ann. 278, 19 South. 283, it was held that where testator bequeathed a note, and the amount thereof was subsequently collected at his instance, and placed to his credit, there was a revocation of the legacy. The court distinguished this case from the *Irwin* case (33 La. Ann. 63) by saying that in the *Irwin* case the conclusion of the court "was in regard to the exchange by the testator of a claim bequeathed based on an indebtedness for the bonds of his debtor. The testator had not parted with his claim. The debt remained, and the original obligation remained, and underwent no material modification, save in the form of the evidence of the same"; and then went on to say: "Here there was no exchange. The debt was paid and the note was canceled. The legacy was not of a sum of money, but of a contract or debt. It was not perfect until the moment the testator died, and then it took place as to what was due."

In *Horner v. Clements* (N. J. Ch.), 11 Atl. 465, a husband executed a declaration of trust in favor of his wife of certain funds, which she accepted, and the trustee received the funds. Afterward the wife bequeathed the proceeds of the trust funds to complainant, her second husband. The trustee invested the trust fund in a house and lot and took title in the name of the wife, who occupied the same at the time of her death. Defendants contended that this investment was a revocation of the testamentary gift, but it was held that the bequest to complainant was valid. And this ruling was affirmed by the court of errors and appeals: *Clements v. Horn*, 44 N. J. Eq. 595, 18 Atl. 71.

VI. Miscellaneous Illustrations Showing When Revocation from Subsequent Sale of Property is Implied and Extent of Revocation.

Under the Alabama code (sections 1602, 1603), the subsequent execution of a deed by the testator is not per se an implied revocation of a will previously made, unless the intention to revoke such will plainly appears; especially where the deed is liable to be set aside for fraud, or a large portion of the purchase money is unpaid at the time of the testator's death; and when such deed amounts to an implied revocation, but does not convey all the property embraced

in the will, the will is provable on account of this residuum: *Powell's Distributees v. Powell's Legatees*, 30 Ala. 697.

And a written instrument, whereby a testator, in compromise of a pending suit, surrenders his interest in certain slaves therein involved, does not operate as an implied revocation in toto of a will previously executed embracing said slaves and other property: *Taylor v. Kelly*, 31 Ala. 59, 68 Am. Dec. 150.

In *Re Tillman's Will* (Cal.), 31 Pac. 563, it was held that, since Civil Code, section 1292, providing that a written will can only be revoked by a writing or by its destruction, a contest interposed to a petition for the probate of a will, which alleged that the property devised was, after the execution of the will, conveyed to contestant, presents no ground for contest. But it is plain that the court did not intend by this ruling to say that a sale of previously devised property will not work a revocation pro tanto, but only to hold that it will not revoke a will in toto, i. e., as to the appointment of executors; for it said that the sale in this case "could only take out of the operation of the will the property conveyed, as a will can only operate upon so much of the property as legally and equitably belonged to the testatrix at the time of her death."

Likewise, the sale of lands devised, subsequent to the execution of the will, operates only as a revocation pro tanto, and does not prevent its probate as to the other property embraced in it: *Moore v. Spier*, 80 Ala. 129; and to same effect is *Hawes v. Humphrey*, 26 Mass. (9 Pick.) 350, 20 Am. Dec. 487. And this for the reason that the will being suffered by the testator to remain uncanceled evinces that his intention was not changed with respect to the other property therein devised or bequeathed: *Carter v. Thomas*, 4 Me. (4 Greenl.) 341. For it is abundantly held that the sale of lands devised subsequent to the execution of the will operates only as a revocation pro tanto, and does not prevent its probate as to the other property embraced in it: *Moore v. Spier*, 80 Ala. 129; *Hawes v. Humphrey*, 26 Mass. (9 Pick.) 350, 20 Am. Dec. 481; and this for the reason that the will being suffered by the testator to remain uncanceled, evinces that his intention was not changed with respect to the other property therein devised or bequeathed: *Carter v. Thomas*, 4 Me. (4 Greenl.) 341.

In *Wiggin v. Sweet*, 47 Mass. (6 Met.) 194, 39 Am. Dec. 716, a testator devised the use of his dwelling-house to his wife for life, and afterward leased the same for a term which did not expire during his life. It was held that if he received the rent in advance for a time longer than he lived, he thereby revoked his devise pro tanto, and that if the wife failed, for any reason, to receive the rent that accrued after his death, she had no claim on his estate for the amount of such rent.

In *Gage v. Gage*, 12 N. H. 371, an instrument, in the form of a deed, purporting for a consideration to convey all the stock and cattle, horses, etc., and all personal estate which the grantor should have at his death, was executed, intending that it should operate as a will of the personal estate. At the same time, and as part of the same trans-

action, deeds of the real estate of the grantor were executed to the same grantees, they assuming certain liabilities in consideration thereof, and the papers were deposited with a third person. Subsequently the parties entered into a different arrangement relating to both the real and personal property of the grantor, and which was intended to supersede the whole of the first arrangement and be substituted for it. The real estate was sold and the grantees received the avails of it and also some of the personal property, but the deeds above mentioned were not canceled. It was held that the instrument relating to the personal estate had been annulled and revoked so that it could not be allowed to operate as a will.

In *Gray v. Hattersley*, 50 N. J. Eq. 206, 21 Atl. 721, testator devised certain land and premises to his son in fee, subject to the full payment by the son of a mortgage debt thereon and on other land and premises which testator further devised to his daughter. Afterward testator executed a deed, conveying, for a nominal consideration, to his daughter a portion of the land covered by the mortgage and devised to his son, subject to a life estate expressly reserved for himself by testator, "and subject also to encumbrance of mortgage." The deed also contained the usual covenants of seisin and warranty, "subject to encumbrances and the life estate hereinbefore mentioned, but no covenant against encumbrances. It was held that the conveyance to testator's daughter was expressly subject to a proportionate share of the mortgage debt, and left the will otherwise unrevoked, and the result of the conveyance was a devise of the remainder of the mortgaged premises, not devised to the daughter, to testator's son, subject to a proportionate share of the mortgage debt, the charge and devise being coextensive.

Again, in *Walton v. Walton*, 7 Johns. Ch. (N. Y.) 258, 11 Am. Dec. 456, after the date of the will, by which two shares in a canal company were devised to the plaintiff, the canal vested in the state under an act of the legislature, which undertook to pay the value of it to the holders, but the testator's interest remained the same, though the two shares were increased to six. It was held that the devise of the stock was not revoked, and that the executor, who had, since the death of the testator, received from the state the appraised value of the stock, was accountable therefor to the devisee.

And in *Vandemark v. Vandemark*, 26 Barb. (N. Y.) 416, testator devised his homestead farm to his son C and gave other property to his other sons and daughters. Afterward he sold most of the farm devised to C. In holding that this sale operated to revoke the will pro tanto only the court said: "It is undoubtedly true that by the sale of the Embree farm, which had been devised to the appellant (C), he has been nearly disinherited. . . . The most of the land devised to him was sold, and the proceeds, being personal property, have probably gone to increase the amount to be received by his brothers Charles and John, to whom the personal estate was bequeathed. But however willing we might be to see the will annulled, and what might seem to us a more equitable distribution of the

property take place, it is not the province of this court to interfere. . . . A change in the property of the testator, subsequent to the execution of his will, operates as a revocation of the devises in the will, just so far as the alteration in the property has had the effect to place it beyond the operation of the provisions of the will, and no further." And to same effect is *Brush v. Brush*, 11 Ohio, 287.

So, too, in *Marshall v. Marshall*, 11 Pa. 430, testator devised an estate to A charged with certain legacies, and devised another estate to W, charged with other legacies, and before his death sold the estate devised to A, and A received part of the purchase money, and, after the testator's death, paid or tendered all the legacies which he was directed by the will to pay. It was held that the sale of the estate devised to A was not a revocation of the whole will, but was only a revocation pro tanto.

And a mortgage of property devised is only a revocation pro tanto: *McTaggart v. Thompson*, 14 Pa. 149. Also where A made a will devising all his real and personal property to certain devisees, and afterward sold all his real estate and conveyed the same, this sale was held to be a revocation of the will as to the real estate only.

And where property included in a will is subsequently incorporated into a deed by testator to the devisees without revoking the will, the will remains operative as to all the property except that affected by the deed: *Dawson v. Dawson*, 2 Strob. Eq. (S. C.) 34.

In *King's Exrs. v. Sheffey's Admr.*, 8 Leigh (Va.), 614, testator devised one-third of the rents and profits of his real estate to his wife, for life, and directed that after her death the real estate should be sold, and the proceeds divided among certain persons named. The wife of the testator died during his lifetime, and he afterward sold the real estate. It was held that the devise of the proceeds was revoked by the alienation.

The old case of *Verdier v. Verdier*, 8 Rich. (S. C.) 135, affords such an excellent illustration of the rule that no mere change in a testator's estate will operate as a revocation of his will, unless the intention of the testator as expressed in the will is thereby impossible of being carried out, that we call attention to it. Here at the date of the will the entire estate, both real and personal, was estimated at between three thousand dollars and ten thousand dollars and was devised to testator's wife. At the date of testator's death, some thirty years afterward, the estate was estimated at between three hundred thousand dollars and five hundred thousand dollars. There had also been some change in the social relations and moral duties of the testator, he having brought two of his nephews from France, who had rendered him valuable services in the management of his affairs. But it was held that these changes in the pecuniary circumstances of the testator and in his social relations and moral duties did not amount to an implied revocation of his will.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

**KEITH v. CHICAGO, BURLINGTON AND QUINCY
RAILROAD COMPANY.**

[82 Neb. 12, 116 N. W. 957.]

BENEFIT ASSOCIATIONS—Physical Disability, What is.—Railway employ es only were permitted to join the relief department of the defendant company, an institution organized to pay disability benefits to members. The contract for benefits provided: "The word 'disability' shall be held to mean inability to work." Held, that the words "physical inability to work" mean inability to perform such labor as the injured member was engaged in at the time of his injury, or similar labor which would enable him to earn wages equally as remunerative. (p. 657.)

BENEFIT ASSOCIATIONS—Recovery from Disability, Effect of Partial.—Under the provisions of such contract, if an injured member of the relief department recovers so that he is able to perform such work as is contemplated in the contract, or similar work equally as desirable and remunerative, then the obligation of the defendants to pay disability benefits ceases. But recovery sufficient to enable him to earn much smaller wages at some other employment, or employment procured through the charity or indulgence of friends or relatives, when, in fact, he has not recovered from his disabilities, is insufficient to release defendants. (p. 658.)

(Syllabi by the court.)

Greene, Breckenridge & Matters and W. H. Hatteroth, for the appellants.

Smyth & Smith, contra.

13 **EPPERSON, C.** This action was instituted by Gant Keith in his lifetime, and later prosecuted by the administratrix of his estate against the Chicago, Burlington and Quincy Railroad Company and the Chicago, Burlington and Quincy Railway Company to recover six hundred and thirty-eight dollars and seventy cents, alleged to be due upon a certificate of membership in the relief fund of the Burlington voluntary relief department for disability benefits at the rate of seventy-five cents a day from December 10, 1901, to April (655),

4, 1904, at which time the said Gant Keith died. On September 11, 1900, the deceased entered the employ of the railway company as a switchman, and became a member of the relief department. Three days later, while thus employed, he received an injury from which it appears he never fully recovered. He was entitled to receive from the relief fund one dollar and a half a day for fifty-two weeks, and thereafter seventy-five cents a day during the continuance of his disability. He received such relief until December 10, 1901, at which time the defendants refused further payment, claiming that his disability had then ceased. At one time Keith attempted to resume his duties as a switchman, but was unable to do so. It is undisputed that he was disabled until December 10, 1901. At that time he reported for work to his employing officer, who tendered him some position as a utility man at the rate of thirty-five dollars a month. This employment Keith refused, either because he was unable to do the work or because the wages offered were unsatisfactory. He then obtained employment as a bartender in his brother's saloon until April, 1902, and thereafter until his death was in the employ of one Dwyer, who succeeded his brother in the saloon business. While in the employ of his brother and for the first year of his employment ¹⁴ by Dwyer he received fifty dollars a month wages, and thereafter sixty dollars a month. During all this time Keith could not place the injured foot upon the ground naturally. He was required to use a crutch or a cane. The toes of the foot stood upright. Every night the foot was swollen. But as bartender he was able to spare his foot, not being required to stand upon it during all the time he was on duty. The evidence shows that he kept a chair behind the bar, which he used whenever he could; that he was enabled a part of the time at least to use a foot-rest. By reason of the injury he was required to quit work occasionally, sometimes one day and sometimes more, and some days he would have to quit for a short time only. His employer testified in substance, that he was not a good man so far as his work was concerned, but from a business standpoint that he was very well thought of; that he took a great deal of interest in the place; that he had many friends throughout the country, and was a good talker. In the court below the plaintiff recovered judgment in the full amount claimed, and defendants appeal.

“The rights of the parties depend upon the construction of a part of one section of the regulations of the relief department in force at the time deceased became a member, and which is

as follows: "Whenever used in these regulations, the word 'disability' shall be held to mean physical inability to work by reason of sickness or accidental injury, and the word 'disabled' shall apply to members thus physically unable to work." It is the defendants' contention that the words "physical inability to work," as used above, mean physical inability to do any work whereby one could maintain himself, and that the deceased, having recovered from his injury so as to be able to perform the duties of a bartender, was under no disability within the meaning of the regulations quoted. The trial court refused an instruction submitting this theory to the jury. Instead, he gave an instruction in which he said: "By the word 'disability' is meant inability to perform the ordinary duties in the employment in ¹⁵ which Keith was engaged at the time of his injuries." It would, indeed, be a harsh rule which would require the relief department to pay to its members continuously the relief promised during disability in the event that such member, although unable to resume the employment in which he was engaged at the time of the injury, should so far recover as to be physically able to earn wages equal to or greater than the wages earned by him in such employment. Such construction cannot be given to the provisions of this contract. If an injured member of the relief department recovers to the extent that he is no longer disabled in the performance of the work contemplated or similar work, that is, employment equally as desirable and remunerative, then the obligation of the defendants to pay disability benefits ceases. The work contemplated is the work of railway employes. The purpose of the department is to partially indemnify its members against the loss of wages occasioned by their inability to perform such labor. In other words, the "disability" for which partial indemnity is paid is the disability which prevents the member from doing the "work" contemplated in the contract, and which results in his financial loss. The regulations of the relief department are similar to the by-laws of a mutual insurance company. They enter into and become a part of the contract. Indemnity to the injured member, and not profits, is the object of the department. This would be defeated if an injured member would be permitted to collect the benefits provided after he had recovered to such an extent that he could enter a similar employment equally as desirable and remunerative.

In *Chicago etc. R. Co. v. Olsen*, 70 Neb. 570, 99 N. W. 847 in the opinion overruling the motion for rehearing it is said:

"There seems to be force in the argument that, if the plaintiff had recovered from the injury so as to be able to perform labor similar and equivalent to that required in the employment in which he was engaged at the time of the accident, or was able to perform the duties of an ¹⁶ engagement that was open and available to him, whereby he could support and maintain himself as he was able to do before the accident, he was 'able to work' within the meaning of that expression in the contract." This is a correct rule, and should be adhered to whenever applicable. Defendants invoke it here. It follows, of course, that the instruction given herein was erroneous, in that it defined "disability" as "inability to perform the ordinary duties in the employment in which Keith was engaged at the time of his injuries." But, as we view it, this error was without prejudice. Under the evidence the judgment rendered was the only one permissible. Keith never became physically able to resume his work as a switchman, nor did he ever become physically able to earn wages in any similar employment, nor was he ever able to earn wages equal to the wages of a switchman. He was retained as a bartender notwithstanding his physical defects, which partially incapacitated him. A review of the evidence leads us to the conclusion that he was able to hold this position by reason of his employer's indulgence, and, further, because of a tenacity of purpose on his part to earn what he could in spite of his impaired physical condition. His condition was such that he could not reasonably be expected to go into the business world and procure remunerative employment. He was badly crippled. People usually do not employ such help except at very small wages. The words "physical inability to work," as used in the regulations of the defendant's relief department, mean inability to perform manual labor which would enable the injured member to earn wages equal to what he would have earned in the employment in which he was engaged at the time he was injured. The fact that the injured member earned wages by employment procured through charitable or indulgent relatives or friends is insufficient to establish his ability to work, within the meaning of the contract. The evidence shows that the minimum which Keith earned in such employment was seventy-two dollars and fifty cents a month, with a prospect for higher wages. The greater ¹⁷ portion of his employment as a bartender he earned twenty-two dollars and fifty cents less than his minimum wages as a switchman. There is no evidence that he could have commanded greater wages as a bartender or in any other employment.

The error of the district court being without prejudice, we recommend that the judgment be affirmed.

Duffie and Good, CC., concur.

By the COURT. For the reasons given in the foregoing opinion, the judgment of the district court is affirmed.

The Phrase "Total Inability to Labor," contained in the constitution and by-laws of an employes' relief association, means a total inability to earn a livelihood at any employment, and not at the particular employment at which the member was engaged at the time of his injury: Baltimore etc. Relief Assn. v. Post, 122 Pa. 579, 9 Am. St. Rep. 147. See, also, Lobdill v. Laboring Men's Mut. Aid Assn., 69 Minn. 14, 65 Am. St. Rep. 542.

The Maintenance of a Relief Department by a railway corporation for the benefit of its employes is not against public policy: State v. Pittsburg etc. Ry. Co., 68 Ohio St. 9, 96 Am. St. Rep. 635. See, however, Chicago etc. R. R. Co. v. Healy, 76 Neb. 786, 124 Am. St. Rep. 830.

BARKLEY v. CITY OF LINCOLN.

[82 Neb. 181, 117 N. W. 398.]

PURCHASER at a Void Tax Sale, Right of to Recover Moneys Paid.—In the absence of a statute, a purchaser at a tax sale cannot, upon failure of his lien, recover the amount expended for taxes from the city levying the same. (By the editor.) (p. 661.)

SUBROGATION Contemplates the Existence of a Lien to which some other person succeeds by reason of having procured an interest in the property. The lien must be an existing one which its holder could have enforced at the time of the transfer of interest. (By the editor.) (p. 661.)

TAX SALE—Right to have a Reassessment of the Property for the Benefit of a Purchaser at a Void.—Section 7792, Annotated Statutes of 1903, providing for the reassessment of property by the city council in all cases where special assessments have been or may be declared void or invalid, does not authorize a reassessment of property for the benefit of a purchaser at tax sale, who fails to recover the amount of such special taxes from the property on account of the illegality of the assessment. (p. 663.)

INJUNCTION to Restrain Enforcement of a Reassessment of Property.—An injunction will lie to restrain the city council from proceeding under color of right to reassess special taxes and levy the same upon property when they have no authority to do so. (p. 665.)

(Syllabi by the court except where stated to be by the editor.)

E. C. Strode, T. J. Doyle and D. J. Flaherty, for the appellants.

E. F. Pettis, contra.

¹⁸¹ EPPERSON, C. In 1892 a special assessment was levied against lots 7, 8 and 9, in block 21, of Lavender's addition to the city of ¹⁸² Lincoln, then owned by Helena Knight, to defray the expenses of paving the streets upon which they abutted. The special assessment was payable one-tenth annually. Default was made in the payment of all taxes levied upon said lots in 1899, including the fifth payment of the said special taxes. One Lessenhop, or his grantor, purchased the premises at a tax sale in November, 1900, and paid the subsequent general and special taxes; and later instituted proceedings in the district court to foreclose the same. The court awarded him a foreclosure of the general taxes, but adjudged the special tax void because of irregularities in the assessment and levy thereof. Thereafter the city council took initiative steps toward the reassessment of said property under the provisions of section 7792, Annotated Statutes of 1903, which provides in part: "The council shall have the power in all cases where special assessments heretofore made or which may hereafter be made, for any purpose, have or may be declared void or invalid, for want of jurisdiction, in making or levying such special assessments or on account of any defect or irregularity in the manner of levying the same, or for any cause whatever, to reassess and relevy a new assessment equal to the special benefits or not to exceed the cost of the improvement for which the assessment was made upon the property originally assessed, and such assessment so made shall constitute a lien upon the property prior and superior to all other liens except liens for taxes or other special assessments." After having given notice of their intended proceeding, the plaintiffs herein instituted this action to restrain defendants from reassessing and relevying taxes for such improvement. Upon trial in the district court, the temporary order of injunction previously issued was made perpetual, and the defendants enjoined from reassessing or relevying the special pavement taxes, and defendants appealed. At the time the taxes were paid by the purchaser, the proceeds thereof were distributed and the amount levied by the city was delivered to it, and was used for the purpose of paying ¹⁸³ bonds issued by the city to raise funds to pay for the improvement in controversy.

Defendants contend that, upon the failure of the purchaser to recover upon his tax sale certificate because of illegality of the taxes, he is subrogated to all the rights of the city, including the right to reassess the property, and that it is the duty of the city council to proceed to relevy the special taxes for his benefit. We are cited to no case which is directly in point,

but it is contended that *Grant v. Bartholomew*, 57 Neb. 673, 78 N. W. 314, lays down a rule broad enough to support the defendants' contention in this case. It is there said, in reference to a void sale for taxes, that the sale will be held "effective as an assignment and transfer of the liens of the public to the tax purchaser, and invests him with all liens and rights which the public had against said real estate by reason of the taxes assessed and delinquent thereon," and "the uniform holding has been that, if the sale was void, no matter for what reason, it was still effective as an assignment of the public's interest." *Grant v. Bartholomew*, 57 Neb. 673, 78 N. W. 314, did not determine the right of a city to reassess property liable to taxation for improvements, nor did the language quoted refer to irregular or illegal taxes, but had reference to an irregular sale for legal taxes, and must be taken to refer only to the lien which the law imposes upon property for and by reason of taxes regularly assessed and levied. That the language quoted did not intend in any way to refer to taxes illegally levied may be seen by referring to the opinion on rehearing (58 Neb. 839, 80 N. W. 45), wherein it appears that the purchaser in that case was denied a lien for the amount paid as special taxes which were irregularly levied. It was for the general taxes only which were regularly levied that the decision of the court relied upon by the appellants herein applied. It is a well-established rule in this state that, in the absence of a statute, the purchaser at a tax sale cannot upon the failure of his lien recover the amount he expended for taxes from the city levying the same: *Pennock v. Douglas County*, 39 ¹⁸⁴ Neb. 293, 42 Am. St. Rep. 579, 58 N. W. 117, 27 L. R. A. 121; *Merrill v. City of Omaha*, 39 Neb. 304, 58 N. W. 121, 78 N. W. 463; *Norris v. Burt County*, 56 Neb. 295, 76 N. W. 551; *Adams v. Osgood*, 42 Neb. 450, 60 N. W. 869; *McCague v. City of Omaha*, 58 Neb. 37, 58 N. W. 121, 78 N. W. 463; *Martin v. Kearney County*, 62 Neb. 533, 87 N. W. 351. It would seem, therefore, that no occasion would exist for a reassessment and relevy of the property, inasmuch as the taxes have been paid by the purchaser. The city not being required by law to refund the same, it would necessarily follow that it could not voluntarily reimburse him. It is a rule, requiring the citation of no authorities to support it, that a municipal corporation can levy taxes only for the purposes authorized by statute. There is not now, and never has been, in this state a statute making a city liable to the purchaser at tax sale for the repayment to him of the amount he expended in the payment of taxes upon his failure to collect the same from

the property. Defendants argue, notwithstanding the rule so firmly established by the cases cited above, that the reassessment and relevy may be made by the city council for the benefit of the purchaser on account of his right to subrogation. The doctrine of subrogation can hardly be carried to this length. It contemplates the existence of a lien to which some other person succeeds by reason of having procured an interest in the property. The lien must be an existing one, which the holder thereof could have enforced at the time of the transfer of interests. At no time has the city of Lincoln had a lien upon the property here in controversy. From the time of the attempted levy of the special taxes until such levy was declared void by the district court, the city of Lincoln and the holder of the tax sale certificate had but an apparent lien. Had the sale only been illegal, that is to say, had there been an illegal or insufficient sale of the premises by the county treasurer for the satisfaction of taxes legally levied, there might be some reason to extend to the purchaser the right of subrogation to the lien of the city for such taxes. We do not know of any case, and are cited to none, which gives to the purchaser the right to have the city create a lien to be substituted ¹⁸⁵ for the one which he supposed that he was acquiring at the time of the purchase. In *Merriam v. Hemple*, 17 Neb. 345, 22 N. W. 775, the right to subrogation by the purchaser at a void sale of real estate for taxes is expressly limited to the legal taxes so paid by him, with legal interest. The facts relative to the taxation of property in *John v. Connell*, 61 Neb. 267, 85 N. W. 82, are very similar to the case at bar. That was an action to foreclose a tax sale certificate. A part of the taxes in controversy was a special assessment made to defray the expenses of grading an avenue abutting the lots in controversy. Regular taxes and other special taxes had been paid by the purchaser. The court found that the special taxes for grading were absolutely null and void, but held that the purchaser was subrogated to the lien of the public only to the extent of the taxes legally levied. The court held: "A tax sale certificate based upon a void levy or assessment gives to the person to whom it is issued no lien upon the property described therein."

It is true that section 7792, *supra*, provides that the council shall have power in all cases where special assessments have or may be declared void or invalid for want of jurisdiction in the first instance to assess, etc., but this must be read with reference to the object of the statute; and proceedings thereunder may be had only for the purpose of exercising such au-

thority as is within legitimate scope of the act. It is apparent that the section was intended to provide public revenue, and for this purpose only can proceedings be had thereunder. Such was not the purpose of the defendants herein in their contemplated proceedings which were restrained by the order of the lower court; instead, they were seeking to raise funds for the benefit of an individual who, as above shown, has no claim upon the city. It is perhaps unfortunate that the purchaser cannot recover from a city the amount of the municipal tax he has paid whenever his tax certificate is declared void because of irregularity in the assessment; but we take the law as we find it, and not as we would have it. Could the purchaser recover from the city, there ¹⁸⁶ would be little or no doubt but that the authorities could relevy the taxes. But to hold that the city could refund the purchase price would be to overrule a line of decisions above cited, and, moreover, to create an exception to the well-established and wise rule limiting municipalities to the exercise of such powers as are conferred by statute. To permit a relevy in the case at bar would be to create a fund, which, under the law, could not be repaid to the purchaser. The improvements have been paid for, and the levy under these circumstances would be for personal and not public interests. The purchaser paid the amount of the tax voluntarily. The city did not guarantee the legality of the tax. It is true that he received nothing of value. But he had an opportunity to inquire and ascertain what he was buying before he parted with his money. At that time the statute did not provide for the reassessment of the property. He had no right to expect that in the event the levy was avoided the city would relevy the taxes for his benefit.

In *Budge v. City of Grand Forks*, 1 N. D. 309, 47 N. W. 390, 10 L. R. A. 165, in a case wherein both the facts and the statute authorizing reassessments were similar to the case at bar, it was held: "That a subsequent statute, authorizing municipalities to reassess, . . . was intended for the benefit of the taxing municipalities only, and that, where such municipality had received the amount of the former assessment by the sale of the assessed property, the right of such municipality to assess such property for such improvement was extinguished, and could not be reasserted, and no power of reassessment as to such property was given by the statute." This case was criticised in *Schintgen v. City of La Crosse*, 117 Wis. 158, 94 N. W. 84. The two cases can well be distinguished, for both the facts and the laws construed were different; and the Wisconsin case may for the same reasons be distinguished

from the case at bar. The assessment there involved was made, but the taxes were not paid. The city authorities then issued improvement bonds therefor. "The improvement bond is practically ¹⁸⁷ but another form of a special assessment certificate which gives the property owner an opportunity to pay his assessment in installments running through a period of years, instead of paying the whole amount of the assessment at once." The reassessment statute construed expressly provided for the issuance of new improvement bonds in the place of those previously issued. Thus we see that by the statute authorizing reassessment the payment of improvement bonds was provided for by the legislature. From a consideration of the above case, it is apparent that the person for whose benefit the reassessment was made advanced the money upon the improvement bond, and that his money was used for the construction of the improvement. The reassessment statute was enacted in part to save him harmless in the event that the assessment should be declared illegal. In the case at bar, the purchaser at the tax sale did not pay his money for the purpose of constructing the improvement for which the special assessment was made. His venture was a speculation, and not for the purpose of assisting the city officials in the improvement of the streets. And, again, as to the Wisconsin case, the right to reassessment existed when the improvement bonds were issued, and under the statute the holder of such bonds was given all the right, title and interest of such city in and to the assessment on which it is based, including, it appears from the opinion, the right to reassessment. It has been held in this state that, although a tax sale is void, yet it will be effective as an assignment and a transfer of the rights of the public to the purchaser and subrogate him to all the liens against the real estate which the public had by reason of the taxes levied: *Grant v. Bartholomew*, 57 Neb. 676, 78 N. W. 314. The purchase was made in November, 1890, at which time the city of Lincoln had no authority to reassess property. The statute above quoted was enacted in 1901. This statute was not intended for the benefit of the purchasers at tax sales, and did not give to the purchaser any greater rights than he had prior thereto. The ¹⁸⁸ statute may be retroactive in so far as it affects the right of the municipality to raise revenue which otherwise would be lost to it and for whose benefit it was enacted, but it cannot be construed as extending to the purchaser any rights whatever.

It is suggested by the defendants that an injunction suit will not lie. It appears that the notice served by them upon

the plaintiffs gave notice that they would meet at a certain time for the purpose of reassessing taxes against the property in controversy to pay for the improvement, requiring the plaintiffs to appear at the time named and show cause why said property should not be so assessed. The defendants, contending at all times since the institution of this suit that they have the legal right to reassess the property, are hardly in a position to urge that the object of their meeting was for the purpose of considering only whether or not the property should be reassessed. It is apparent that an attempted reassessment would cast a cloud upon the plaintiff's title, and interfere with and delay a sale of said property, a license for which had been granted to one of the plaintiffs as administrator. We think there is no doubt but that injunction is a proper remedy in this case to prevent the defendants, the city council, from proceeding under color of right to do a thing which is not authorized by law, and which will be, as above shown, a great injury to the plaintiffs.

We recommend that the judgment of the district court be affirmed.

Duffie and Good, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

The Right to Recover Money Paid at a Void Tax Sale is considered in the note to Pennock v. Douglas County, 42 Am. St. Rep. 588. In Waldron v. Harvey, 54 W. Va. 608, 102 Am. St. Rep. 959, it is said that taxes paid by a purchaser under a void decree inure to the benefit of the former owner to prevent forfeiture by his nonentry for taxes. And in Green v. McGrew, 35 Ind. App. 104, 111 Am. St. Rep. 149, it is said that although a tax deed does not pass the title to the grantee, he may thereby acquire the lien of the state and be entitled to the compensation provided by statute for his outlays.

The Right to Subrogation by a Purchaser at a Void Tax Sale is considered in the note to American Bonding Co. v. National etc. Bank, 99 Am. St. Rep. 530.

JOHNSON v. SAMUELSON.

[82 Neb. 201, 117 N. W. 470.]

JUDGMENT, Order in Garnishment, When Amounts to.—An unconditional order, made under the provisions of section 249 of the Code, that a garnishee pay money into court, is a judgment within the meaning of the statutes making judgments, when docketed in the office of the clerk of the district court, a lien upon the lands of the debtor situated within the county. (p. 667.)

ACTION to Determine Conflicting Claims of Title, Interest or Claim Justifying Maintenance of.—One who has an apparent judgment lien has an interest within the meaning of the statute providing that an action may be brought and prosecuted on a final decree, judgment or order by any person or persons, whether in actual possession or not, claiming title to real estate against any person or persons who claim an adverse interest therein for the purpose of determining such claim. (By the editor.) (p. 668.)

VENUE OF SUITS to Determine Conflicting Claims of Title.—The venue of an action to quiet title to real estate as against the apparent lien of a void judgment is governed by the provisions of section 51 of the Code, and must be laid in the county in which such real estate is situated. (p. 668.)

STATUTES, Interpretation of.—It is always competent to consider the consequences of a statute, to arrive at the intention of its framers. (By the editor.) (p. 669.)

GARNISHMENT, Loss of Jurisdiction in Proceedings for, When Takes Place and Its Effect.—Where a garnishee, summoned by a justice of the peace under the provisions of section 249 of the Code, makes a disclosure denying any indebtedness or liability to the judgment debtor, and the justice, without announcing any decision or any adjournment of the hearing, informs the garnishee that he is excused, said justice thereby loses jurisdiction of the case; and an order afterward entered requiring the garnishee to pay the amount of the judgment into court is constructively fraudulent. (p. 670.)

(Syllabi by the court except where stated to be by the editor.)

John Tongue and France & France, for the appellant.

Power & Meeker, contra.

²⁰¹ **CALKINS, C.** This was an action to quiet title as against the alleged lien of a judgment or order in garnishment. On the fourth ²⁰² day of April, 1900, the defendant, Mrs. Samuelson, in an action before a justice of the peace, recovered a judgment against one Anderson. Execution being issued on this judgment and returned unsatisfied, the plaintiff, Johnson, was summoned as garnishee, and such proceedings had that the justice entered an order requiring the plaintiff to pay the amount of such judgment into court. Afterward a transcript of the proceedings before the justice was filed in the office of the clerk of the district court for York county. The plaintiff, owning land in said county, claiming that such judgment constituted a cloud upon his title, brought this action

upon the ground that the judgment was fraudulently obtained, and that the justice was without jurisdiction to make the order. Neither of the defendants resided or were summoned in York county; but summons was issued to the counties where they respectively resided, and was there served upon them. There was a judgment for the plaintiff below, and the defendant appeals.

1. The defendant contends that the order made by the justice requiring the plaintiff to pay the amount of the judgment against Anderson into court was not a judgment within the meaning of the statute (Code, secs. 477, 561, 562) making judgments a lien upon the real estate of the judgment debtor. The provisions of the code regulating proceedings against garnishees after judgment and execution returned unsatisfied provide that, in all cases where the garnishee in answering the interrogatories propounded to him shall disclose that he is indebted to the defendant in execution, the court shall order the garnishee to pay over the amount found to be due from the said garnishee to the defendant in execution, which amount shall be collected by execution as in other cases, as near as may be: Code, sec. 249. No proceeding other or further than the entry of the order is provided for or indicated in the statute, and it is plainly the order to pay over the amount found due that is to be enforced by execution. Section 428 of the Code provides that "a judgment is the final determination²⁰³ of the rights of the parties in an action." Orders made in pursuance of section 249 are final (*Schluter v. Raymond*, 7 Neb. 281), and may not be collaterally attacked: *Wilson v. Burney*, 8 Neb. 39; *Union Nat. Bank v. Hickey*, 34 Neb. 300, 51 N. W. 825.

The defendant relies upon the case of *Clark v. Foxworthy*, 14 Neb. 241, 15 N. W. 342, to sustain her position that such order does not amount to a judgment; but we do not think that case supports her contention. It is there held that an order for the payment of money under section 249 of the Code can be rightly made and enforced by execution only upon an unqualified admission by the garnishee of a present indebtedness which the execution debtor would be entitled to but for the garnishment. This is a correct statement of the law which should govern the courts in acting upon the disclosure of a garnishee; but it expressly recognizes the power of a court in a proper case to make an order which can be enforced by execution, and has therefore the quality of a judgment: *Hollingsworth v. Fitzgerald*, 16 Neb. 492, 20 N. W. 836; *Burlington & M. R. R. Co. v. Chicago Lumber Co.*, 18

Neb. 303, 25 N. W. 94. And in *Cobbey v. Wright*, 34 Neb. 771, 52 N. W. 713, it was held that such a judgment, void for facts extrinsic the record, would be set aside and the apparent lien declared of no effect. We are therefore of the opinion that such an order, when made by the district court or docketed in the office of the clerk of the district court upon a transcript from a justice of the peace, creates an apparent lien upon the real estate of the garnishee in the county in which the same is docketed.

2. Under the provisions of our statute (Comp. Stats. 1907, c. 73, sec. 57), "an action may be brought and prosecuted to final decree, judgment or order, by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons who claim an adverse estate or interest therein, for the purpose of determining such estate or interest, and quieting the title to said real estate." That an apparent judgment lien is an interest within the meaning of the word as used in ²⁰⁴ such statute has been recognized in *Cobbey v. Wright*, 34 Neb. 771, 52 N. W. 713; *Corey v. Schuster*, 44 Neb. 269, 62 N. W. 470; *Smith v. Neufeld*, 57 Neb. 660, 78 N. W. 278. The question was fully and ably discussed by Sanborn, C. J., in *Ormsby v. Ottman*, 85 Fed. 492, 29 C. C. A. 295, and the conclusion was reached that the word "interest" is used in the statute in its ordinary signification of including any right, title or estate in or lien upon real estate. We are satisfied that the statute should be so construed. Section 51 of the Code provides that actions to recover for any trespass upon or any injury to real estate, and for the recovery of real property or of an estate or interest therein, shall be brought only in the county where such real estate is situated. We think the language of the statute broad enough to include an action to quiet title. Recovery is the obtaining of a thing by the judgment of a court as the result of an action brought for the purpose: *Keiny v. Ingraham*, 66 Barb. (N. Y.) 250. What a party recovers in an action quia timet is the integrity of his title. Such actions may therefore be properly considered as brought for the recovery of an estate or interest in real property. This question was before this court in *Cobbey v. Wright*, 34 Neb. 771, 52 N. W. 713. This case, first reported in 23 Neb. 250, 36 N. W. 505, was a personal action brought in Lancaster county against Cobbey, the judgment creditor, and the sheriff of Lancaster county, to enjoin the enforcement of a judgment rendered in Gage county against Wright as garnishee, a transcript of which judgment had been filed and such judgment docketed in Lan-

caster county. Service of summons was had upon the sheriff in Lancaster county, and upon Cobbey in Gage county, and the action was then voluntarily dismissed as to the sheriff. For the reason that the action was personal, no real estate being mentioned in the petition, this court reversed the judgment of the district court, which had granted an injunction and remanded the case, with instructions to permit the plaintiff to amend his petition. This the plaintiff attempted to do, but failed to describe the real estate upon which it was claimed the judgment appeared to be a lien, and for that ²⁰⁵ reason the judgment was again reversed and the action dismissed: *Cobbey v. Wright*, 29 Neb. 274, 45 N. W. 460. The plaintiff then brought an action in Lancaster county, describing land owned by him situate therein, upon which such judgment appeared to be a lien. To this action the defendant Cobbey made a special appearance objecting to the jurisdiction of the court. This special appearance being overruled, he made no further defense. A judgment being rendered against him, the same was affirmed by this court: *Cobbey v. Wright*, 34 Neb. 771, 52 N. W. 713. The opinion fails to show where Cobbey was summoned or the grounds of his special appearance; but, taking the history of the litigation as it may be gathered from the three opinions referred to, the inference is plain that Cobbey was not served in Lancaster county, and that that fact was probably the ground of his special appearance. But whether this case is to be determined as one of first impression, or is settled by the decision of *Cobbey v. Wright*, the result must be the same. It is always competent to consider the consequences of a statute in order to arrive at the intention of its framers. To give this statute any other construction would leave the owner of real estate whose title is clouded by apparent liens without remedy in those cases in which the person claiming to own the apparent lien is a nonresident, and, if the language of the statute were less plain than it is, we should still be constrained to hold that the action to quiet title is one in rem, which should be brought in the county in which the land is situated.

3. This brings us to the consideration of the objections which are urged against the validity of the judgment. It appears that the garnishee was first summoned in 1901, and answered concerning his indebtedness, after which disclosure he was told that that was all, and that he could go. No order was entered against him upon this proceeding. He was again summoned in May, 1904, and examined concerning his supposed indebtedness to the judgment debtor, especially upon

two notes which he had given to the judgment debtor, or to the judgment debtor's sister in law. ²⁰⁶ He denied any indebtedness, and testified that he had paid the notes, producing them canceled to corroborate his statement in that regard. He was then told that he could go, "unless something more came up." The justice himself testified that he told the plaintiff "that he could go now—be excused; and that he would call him if any further examination was wanted." It is agreed by all parties that the plaintiff emphatically denied any indebtedness to the judgment debtor, and there does not appear to have been the slightest ground for the rendition of any order against him. Nothing was said to him to indicate that the making of such order was in contemplation. It was just about noon when the garnishee was excused, and the justice testified that he transacted other business that afternoon, and about 4 or 5 o'clock in the evening he decided to, and did, enter the order in question. This was on the twenty-fourth day of May, 1904, and the plaintiff Johnson testified that he had no knowledge of the entering of such order until about election time, November, 1905. The justice undertakes to deny this, but his testimony is not convincing, and we are satisfied with the finding of the district court that the plaintiff had no knowledge of the entry of this order until about November, 1905, when it was too late for him to prosecute any direct proceeding to set the same aside. It was shown that the plaintiff was the owner of a large amount of unencumbered real estate, and in possession of ample personal property, yet no effort appears to have been made to enforce this order until after the plaintiff had discovered the existence thereof in November, 1905, and complained to the justice about the making thereof. We are satisfied that the plaintiff understood, and had a right to understand, when he was excused by the justice from further attendance unless he should be notified to again appear, that the proceedings were ended, and that by the justice's failure to either announce his decision or an adjournment of the hearing he lost his jurisdiction. The making of the order afterward was a constructive fraud, which avoids the judgment. It ²⁰⁷ is not necessary that there should be actual fraud, i. e., that the justice and the attorney for the judgment creditor should have intended to deceive the plaintiff and to keep him in ignorance of the fact of the rendition of such order until it was too late for him to prosecute error or appeal therefrom. It is enough that by their conduct he was lulled into a feeling of ease and safety, and led to understand that the proceeding was ended: *Klabunde v. Byron*

Reed Co., 69 Neb. 120, 95 N. W. 4, 98 N. W. 182; Arnout v. Chadwick, 74 Neb. 620, 104 N. W. 942.

We therefore recommend that the judgment of the district court be affirmed.

Fawcett and Root, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

The Lien Acquired by the Garnishment of a Debt Due the Defendant is not lost by taking judgment against the defendant and the garnishee: Goodwin v. Claytor, 137 N. C. 224, 107 Am. St. Rep. 479.

As to the Estates and Interests to Which Judgment Liens Attach, see the note to Flint v. Chaloupka, 117 Am. St. Rep. 776.

STATE v. DRAYTON.

[82 Neb. 254, 117 N. W. 768.]

CONSTITUTIONAL LAW—Statutes, When will be Upheld.—No act of the law-making power of the state can be unconstitutional unless it is clearly violative of the provisions of the constitution. If it is legally possible to sustain legislative enactments, they should not be held void. (By the editor.) (p. 675.)

CONSTITUTIONAL LAW.—The Police Power is Inherent in Every Government and does not depend on legislative grant or limitations, and unless the act under consideration is open to attack as a violation of the provisions of the fundamental law or an illegal effort to extend the police power over a subject which cannot be brought within the rightful exercise of that power, the law must stand. (By the editor.) (p. 675.)

CONSTITUTIONAL LAW—Powers of the Legislature.—Within constitutional limits, the legislature is the sole judge as to what laws should be enacted for the protection and welfare of the people, and as to when and how the police power of the state is to be exercised. (p. 675.)

CONSTITUTIONAL LAW—Police Power, Prevention of Discrimination, When Within.—The prevention of discrimination in particular localities, in prices of commodities in general use, "for the purpose of destroying the business of a competitor," by selling such commodities at a lower rate in such locality than is charged for the same elsewhere, is within the police power of the state. (pp. 677-679.)

CONSTITUTIONAL LAW—Statute Prohibiting Discrimination for the Purpose of Destroying Competition, When not Invalid.—A statute declaring that any person, firm or corporation engaged in the production, manufacture or disposition of any commodity in general use, which shall, for the purpose of destroying the business of a competitor in any locality, discriminate between different sections, communities or cities of the state by selling such commodity at a lower rate in one section than is charged by such party in another

section or community, after making due allowance, if any, in the grade and quality and in the actual value of transportation, shall be guilty of unfair discrimination, is not unconstitutional. (By the editor.) (pp. 675, 680.)

CONSTITUTIONAL LAW—Statute Against Discrimination to Destroy Competition, When not Class Legislation.—The said act does not prevent persons and corporations dealing in commodities in general use from selling them at such price as such person or corporation may see proper to demand, nor is it class legislation within the constitutional prohibition. (pp. 680, 681.)

(Syllabi by the court except where stated to be by the editor.)

William T. Thompson, attorney general, W. B. Rose and S. D. Thornton, for the plaintiff in error.

W. D. McHugh, Jackson & Kelsey and Isaac E. Congdon, contra.

255 REESE, J. An information was filed in the district court for Antelope county, in which it was charged that the defendant, the agent of the Atlas Elevator Company, a corporation incorporated under the laws of the state of West Virginia, and doing business in this state and engaged in the sale and distribution of lumber, lime, plaster, cement and brick, commodities in general use in the village of Orchard, in Antelope county, and in the village of Brunswick, in the same county, on the twentieth day of August, 1907, in the county and state aforesaid, "did unlawfully, maliciously and intentionally, for the purpose of destroying the business of a competitor in the village of Orchard, in Antelope county, in the state of Nebraska, discriminate between different sections of the state of Nebraska, to wit, the village of Brunswick, in Antelope county, in the state of Nebraska, and the village of Orchard, in Antelope County, in the state of Nebraska, by selling such lumber, lime, plaster, cement and brick at a lower rate in the village of Orchard, in said county and state, than is charged by the Atlas Elevator Company for lumber, lime, plaster, cement and brick in the village of Brunswick, in said county and state, after making due allowance for the difference in the grade, quality and the actual cost of transportation from the point of production of said lumber, lime, plaster, cement and brick, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Nebraska."

The defendant filed his motion to quash the information, **256** alleging the following reasons and grounds therefor: First. Because the legislative enactment by the legislature of the state of Nebraska, under which the said information was filed, contravenes the provisions of the constitution of the United

States of America. Second. Because the legislative enactment contravenes the provisions of the constitution of the state of Nebraska, and that such enactment is unconstitutional and void. Third. Because the facts stated in the information are not sufficient to constitute an offense under the laws of the state of Nebraska."

The district court sustained the motion, following the order with the recital: "It appearing to the court that no valid information can be filed against the defendant under the statute and laws of the state, under which the information was filed, it is ordered that the defendant be discharged and his bail released." The county attorney excepted to the ruling and order of the court, and brings the case to this court for review under the provisions of sections 483 and 515 of the Criminal Code.

There is no attack made upon the form of the information in the briefs of contending parties, and nothing was said upon the subject in the oral arguments; hence no reference will here be made to it. The whole contention is as to the constitutionality of the act of April 3, 1907, published as chapter 157, Laws of 1907. The act is too long to be copied here in full, and we must be content with a reproduction of the first section, which is as follows:

"Section 1. (Local Unfair Discriminations.) Any person, firm, company, association or corporation, foreign or domestic, doing business in the state of Nebraska, and engaged in the production, manufacture or distribution of any commodity in general use, that shall intentionally, for the purpose of destroying the business of a competitor in any locality, discriminate between different sections, communities or cities of this state, by selling such commodity at a lower rate in one section, community or city, than is charged for said commodity by said party in ²⁵⁷ another section, community or city, after making due allowance for the difference, if any, in the grade or quality and in the actual cost of transportation from the point of production, if a raw product, or from the point of manufacture, if a manufactured product, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared unlawful."

The other sections prescribe the penalties for a violation of the law and the methods of its enforcement, but which we need not here notice. We have been favored with able oral arguments at the bar of the court, as well as very elaborate briefs in which a multitude of cases are cited, and with a full discus-

sion of the legal principles contended for, but which it will be impossible for us to refer to in detail without extending this opinion to an unreasonable length. As we understand the contention of counsel for defendant, it may be fairly summarized by the following extract from their brief: "A careful examination of the act reveals that it is directed against persons or corporations doing business in the state and engaged in the production, manufacture, or distribution of 'any commodity in general use'; against persons or corporations dealing in commodities which, until the passage of the act, had universally, and ever since mankind began to trade, been regarded as subjects of legitimate and unrestrained commerce and private enterprise. The act is not directed against dangers to the public health or morals. The act is not directed against so-called natural monopolies or business affected with a public interest. The act attacks trading in commodities in general use. It is the converse of an anti-trust law in being an anti-competition law." The argument is that the object and purpose of the act are not within the police power of the state; that its effect would be to stifle competition and thus foster monopolies; that it takes from the citizen the right to contract and to control his property, destroys freedom in trade, and practically compels the merchant and tradesman to conduct and carry on his ²⁵⁸ business at one place only; that it is class legislation, and "operates upon and against the man who has stores in more than one place, and does not affect the dealer in but one place." It is said: "The fundamental error in the act is that it attempts to inquire into a man's intentions with reference to something that is his own private concern, just as much as his religion or politics. Dealing in commodities in general use is something with which the police power of the state has nothing whatever to do. The citizen is a free man, and is the keeper of his own heart and mind." It is contended that the act is violative of the fourteenth amendment to the constitution of the United States, which provides that no state shall deprive any person of life, liberty or property without due process of law, and that no person shall be denied the equal protection of the laws, and that the similar provision in the constitution of this state is also violated by this act. Many cases are cited by which it is sought to maintain this contention; but, in the view which we take of the law, we are not able to see that they can be applied. They refer, in the main, to the statutes which seek to control and limit transactions in the ordinary and lawful commerce of the country, such as the issuance of trading stamps, the

conferring of presents or gratuities out of one's own property for the purpose of drawing custom, the right of the individual to engage in any line of lawful business he may see proper to follow; that acts which discriminate in favor of one as against another class of persons engaged in the same lawful business are infractions of the constitution, and therefore void, as well as acts declaring specified transactions unlawful, but exempting from their provisions certain named classes of persons and lines of business; the maintaining by mining or manufacturing companies of stores, truck shops, etc., by which they sell their goods and wares to their employés on credit at a higher price than is charged other customers who buy for cash; that classifications of persons or things must be general and apply to all similarly situated; acts ²⁵⁹ which seek to destroy the right of every competitor to fix his own price upon commodities which he may lawfully sell, or money which he may lawfully loan (subject, of course, to usury laws), and, in general, such acts as seek to invade the reserved right of every individual to transact and carry on his lawful business according to his own judgment, in his own way, untrammelled by discriminatory laws, by which others similarly situated are given preferences over him. In the foregoing we have sought to fairly outline the contention of the defendant, giving in this limited way the substance of the holdings of the cases cited without further reference to them.

At the beginning of our investigations, we are confronted with the oft-repeated and well-settled doctrine that no act of the law-making power of the state can be held unconstitutional unless it is clearly violative of the provisions of the constitution; that, if it is legally possible to sustain legislative enactments, they should not be held void. We are further met with another well-known rule that what is known as the police power is inherent in every government, and does not depend upon legislative grants or limitations; that unless the act under consideration is open to attack as in violation of the written provisions of the fundamental law, or an illegal effort to extend the police power over a subject which cannot be brought within the rightful exercise of that power, the law must be sustained. It must also be remembered that with reference to the latter subject, the legislative department of the state, within well-known and well-defined limitations, is the sole judge as to when and how that power is to be exercised.

From a careful reading and study of the act in question, we are driven to the conclusion that it is not subject to attack

upon either of the grounds named. It does not seek to prevent any person or corporation from engaging in any lawful business, nor does it prevent legitimate competition, nor seek to interfere in any way with the due management of any one's business, nor ²⁶⁰ prevent the sale of any commodity at any price which the owner may fix or demand. Indeed, the act recognizes the right of all to engage in the production, manufacture, distribution and sale of any and all commodities in general use. There is a clear recognition in law, in commerce, and in the possession and use of property, that every person has the right to use his own as he sees fit, so long as he does not wrongfully use it in such a way as to interfere with the rights of others. The whole fabric of civilized, social and commercial life, and the enjoyment of liberty and ownership of property, are based upon compromises and limitations of the use of one's members and the control of his property. The act in question only provides against the use and sale of one's property for the purpose of destroying the business of a competitor. The owner or dealer may sell for any price he may choose, on any terms he may adopt, without reference to what effect his action may have upon the trade or business of others, so long as he does not do so for the purpose named. It may be that by underselling others he may draw trade away from them, or, indeed, the secondary effect may be to compel them to adopt his scale of prices or abandon their business, yet, if his conduct is not for the purpose and with the intention prohibited by the statute, he is violating no law, and no one can legally object to or interfere with his methods. The statute clearly makes the purpose with which the act is done the controlling element of the offense. As claimed by counsel for the state, the statute under consideration was enacted for the purpose of supplying a defect in the anti-trust laws of the state. It is within the knowledge of all that in many instances persons engaged in the sale of commodities in general use by the people have depressed prices in one locality, where there was competition, and increased them in others, where there was none, thus avoiding loss, until the competitor was driven out of business, when prices would be raised to an unreasonable and oppressive extent, and the people of the district or community supplied ²⁶¹ from that point would be the sufferers. It was evidently the intention of the legislature to prevent that course of conduct if resorted to for that purpose. The law afforded no protection from the injurious effects of such predatory course. If no protection could be furnished to

the people who were compelled to purchase the commodities, it would be easily within the range of possibilities for one person or corporation to practically control the whole commerce of a community, a county, or even the state, exacting such prices as greed might dictate, and yet seeing to it that no others should be allowed to engage in a similar business as competitors. It is within the knowledge of all of mature years that within the last quarter or half century the meats furnished the people of our cities and towns were supplied by local dealers who purchased their livestock from the near-by farmer or stock-grower, slaughtered the animals, and supplied wholesome meats at reasonable prices, and yet paid remunerative prices for the live animals, saving the cost of transportation to and from what are now the exclusive points of manufacture and production. That both the producers and consumers are losers is known to all. That this condition has been brought about by a system of coercion and underselling "for the purpose of destroying the business" of local competitors is also known to all. Is there no power anywhere lodged in the state to prevent this or remedy the evil? If there is, it is with the law-making power. If that department of government has the power, it must be by the exercise of the right of police regulation. Has the legislature that power?

Many writers have sought to define and prescribe the true extent and limitations of the police power, but none has succeeded to the approval and satisfaction of all. It must be conceded that in its operation there is no distinction between persons natural or corporate: *Northwestern Fertilizing Co. v. Hyde Park*, 70 Ill. 634. In *Tiedeman on Limitations of Police Power*, 1, it is said: "The object of government is to impose that degree of restraint upon ²⁶² human actions, which is necessary to the uniform and reasonable conservation and enjoyment of private rights. Government and municipal law protect and develop, rather than create, private rights. The conservation of private rights is attained by the imposition of a wholesome restraint upon their exercise, such a restraint as will prevent the infliction of injury upon others in the enjoyment of them. It involves a provision of means for enforcing the legal maxim, which enunciates the fundamental rule of both the human and the natural law, 'Sic utere tuo ut alienum non laedas.' The power of the government to impose this restraint is called 'Police Power.' By this 'general police power of the state, persons and property are subjected to all kinds of restraints and burdens, in order to

secure the general comfort, health and prosperity of the state, of the perfect right in the legislature to do which no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned.' "

In 22 American and English Encyclopedia of Law, 915, it is said: "It has been found impossible to frame, and is indeed deemed inadvisable to attempt to frame, any definition of the police power which shall absolutely indicate its limits by including everything to which it may extend and excluding everything to which it cannot extend, the courts considering it better to decide as each case arises whether the police power extends thereto. There have been, however, many attempts to define this power in a general way, and the sum of these definitions amounts to this: That the police power in its broadest acceptation means the general power of a government to preserve and promote the public welfare by prohibiting all things hurtful to the comfort, safety and welfare of society, and establishing such rules and regulations for the conduct of all persons and the use and management of all property as may be conducive to the public interest." At page 918: "The police power is an attribute of sovereignty, and exists without any reservation in the constitution, being founded ²⁶³ upon the duty of the state to protect its citizens and provide for the safety and good order of society. It corresponds to the right of self-preservation in the individual, and is an essential element in all orderly governments, because necessary to the proper maintenance of the government and the general welfare of the community. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property, and it has been said to be the very foundation upon which our social system rests. It is founded largely on the maxim, 'Sic utere tuo ut alienum non laedas,' and also, to some extent, upon that other maxim of public policy, 'Salus populi suprema lex.' "

It is true that the ultimate question of the validity of a statutory enactment, by which this power is sought to be exercised, is with the courts, and they will not hesitate to discharge the duty of declaring an act void if clearly so convinced, but subject to the presumptions and limitations herein referred to. The rule upon this subject can, perhaps, be no more clearly expressed by us than by the following: "Under the police power the state can interfere whenever the public interests demand it, and in this particular a large

discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. But the character of police regulations, whether reasonable, impartial and consistent with the constitution and the state policy, is a question for the courts, for the police power is too vague, indeterminate and dangerous to be left without control, and hence the courts have ever interfered to correct an unreasonable exertion or a mistaken application of it; and, when the legislature passes an act which plainly transcends the limits of the police power of the state, it is the duty of the judiciary to pronounce its invalidity and to nullify the legislative attempt to invade the citizen's ²⁶⁴ right, for to hold that every act of the General Assembly passed under the guise of an exercise of the police power or sought to be defended upon that ground was beyond judicial control would render every guaranty of personal right found in the constitution of little or no value": 22 Am. & Eng. Ency. of Law, 936. The legislature, as we must conclusively presume, acted upon the fullest investigation, and upon what appeared to it to be reasonable grounds, and, as must be also assumed, has determined that the prohibition of the reduction of the price of commodities in general use in any particular locality "for the purpose of destroying the business of a competitor in such locality" and discriminating "between different sections, communities or cities" by underselling at the point of competition for the purpose named would be conducive to "the general welfare" of the people compelled to purchase such commodities, and by the act in question has sought to remedy the evil. Has it not the power to do so? As said in *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, 30 L. ed. 220, and quoted in *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. Rep. 992, 1257, 32 L. ed. 253: "The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." If the state has not the power to protect its people from the acts of those who have for their "purpose" the destruction of the business of a competitor, in order that the wrongdoer may have a monopoly, its powers are much more limited than we had supposed. In *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. Rep. 992, 1257, 32 L. ed. 253, the court, quoting from the *Sinking Fund Cases*, 99 U. S. 700, 25 L. ed. 496, said: "Every possible presumption is in favor

of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule. . . . The power which the legislature has to promote the general ²⁶⁵ welfare is very great, and the discretion which that department of the government has in the employment of means to that end is very large." *Waters-Pierce Oil Co. v. State*, 19 Tex. Civ. App. 1, 44 S. W. 936, is an instructive and well-considered case upon the general subject involved in this case. When we take into consideration that it is not the act itself, but the act coupled with the purpose of destroying the business and property of others, which is declared to be criminal, we find but little trouble in arriving at the conclusion that the statute is within the power of the legislature, and is therefore valid.

It is contended by counsel for defendant that "the act interferes with freedom of contract," and is therefore violative of the constitutions of both the federal and state governments. As we have already indicated, we are wholly unable to see where the previously existing right of the individual to enter into lawful contracts is in the least abridged or impaired. It is not the making of contracts which is forbidden, but the conduct, purpose and motives of the party in connection with his acts which brings him within the prohibitions of the law.

It is also contended that the act is void by reason of its classifications, and must therefore be held invalid on the ground of "class legislation." It is said that "the act operates upon and against the man who has stores in more than one place, and does not affect the dealer in but one place"; that "keepers of but one store may compete, intend to build themselves upon the ruins of their fellows who maintain single stores or stores in several places, and to ruin their fellows in order to build themselves up, and the law applauds; but keepers of more than one store doing the very things and with like intentions as single storekeepers are frowned upon, fined and imprisoned." To this we must be permitted to say that we are unable to find any provision in the act which is susceptible of the construction contended for. An individual or corporation may have but one place where the commodity dealt in may be stored or kept in stock, and yet in the "distribution" ²⁶⁶ of that stock may seek to destroy the business of a competitor in another locality, and thus violate the law. There are many cities and villages in this

state which are adjacent to each other, sometimes so near as to cause a stranger, unacquainted with their superficial boundaries, to be unable to say where one leaves off and another begins. A dealer in one may, for the purpose of destroying the business of a competitor in the other, so discriminate as between the two places as to violate the statute. Common experience and observation, within the knowledge of all, is to the effect that many of the strongest and most grasping monopolies of the state have their place of business, their business homes, in but one place, and yet they are "distributing" and "selling" their commodities in practically every city and village within the state. They do not desire competition. They do not hesitate to destroy the business of local dealers, wherever found, by unjust discriminations. If prompted by that "purpose," the law is violated, and it is within the power of the legislature to prevent the discrimination. Again, it is said that by the provisions of the law an act which is of itself lawful may be rendered unlawful by reason of the mind or purpose of the individual accused, and that such mental condition or purpose would be impossible of proof. This is not a question which inheres in the subject before us. The presence or absence of a criminal purpose may or may not be easily ascertained, but with that we now have nothing to do. Each prosecution under the act will have to depend upon its own proved facts. The existence or nonexistence of what is known in criminal law as the criminal mind would be a question for a trial jury under the facts established by the evidence submitted.

Questions are discussed in the brief of defendant which we have incidentally referred to, but without special attention, and which we scarcely think merit a further extension of this opinion.

We find nothing in the act under consideration requiring us to hold it unconstitutional. The district court ²⁶⁷ erred in holding the act of the legislature invalid. The exceptions of the state are therefore sustained.

The Exercise of the Police Power is not limited to regulations to promote the public health, morals or safety, but may extend to such regulations as will promote the public convenience and general prosperity: *Williams v. State*, 85 Ark. 464, 122 Am. St. Rep. 47; *Berea College v. Commonwealth*, 123 Ky. 209, 124 Am. St. Rep. 344; *State v. Redmon*, 134 Wis. 89, 126 Am. St. Rep. 1003. The state, in the exercise of its police power, has the right to enact such laws as are calculated to promote the health, comfort, safety and welfare of society, although such laws may operate as an infringement upon the personal liberty of the citizen, but such laws must be in fact calculated to promote those objects; otherwise they are an arbitrary

restraint on the citizen, and unconstitutional: *Halter v. State*, 74 Neb. 757, 121 Am. St. Rep. 754; *Ex parte Quarg*, 149 Cal. 79, 117 Am. St. Rep. 115; *Equitable Loan etc. Co. v. Edwardsville*, 143 Ala. 182, 111 Am. St. Rep. 34; *Ex parte Hayden*, 147 Cal. 649, 109 Am. St. Rep. 183.

In Testing the Validity of a Given Regulation in the supposed exercise of the police power, the courts resolve all doubts in favor of the legislative action, and sustain it, unless it appears to be clearly outside the scope of reasonable and legitimate regulation: *Williams v. State*, 85 Ark. 644, 122 Am. St. Rep. 47; *Bland v. People*, 32 Colo. 319, 105 Am. St. Rep. 80.

MOYER v. LEAVITT.

[82 Neb. 310, 117 N. W. 698.]

PLEDGOR AND PLEDGEE—*Pretended Sale by the Latter to Himself, When not Ratified.*—If a pledgee notifies the pledgor that he has sold the pledged property and pays him the balance claimed to be left after paying the debt for which the property was pledged, but, as a matter of fact, the pledgee retains possession and has not made any sale, unless to himself, such sale is not ratified by the receipt of such balance without knowledge of the true facts. (By the editor.) (p. 683.)

PLEDGE, Tender of Debt as a Destruction of the Lien.—A tender of the amount secured by pledge of personal property made upon the maturity of the debt, although not accepted nor kept good, will release the property from the lien of the pledge. (p. 684.)

INTEREST MONEY Paid to Consummate a Fraud on the Receiver.—The pledgee of personal property fraudulently represented that he had sold the property pledged and sent twenty dollars to the pledgor as a part of the purchase price, which the latter, relying upon the fraudulent representations, retained until he discovered the fraud. Held, that the pledgor was not liable for interest on the twenty dollars. (p. 685.)

(Syllabi by the court except where stated to be by the editor.)

Allen G. Fisher and Justin E. Porter, for the appellant.

Albert W. Crites, contra.

310 EPPERSON, C. This is a replevin action, and presents to the court a controversy between the parties as to the title and the right to the possession of a certain gold ring with a diamond setting, valued at \$200. The facts out of which the trouble arises were related by defendant substantially as follows: April 3, 1902, the defendant found himself in the city of Crawford without money, but with the diamond here in controversy. He met the plaintiff, and, after verbal negotiations, borrowed from him \$50, payable in three months, and pledged the diamond ring as security therefor. Defendant agreed to pay, and plaintiff agreed to accept, \$5

as interest for the loan. At the same time the defendant gave plaintiff authority to sell the ring for \$150. On June 14th following, the defendant sent to the ³¹¹ plaintiff from Sturgis, South Dakota, a money order for \$55, and requested plaintiff to send him the ring. Plaintiff answered, stating that he had sold the ring for \$75, returned the money order and his personal check for \$20. Defendant cashed the money order and the check. Early in January, 1906, the defendant, who had returned to Crawford, saw the ring in the possession of the plaintiff, visited him at his place of business, and, pretending that he only wished to examine the diamond, obtained possession thereof. This he was enabled to do because the plaintiff did not recognize him as the pledger. Once in possession of the ring, he made his identity known, and tendered to the plaintiff \$70 in currency, representing the \$50 loaned and the \$20 received by check. This the plaintiff refused to accept, whereupon defendant, with notice to plaintiff, deposited the money for the plaintiff with a business man in Crawford. The plaintiff then instituted this action, alleging that he was the owner of the property. Upon trial defendant obtained judgment, and plaintiff has appealed.

Plaintiff testified that the \$50 advanced by him was a loan, but he says that he was authorized to sell the ring for \$75; that the \$5 to be retained was not interest, but was an agreed compensation for his trouble in making the sale. He testified further that he actually sold the ring to a traveling man, and later repurchased. He further testified that no particular time was mentioned for the payment of the loan, but that it was to run a month or two. From the evidence we are convinced that default had not been made in the payment of the loan at the time defendant remitted to the plaintiff the sum of \$55 on June 14, 1902. If plaintiff had made a sale, as he claimed and testified, it was ratified by the defendant. Plaintiff's evidence as to this transaction is not convincing. The jury found against him, and we accept their verdict as final upon this proposition. The conduct of the defendant did not amount to a ratification of a sale by the plaintiff as pledgee to himself. The plaintiff was required to return ³¹² the diamond to the defendant at any time it was called for, if within his power to do so and the amount it secured was tendered to him, unless, of course, there had been a change of title from the defendant to the plaintiff, or an unauthorized transfer had been ratified by the defendant. The plaintiff acquired no rights whatever by the pretended change in his holding from that of bailee to that of owner.

It being established that plaintiff had not in fact sold the pledged property, defendant was entitled to possession when he detected the plaintiff's deceit. About one month after the money tendered had been deposited, the depository refused to hold it longer, and it was taken up by the defendant. The controlling question in the case is thus presented: Can the defendant recover in this action without making his tender good?

It is the general rule that an unaccepted tender of the amount due after maturity of the debt, although not kept good, discharges the lien. As to chattel mortgages, it is the rule in this state that, if the tender be made after default of the payment at the stipulated time, it must be kept good, or it will be entirely unavailing, but that a tender of the amount secured on the day fixed for payment, although not accepted and not kept good, will release the property from the lien. In *Wilkins v. Redding*, 70 Neb. 182, 97 N. W. 238, it was held: "Where personal property is pledged to secure the payment of a debt, the pledger cannot recover the property in a replevin action without paying or tendering the whole amount of the debt and keeping good the tender." The learned commissioner, writing the opinion in that case, failed to distinguish between tenders made upon the maturity of the debt and those made after default, and failed to distinguish between a tender necessary to release the lien of a chattel mortgage and that of a pledge. We find that the reasoning of that case was founded in part on *Tompkins v. Batie*, 11 Neb. 147, 38 Am. Rep. 361, 7 N. W. 747, wherein it was held that an unconditional tender kept good is necessary to defeat the mortgagee's action, but the commissioner overlooked the fact that the rule he quoted from ³¹³ *Tompkins v. Batie* was expressly applied to a tender made after the maturity of the note. There was another rule announced in *Tompkins v. Batie* relative to the effect of a tender made by the mortgagor of chattels, which clearly distinguishes *Wilkins v. Redding*, 70 Neb. 182, 97 N. W. 238, from the case at bar, for it is there also held: "A mere tender of the amount secured by a chattel mortgage to the creditor on the day fixed for payment, although not accepted, nor kept good, has the effect to release the property from the lien of the mortgage." This rule was reaffirmed in *Musser v. King*, 40 Neb. 892, 42 Am. St. Rep. 700, 59 N. W. 744, and *Gould v. Armagost*, 46 Neb. 897, 65 N. W. 1064. In *Wilkins v. Redding*, 70 Neb. 182, 97 N. W. 238, the court seemed to consider that the same rule which controls the lien of a chattel mort-

gage applies to the lien of a pledge. But, if the same rule controls in both classes of cases, it may be seen that *Wilkins v. Redding* does not control the case at bar, inasmuch as the tender of \$55 was made by the defendant herein upon the maturity of the debt which the property was pledged to secure. The remittance made by defendant to the plaintiff prior to the defendant's default in paying the loan was a tender of the amount due, as no objection was made to the form of that tender. The money order was returned by plaintiff, not because he was dissatisfied with the manner of payment, but because he had converted the diamond to his own use, and he returned the money order and his own check for \$20 apparently for the purpose of deceiving the defendant. After the defendant had learned that the plaintiff had not in fact sold the diamond, he again tendered the amount of the loan. If the defendant's right to possession depended upon this tender, we think that it would be sufficient. In view of the deceit practiced by the plaintiff, he can hardly be heard to say that the loan, even at this late date, had matured, and that this tender which was not kept good was insufficient. If the defendant was then in default, it was because of the plaintiff's fraud. Defendant had not paid the loan sooner because he believed that his debt was paid by the sale of the property.

³¹⁴ It is argued by the plaintiff that the tender of \$70 was insufficient because plaintiff was entitled to interest upon the \$20 and the interest was not included in the tender. Three reasons oppose this theory. The repayment of the \$20 was not secured by the pledge. No tender of that sum was necessary in order to enable the defendant to recover. Although the defendant had the use of the \$20, it is apparent from the evidence that the plaintiff had use of defendant's property worth at the time of the trial \$200. The author of this opinion does not know the value of the use of diamonds; but, in the absence of enlightenment, we take it that the plaintiff was benefited by the use of the diamond to an extent at least equal to the benefits resulting from defendant's use of the \$20. And, again, there was no express or implied agreement to pay interest on the \$20; nor did the defendant even wrongfully detain it, nor damage the plaintiff by not repaying it to him. The law will not charge defendant with interest. We find, therefore, that at the maturity of the loan defendant had tendered the amount due, and that, when he discovered the deceit practiced by the plaintiff, he again tendered the amount due upon the loan and kept that tender good until

after the institution of this suit. He later deposited the amount with the clerk of the lower court. Under the circumstances in this case, the plaintiff having through deceit converted the property to his own use, and having twice without good reason rejected the amount due to him when tendered, and claiming to be the owner of the property in controversy, we think that he has abandoned his lien, or at least cannot insist that the defendant has failed to make his tender good.

There is no prejudicial error in the record, and we recommend that the judgment of the district court be affirmed.

Duffie and Good, CC., concur.

315 By the COURT. For the reasons given in the foregoing opinion, the judgment of the district court is affirmed.

The Lien of a Pledgee is Extinguished by a Valid Tender to him of the amount due and his refusal to accept it: Loughborough v. McNevin, 74 Cal. 250, 5 Am. St. Rep. 435; Norton v. Baxter, 41 Minn. 146, 16 Am. St. Rep. 679. And it would seem unnecessary, in order to produce this result, that the tender be kept good: Andrews v. Hoeslich, 47 Wash. 220, 125 Am. St. Rep. 896; Thomas v. Seattle Brewing etc. Co., 48 Wash. 560, 125 Am. St. Rep. 945; Moore v. Norman, 43 Minn. 428, 19 Am. St. Rep. 247.

AULT v. NEBRASKA TELEPHONE COMPANY.

[82 Neb. 434, 118 N. W. 73.]

MASTER AND SERVANT—Fellow-servants, Who are not.—Two gangs of workmen were engaged in the construction of a telephone line, each under a different foreman; the first gang digging the holes and setting the poles therein, the second gang stringing the wires on the poles. Held, that the parties employed in such separate employment were not fellow-servants.

NEGLIGENCE, Master's Contract Against Liability for.—A master cannot by contract with his servant escape liability for negligence. Such a contract is against public policy. (By the editor.) (p. 689.)

MASTER AND SERVANT—Liability for a Defective Pole, When not Avoided by Notice.—A telephone company gave each of its linemen a printed notice setting forth their duties, and stating, among other things, that "all linemen and other employes of the company whose duties require them to work upon or about poles are especially charged with the duty of inspecting the implements with which they work, all poles, cross-arms and wires, and must know that they are safe to work with or upon, before climbing or going upon such poles and cross-arms." Held, that, notwithstanding this notice, the company, in the construction of new lines in which it employed two gangs of workmen, one known as "groundmen," who set the poles, and one known as "linemen," who strung the wires, could not

escape liability for setting a defective pole, from the breaking of which a lineman was precipitated to the ground and injured. (p. 690.)

JURY TRIAL—Instructions, When not Prejudicial.—A judgment will not be reversed because of an instruction which, taken by itself, is ambiguous, and which in one view seems to impose on the master a greater burden than the law imposes in respect to the character of the tools and appliances furnished his servant, if such instruction is qualified by others, so as to make it apparent that the jury were not misled, and the charge as a whole correctly defines the law. (p. 691.)

(Syllabi by the court except where stated to be by the editor, but we are unable to point out the language in the opinion corresponding to syllabus 1 by the court.)

Greene, Breckenridge & Matters, for the appellant.

Gilkeson & Slama and J. M. Galloway, contra.

435 DUFFIE, C. The defendant company was constructing a line of telephone near the town of Yutan, Saunders county, Nebraska, in the months of December, 1905, and January, 1906. Two sets of men, known as groundmen and linemen, were engaged in the construction. The groundmen set the poles and the linemen strung the wires. Each gang was in charge of a foreman who directed the work. The plaintiff was a lineman, and was severely injured by the breaking of a defective pole, upon which he, together with his foreman, was engaged in tightening the wires at the end of the line. They were both near the top of the pole, and fell a distance of some fourteen feet. The defective pole was set by the groundmen something like a week prior to the accident. The plaintiff recovered judgment and the defendant has appealed.

436 A short time after entering defendant's employment the plaintiff signed and acknowledged receipt of a printed direction and notice to employes of the defendant company, a copy of which reads as follows:

"To all linemen, trouble inspectors, and all other employes whose duties require them to work upon or about poles:

"The duties of a lineman are, among other things, to test and inspect poles; reset old poles; set new poles; rebuild old pole lines; climb poles; paint poles; gain poles; cross-arm poles; take down old wires; string new wires; pull slack; knock out crosses; trim trees; straighten up cross-arms on poles that have been pulled out of shape; replace defective cross-arms with new ones; string and hang cables; put up guy wires; set and reset guy stubs; and in fact do everything necessary to keep pole lines, cross-arms, wires, exchange cables

and subscribers' wires in perfectly safe condition and working order. All linemen and other employés of the company whose duties require them to work upon or about poles are especially charged with the duty of inspecting the implements with which they work, all poles, cross-arms, and wires, and must know that they are safe to work with or upon, before climbing or going upon such poles and cross-arms. The company does not employ other persons to make such inspection, but relies upon its linemen and such other employés to make such inspection themselves at the time, and to know that the poles, cross-arms and wires are safe for them to work upon. They must be constantly on the lookout for trouble, and at once, upon discovery, report to the manager or foreman (in writing) any trouble or defect on lines or poles that they cannot at once repair. As the occupation is a more or less hazardous one, those engaged in that line of work must at all times be on their guard and careful for their own safety, as well as the safety of those engaged in working with them, and of the general public. In exchanges where only one lineman is employed, the lineman is the foreman, and must report to the exchange manager in writing any weak or defective wires or poles which he does ⁴³⁷ not immediately repair. Each manager is required to keep a copy of this rule and notice posted in a conspicuous place in his office.

"Omaha, Nebraska, September 1st, A. D. 1903.

"C. E. YOST,

"President.

"I acknowledge that I have received and read a copy of the foregoing this 6th day of December, A. D. 1905.

"C. E. AULT."

Defendant introduced the above copied paper in evidence, and insists that one of the duties of the plaintiff was to inspect all poles on which he was required to work, and that this, if it did not relieve the company of all liability for damages suffered by the plaintiff from the breaking of a defective pole, should be considered in determining whether he was negligent in failing to discover its defective condition. The defendant's contention may be best understood by a quotation from its brief: "In this case the contract between the parties with respect to the duties of the service in which the plaintiff was engaged for the defendant was wholly disregarded. It was treated even as unworthy of consideration as evidence. The injury to plaintiff was received while he was engaged in the work that he was hired to do, and resulted from a risk which he had assumed as a matter of express con-

tract, for when he made the written application, and received a notice of the company's rules on the sixth day of December, it was optional with him to remain or not upon the terms which were thus imposed upon him, and by continuing in the service thereafter the rules of the company, which he acknowledged he received and with which he was familiar, became the very essence of his contract of employment. If this is not so, then it is wholly impossible for an employer to fix the terms upon which he will employ his servants." Whether the master may impose upon his servant duties and obligations not in line of his employment, and relieve himself from liability for negligence in furnishing reasonably safe appliances for use by the servant, is not a question of grave doubt. That he cannot by a direct contract to that effect escape liability for negligence is well settled, such contracts being against public policy. The state has an interest in the ⁴³⁸ lives and healthy vigor of its citizens, which it will not allow the master to endanger by contracting against liability for his negligently endangering them.

In *Consolidated Coal Co. v. Lundak*, 196 Ill. 594, 63 N. E. 1079, the company posted notices to the effect that persons accepting employment did so with full notice that the danger from falling roofs was one of the usual risks; that the manager does not assume that the place where the employé is ordered is not dangerous, but every place is dangerous, and the duty of ascertaining and avoiding the danger is on the employé; that no employé is authorized to run any risks or in relying on the timbermen; that the company by employing timbermen does not agree to secure the roof. It was held that such notices were not rules which should govern all persons working in the mine, but were attempts to make laws under the guise of rules, and, in so far as operating as a contract against the operator's negligence, were void, as against public policy. So in *O'Neil v. Lake Superior Iron Co.*, 63 Mich. 690, 30 N. W. 688, it was held that posted notices reciting that the business is hazardous and that "all employés assume their own risks of accidents or illness, from whatever cause" would not exempt the employer from liability to his employés. In *Missouri, K. & T. R. Co. v. Wood* (Tex. Civ. App.), 35 S. W. 879, a contract between a railroad company and a brake man requiring the latter "not to attempt to couple or uncouple a car unless he knows the coupling is in a proper condition," is an attempt to impose upon the servant a duty which the law imposes on the master; that he is to see that

the implements furnished are in a reasonably safe state of repair, and such contract was held no defense to an action to recover for injury caused by a defective coupling.

In the case we are considering, the evidence is clear that the defective pole which caused the accident was set a week or two prior to the plaintiff's injury. It is also established that the foreman in charge of the linemen had ascended the pole and was engaged in tightening the ⁴³⁹ wires, and that he called upon the plaintiff to come up and assist him. Under these circumstances, the plaintiff had a right to assume that the master, or those engaged by him in setting the poles, had used reasonable care and diligence in the selection of such poles as would not endanger those who were afterward required to work on or about them in the construction of the line. It is probable that after a line is once constructed that the linemen employed by the company have the best opportunity of inspecting and discovering any defects caused by decay, storms or accidents, and it may not be unreasonable to impose upon them the duty of inspection to discover such defects or want of repair as time and weather conditions may work on the line; but we know of no rule of law which will allow the master, by contract or otherwise, to relieve himself from liability for negligently allowing a dangerous condition to be created by one set of employes engaged in one employment, and this dangerous condition imposed upon another set of employes engaged in a different employment. The court did not err in refusing the first instruction asked by the defendant to the effect that the defendant would not be liable, if the evidence disclosed that the nature of the work or the contract of employment made it the duty of the plaintiff to make inspection and discover defects, if a reasonable inspection would have discovered that the pole in question was unfit for use.

The fifth instruction of the court, relating to the duty of the master in furnishing his servant with tools and appliances and a place to perform his work, is in the following language: "It is the duty of the master to provide his servant with a reasonably safe working place, and with reasonably safe tools and appliances with which to work, and if he fails in this regard and the servant is injured in consequence of the negligence of his master to so provide for his servant, and the servant, without fault on his part, sustains injuries in consequence of such failure, then the master is liable for such injury." We cannot approve the ⁴⁴⁰ language of this instruction; at best, it is ambiguous and, if standing alone,

liable to mislead. If the jurors understood the court by the use of the word "negligence" found between the words "the" and "of" in said instruction to mean the neglect or failure of the master to furnish safe tools and appliances, then they were given a wrong impression of the liability imposed upon the master by the law; but if they understood that the court by the use of the word "negligence" meant a negligent failure on the master's part to cause proper inspection of the tools and appliances furnished and to use reasonable care in that respect, then the instruction contains a correct exposition of the law and they were not misled. In view of what the court told the jury in other instructions, it is wholly improbable that the jury were misled or could understand that liability would be cast upon the defendant, unless it was established that it failed to use ordinary care in providing a reasonably safe working place and reasonably safe appliances for its employés. In stating the case to the jury, the court told them that the charge against the defendant was that it "negligently and carelessly caused to be set in the ground a pole which was defective and unfit for use." And in its third instruction the jury were told: "In order to recover in this action, the plaintiff must prove by a preponderance of the evidence the following material facts: First, that the defendant negligently set a telephone pole which it knew or ought to have known to be defective and unfit for use; . . . third, that such injuries were sustained by the plaintiff in consequence of the defendant's negligence in setting said defective telephone pole and commanding the plaintiff to work thereon." The fourth instruction defines negligence in the following language: "The jury are instructed that negligence may consist in either failing to do what, under the circumstances, a reasonable and prudent man would ordinarily have done or in doing what a reasonable and prudent man would not have done." A part of the eighth instruction is in the following language: ⁴⁴¹ "In going about and performing his work the plaintiff had the right to assume that the defendant had exercised care to furnish him a reasonably safe working place, and he was not required to suspect that the defendant had been guilty of negligence, or to make such investigation or inspection as would be prompted only by the suspicion that the defendant had omitted to perform its duty." In the eleventh instruction it is said: "If the jury believe from the evidence that the defendant company negligently set a defective pole, which it knew or, by the exercise of reasonable care, ought to have known to be defective and unfit for use,

... and the plaintiff sustained injuries in consequence of the negligence of the defendant company, as by plaintiff alleged, and without negligence or fault of plaintiff, then plaintiff should recover." The instructions taken all together plainly inform the jury that the charge against the defendant was that it negligently set a defective pole, and that this charge could not be sustained unless the evidence established a failure on the part of the defendant to use ordinary care in selecting such poles as were reasonably safe for use.

A careful consideration of the whole record, not only by the commission, but by the court, convinces us that no reversible error was committed by the trial court, and that its judgment ought to be affirmed. We so recommend.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

A Master cannot by Contract in Advance absolve himself from liability for injuries to a servant caused by the master's negligence. Such a contract is void as against public policy: *Pugmire v. Oregon Short Line R. R. Co.*, 33 Utah, 27, 126 Am. St. Rep. 805.

The Doctrine of Assumption of Risk and Contributory Negligence in the law of master and servant is discussed in the notes to *Huston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 884; *Brazil Block Coal Co. v. Gibson*, 98 Am. St. Rep. 289. As to whether a lineman assumes the risk of the dangers of unsafe or dangerous poles, see *McIsaac v. Northampton etc. Co.*, 172 Mass. 89, 70 Am. St. Rep. 244; *McGorty v. Southern etc. Telephone Co.*, 69 Conn. 635, 61 Am. St. Rep. 62; *Barto v. Iowa Telephone Co.*, 126 Iowa, 241, 106 Am. St. Rep. 347.

WHITNACK v. CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY.

[82 Neb. 464, 118 N. W. 67.]

CARRIERS—Bill of Lading, Parol Evidence to Vary.—When a bill of lading has been issued by a common carrier, and signed and accepted by the shipper, it constitutes the contract for the shipment of merchandise therein described, and its terms cannot be altered or varied by parol testimony. (p. 695.)

CARRIERS—Bill of Lading, Construction of.—The language used in a bill of lading is subject to the same rules of construction which govern other contracts, and while the instrument is to be construed as a whole, invalid conditions will not necessarily render the contract invalid, and it may be enforced so far as it is valid. (p. 696.)

CARRIERS, Initial and Connecting.—A common carrier is not liable for the negligence or default of a connecting carrier in the absence of a contract making it liable therefor. (By the editor.) (p. 697.)

CARRIERS, Initial, Liability of for Loss Occurring After the Goods have Left Its Line, but Due to Its Negligence.—Where a common carrier accepts goods for shipment to be delivered to a connecting carrier, the first carrier will be liable for any damages to the goods resulting directly from the negligence of such carrier, although the loss may not actually occur until after the goods are delivered to the second carrier. (p. 697.)

A RAILROAD COMPANY cannot, Under the Constitution of Nebraska, by Contract with Another Shipper, limit its liability as a common carrier, nor relieve itself from the consequences of its negligence to such shipper. (By the editor.) (p. 697.)

CARRIER, Liability of for Loss of Potatoes by Freezing After Leaving Its Line.—A common carrier undertook during extreme cold weather to carry two carloads of potatoes and deliver them to a connecting carrier. The contract provided that the shipper should furnish a caretaker to accompany the shipment and keep fires in the car to prevent the potatoes from freezing. The carrier separated the two cars while they were in transit and on its lines of railway, so that the caretaker was prevented from attending to one car of the potatoes, and they were thereby permitted to freeze. Held, that the carrier was liable, even though the potatoes may not have frozen until after they were delivered to the second carrier. (p. 697.)

CARRIERS, Burden of Proof of the Cause of Damage to Property by Freezing.—Where a common carrier's contract contemplates keeping two carloads of merchandise together in charge of a caretaker, and it separates the two cars, so that the caretaker is prevented from attending to one of them, and loss thereby ensues, the burden of proof is upon the carrier to prove that there was sufficient cause for separating the two cars. The fact of the separation of the two cars under the circumstances imports negligence. (p. 698.)

NEGLIGENCE, Concurrent, Liability for.—If one suffers damage as the proximate result of the negligence of two others, and the damage would not have occurred from the negligence of either alone, both are held liable to the party injured. (By the editor.) (p. 698.)

JURY TRIAL—Instruction Respecting Concurrent Negligence When None is Pleaded.—If, in an action against an initial carrier to recover damages claimed to be due to negligence, it attempts to shift the responsibility to a connecting carrier, it is proper to instruct the jury respecting the liability for the concurrent negligence of the two carriers, though such negligence is not referred to in the pleadings. (By the editor.) (p. 698.)

(Syllabi by the court except where stated to be by the editor.)

J. E. Kelby, Frank E. Bishop, Fred M. Dewesse and Arthur R. Wells, for the appellant.

George W. Berge and Morning & Ledwith, contra.

465 **GOOD, C.** The plaintiff, Charles C. Whitnack, recovered a judgment against the defendant railway company for damages to a shipment of potatoes while in transit from Omaha, **466** Nebraska, to Fort Worth, Texas, alleged to have been sustained by reason of defendant's negligence. The defendant has brought the case to this court on appeal.

In February, 1905, plaintiff shipped from Omaha, over defendant's line of railway, two carloads of potatoes consigned

to himself at Fort Worth, Texas. Defendant's line of railway extended no farther than Kansas City, Missouri, and from that point the potatoes were to be carried over the line of the Missouri, Kansas and Texas Railroad. The weather was very cold, and, to prevent the potatoes from freezing, it was arranged that a caretaker should accompany the shipment and keep a fire in each of the cars. The potatoes, which were in bags, were so placed in the cars as to leave an open or vacant space in the center of each car. In these vacant spaces oil stoves were placed and lighted to keep the cars warm. A. C. Brown was employed by the plaintiff as caretaker to accompany the potatoes, and to attend to the stoves and see that they were kept filled and burning. The potatoes in charge of Mr. Brown reached St. Joseph, Missouri, in good condition. At this point the train was stopped for some time. Mr. Brown refilled the stoves and adjusted the wicks preparatory to continuing the journey. As the train was leaving St. Joseph, Brown discovered that one of the cars was missing from the train. He made inquiries of the train crew, but received no information as to the missing car. The train was in motion, and he was informed that, if he was going on that train, he must get aboard. He got aboard the train and proceeded on the journey with but one car. The other car, having been cut out of the train at St. Joseph, was left behind. Brown reached Fort Worth with the one car of potatoes in good condition. The other carload of potatoes, with which we have to deal in this case, reached their destination several days later badly frozen and wholly worthless.

The plaintiff contends that the contract for the transportation of the potatoes was for a through shipment, while the defendant contends that the contract of the ⁴⁶⁷ defendant was to carry the potatoes to Kansas City and turn them over to the connecting carrier. The only act of negligence pleaded by the plaintiff was that the defendant negligently separated the cars at St. Joseph, whereby the caretaker was prevented from taking care of the potatoes in the car that was left at St. Joseph, and that, by reason of that negligence, the potatoes were permitted to freeze. The evidence shows that the carload of potatoes, after being detained at St. Joseph for a few hours, was carried to Kansas City and turned over to the connecting carrier from twelve to fifteen hours after the fires had been attended to at St. Joseph. Defendant contends that the freezing of the potatoes did not occur while on its lines or in its possession, and contends that the potatoes froze after they were delivered to the connecting carrier, and that

under the contract of shipment, which will be referred to hereafter, the defendant was not liable for the loss sustained. Defendant relies upon the bill of lading as the contract of shipment, while the plaintiff contends that the contract for the shipment was oral, and that he is not bound by the provisions contained in the bill of lading. The evidence shows that on the day previous to the loading of the potatoes for shipment plaintiff arranged with the defendant for their transportation to Fort Worth. At this time it was arranged that the potatoes should be loaded the next day by A. C. Brown, who would accompany the potatoes as the agent of the plaintiff. The freight rate, the kind of cars to be furnished, and the route were agreed upon. Plaintiff further admits that he understood and knew that a written contract or bill of lading was to be executed, and that he authorized Brown, as his agent, to ship the potatoes and sign such a contract. Brown also testified that he was authorized to, and did, sign the bill of lading. The greater part of this instrument is printed matter, and it clearly shows that it was originally designed as a contract for the shipment of livestock. Most of its provisions relate to livestock shipments, and can have no application to a shipment of potatoes. ⁴⁶⁸ There are other provisions of a general nature which might apply to such merchandise as potatoes as well as to livestock. It is clear that many of the provisions relating to the shipment of livestock must be disregarded. In the printed form, and following the words "cars loaded with," occurs the word "potatoes." The names and numbers of the cars are written in their appropriate places. This contract was used by Brown to secure his free passage as caretaker on the train.

The question is, Does the bill of lading constitute the contract of shipment, or may the plaintiff rely upon the prior oral agreement which preceded the making of the written contract? No doubt exists that an oral contract for the transportation of freight would be valid, but the question is not whether an oral contract would be valid, but whether a written contract was made. That such a one was made is beyond question. May a written contract be disregarded and set aside when it contains many provisions which cannot be given effect because they are wholly inapplicable to the subject matter of the contract? The rule of law is general that, where a written contract has been made between the parties, it cannot be altered or contradicted by parol, and that all oral negotiations leading up to the making of the written contract are merged therein, and this rule is applicable to bills of

lading: 6 Cyc. 427. It was clearly the intention of the parties that there should be a written contract, and one was deliberately made and entered into. The fact that the contract contains many provisions which cannot be given effect, and which it is apparent were never intended to be given effect, does not appear to be any sufficient reason for holding the contract invalid, or to justify setting aside and disregarding the provisions which are applicable to the subject matter of the contract. A bill of lading is an instrument issued by a carrier to the consignor, consisting of a receipt for the goods and an agreement to carry them from the place of shipment to the place of destination: 6 Cyc. 417, and cases there cited. The language ⁴⁶⁹ used in a bill of lading is subject to the same rules of construction which govern other contracts, and, while the instrument is to be construed as a whole, invalid conditions will not necessarily render the contract invalid, and it may be enforced so far as it is valid: *Grieve v. Illinois C. R. Co.*, 104 Iowa, 659, 74 N. W. 192; 6 Cyc. 418.

The bill of lading in the case at bar contains the following provisions: "Nor shall said railway company be liable for loss or damage after delivery to any connecting line, nor for any loss or damage not incurred upon its own line." The defendant contends that the evidence shows that the loss or damage complained of occurred after the delivery of the potatoes to the Missouri, Kansas and Texas Railway Company at Kansas City, and that, under the provisions of the contract above quoted, it is not liable to the plaintiff in this case. The evidence shows that the oil stoves used to keep the potatoes warm would ordinarily burn about twelve hours, and the evidence shows that the stove in the car that was left at St. Joseph was filled and lighted about twelve or fourteen hours previous to its being turned over to the connecting carrier at Kansas City. The defendant argues that the presumption is that the stove continued to burn and keep the car warm, and that the potatoes were not frozen while in its possession. The evidence also shows that the potatoes remained in the yards of the connecting carrier at Kansas City for several days, and that the car when received by it at Kansas City was in bad condition; that several of the boards constituting one end of the car were broken, thus exposing the interior of the car to the cold air. The weather was shown to have been extremely cold during the time the potatoes were in the yards of the connecting carrier at Kansas City. It is not clearly shown from the record when the potatoes froze, whether they suffered from the cold prior to the time they were delivered to the

connecting carrier or afterward. We do not think, however, that this is material.

The rule both at common law and in this state is that a ⁴⁷⁰ common carrier is not liable for the negligence or default of the connecting carrier in the absence of a contract making it liable therefor: *Fremont etc. R. Co. v. New York etc. R. Co.*, 66 Neb. 159, 92 N. W. 131, 59 L. R. A. 939. But this rule does not relieve the initial carrier from liability on account of its own negligence. The first carrier may by its own negligence in dealing with the goods render itself liable to the shipper, even though the actual loss resulting is not apparent until the goods are in the possession of the second carrier. The real question is, Did the loss occur as the direct result of the negligence of the initial carrier? If so, then its negligence was the proximate cause, and it would be liable: *Selma & M. R. Co. v. Butts & Foster*, 43 Ala. 385, 94 Am. Dec. 694; *Norfolk & W. R. Co. v. Sutherland*, 89 Va. 703, 17 S. E. 127; *Fox v. Boston & M. R. Co.*, 148 Mass. 220, 19 N. E. 222, 1 L. R. A. 702. Under our constitution, as interpreted by this court, a railroad company cannot by contract with the shipper limit its liability as a common carrier, nor may it by contract relieve itself from the consequences of its negligence as a common carrier: *Missouri P. R. Co. v. Vandeventer*, 26 Neb. 222, 41 N. W. 998, 3 L. R. A. 129; *St. Joseph & G. I. R. Co. v. Palmer*, 38 Neb. 463, 56 N. W. 957, 22 L. R. A. 335. In the instant case, it may be admitted, for sake of argument, that the potatoes did not freeze until after they were delivered to the connecting carrier at Kansas City. But this would not relieve the defendant from liability if its negligence was the proximate cause of the freezing of the potatoes. The contract of shipment bound the defendant, not only to deliver the potatoes to the connecting carrier, but to deliver them with a caretaker in charge. In this defendant failed. By its act in separating the two cars it made it impossible for the caretaker to remain in charge of both cars. The caretaker could not maintain the fires in the car left behind, and thereby the potatoes in that car were permitted to freeze. This was sufficient to justify the jury in finding that the loss was sustained in consequence of defendant's negligence.

Defendant urges that the record is silent as to what ⁴⁷¹ cause the defendant may have had for separating the cars, and, as there may have been a sufficient cause, that negligence is not proved by showing the mere separation of the cars. The cars were in good condition when started from Omaha. It was contemplated by the contract that the two

cars should be kept together. If any fact existed which would justify defendant in separating the cars, we think it was its duty to notify the caretaker. At any rate, we do not think plaintiff should be required to prove absence of any act that would be a justification. Such a rule would be harsh and unreasonable, and would practically result in a denial of justice.

The trial court instructed the jury, in effect, that if one suffers damage as the proximate result of the concurrent negligence of two other parties, and if the damage would not have occurred from the negligent act alone of either party, then both would be liable to the party injured. Defendant assails this instruction which submitted the question of concurrent liability, because no concurrent negligence of the defendant and the connecting carrier was pleaded. It is apparent from the pleadings and the evidence that the defendant attempted to shift the responsibility for the damage to the connecting carrier, and it was doubtless to meet this phase of the case that the instruction was given. We think it is immaterial that the plaintiff did not plead concurrent negligence on the part of the connecting carrier, nor is it necessary for us to determine whether the evidence disclosed any negligence upon the part of the connecting carrier. The instruction placed no greater burden upon the defendant than the law required. Under this evidence the defendant could not be held liable unless it was negligent, and then only in the event that the loss would not have occurred except for the negligence of the defendant. The instruction as an abstract proposition of law appears to be sound, and we are unable to perceive wherein it was prejudicial to the defendant, and, in view of the defendant's attempt to shift the responsibility⁴⁷² for the loss to the connecting carrier, we think the instruction was properly given.

Defendant has criticised the rulings of the trial court in the giving and the refusal of several other instructions, but the question of the correctness of these rulings is disposed of by the foregoing discussion, and it is not necessary to further refer to them.

We fail to discover any prejudicial error in the record, and therefore recommend that the judgment of the district court be affirmed.

Duffie and Epperson, CC., concur.

By the COURT. For the reasons given in the foregoing opinion, the judgment of the district court is affirmed.

The Liability of an Initial Carrier for the torts and negligence of connecting lines is discussed in the note to Pennsylvania Co. v. Loftis, 106 Am. St. Rep. 604; and the burden of proof as between connecting carriers to show who is at fault for a loss or injury is discussed in the note to Beede v. Wisconsin Cent. Ry. Co., 101 Am. St. Rep. 392. For subsequent decisions on these questions, see Orem etc. Co. v. Northern Cent. Ry. Co., 106 Md. 1, 124 Am. St. Rep. 462; Charles v. Atlantic Coast Line R. R. Co., 78 S. C. 36, 125 Am. St. Rep. 762, and cases cited in the cross-reference note thereto.

The Liability of a Carrier for the Loss of Perishable Goods is discussed in Orem etc. Co. v. Northern Cent. Ry. Co., 106 Md. 1, 124 Am. St. Rep. 462; Baker v. Boston etc. R. R., 74 N. H. 100, 124 Am. St. Rep. 937. If a common carrier negligently and carelessly delays the shipment of goods intrusted to him for transportation, whether they are perishable or not, and such goods are damaged while in transit by an act of God which could not reasonably have been anticipated, but which would not have caused the damage had there been no delay in shipment, the carrier is liable. Such negligence and unreasonable delay are such proximate or concurring causes as render the carrier liable in such case: Bibb etc. Co. v. Atchison etc. Ry. Co., 94 Minn. 269, 110 Am. St. Rep. 361.

As to Whether a Bill of Lading may be Varied by parol evidence, see McFadden v. Missouri Pacific Ry. Co., 92 Mo. 343, 1 Am. St. Rep. 721; Morganton Mfg. Co. v. Ohio etc. Ry. Co., 121 N. C. 514, 61 Am. St. Rep. 679; St. Louis etc. Ry. Co. v. Elgin Con. Milk Co., 175 Ill. 557, 67 Am. St. Rep. 238; Tallassee Falls Mfg. Co. v. Western Ry., 117 Ala. 520, 67 Am. St. Rep. 179; McElveen v. Southern Ry. Co., 109 Ga. 249, 77 Am. St. Rep. 371; St. Louis Iron Mountain etc. Ry. Co. v. Citizens' Bank of Little Rock, 87 Ark. 26, 128 Am. St. Rep. 17.

BUFFALO COUNTY TELEPHONE COMPANY v. TURNER.

[82 Neb. 841, 118 N. W. 1064.]

TELEPHONE CORPORATIONS, Rule of Requiring Payment of Rent in Advance.—A rule of a rural telephone company that telephone rent must be paid six months in advance is reasonable, and a subscriber refusing to comply therewith is not entitled to service from the company.

TELEPHONE CORPORATIONS, Counterclaim in Favor of Subscriber, When does not Justify Refusal to Pay for Services.—Nor will the existence of a counterclaim or setoff asserted by the subscriber, a large part of which is exorbitant and illegal, justify him in demanding that he be given service without prepayment of charges as other subscribers pay. (p. 701.)

TELEPHONE CORPORATIONS, Deductions for Rent While Line is Out of Repair.—A telephone subscriber is presumed to know that his telephone is liable to get out of order, and, if it is situated in the country, that some time may elapse before it can be repaired, and such subscriber is only entitled to a deduction from his bill subsequent to the expiration of a reasonable time after the company had notice of the trouble and has failed to repair it. (pp. 701, 702.)

TELEPHONE CORPORATIONS, Right of Citizens to be Served by.—One paying or offering to pay charges imposed by a telephone corporation is entitled to telephone service, provided he and the members of his family conduct themselves within the reasonable rules of the company. (By the editor.) (p. 703.)

(Syllabi by the court except where stated to be by the editor, but we discover no language in the opinion corresponding to the first syllabus by the court.)

Fred A. Nye, for the appellant.

Warren Pratt, contra.

841 **ROOT, C.** Plaintiff is a corporation engaged in the telephone business in the vicinity of Kearney. Its stockholders, officers and subscribers are farmers, who are served by connecting the telephones with party wires which converge at Kearney, and are there connected with a local switchboard owned, controlled and operated by the Kearney Telephone Company. Plaintiff pays said company a fixed sum for connecting the telephones of its subscribers to complete service. Plaintiff charges one dollar a month, payable six months in advance, for the use of its telephones. Plaintiff's **842** business does not warrant the continuous employment of an electrician or mechanic to repair its telephones, but as repairs are called for it disconnects the faulty instrument and has it repaired in Kearney. Defendant is a stockholder in and a customer of plaintiff. In June, 1905, his telephone did not give satisfaction, and one of plaintiff's officers took it to Kearney for repairs. The instrument was not returned for a week, and defendant, at the suggestion of one of the plaintiff's directors, brought the instrument home with him one day when in Kearney on other business, and for this he insisted that he should receive from plaintiff three dollars and an allowance of twenty-five cents for the week that he did not have the use of the telephone. When the semi-annual rental of six dollars became due in January, 1906, defendant refused to pay unless given credit for three dollars and twenty-five cents, and in March plaintiff disconnected defendant's telephone. Defendant paid said rent, and there was no further difficulty until an attempt was made to collect the second installment of rent for said year. Defendant refused to pay, because plaintiff would not allow him for the time his telephone was out of commission, nor his charges for services hereinbefore referred to, plus a charge of one dollar and fifty cents for reconnecting the telephone in March, 1906. Defendant would not permit plaintiff's employé to take its telephone out of his house. The employé disabled said instrument, and

later the line from defendant's telephone to the party wire was disconnected. Defendant repaired the telephone, reconnected it with the party line, and insisted upon service through the switchboard of the Kearney company, and plaintiff brought this action for an injunction against defendant. The district court perpetually enjoined defendant from in any manner meddling with the appliances of plaintiff, and from making or permitting any connections of the telephone in defendant's house with the lines of plaintiff, or from using said telephone in connection with said lines. Defendant appeals.

1. It is apparent that neither party to this controversy is entirely without fault. Plaintiff is a public service ⁸⁴³ corporation, and should render to each individual in situation to patronize it equal service and upon the same terms. Defendant was not notified that, if he did not pay his rental as demanded, the service would be discontinued and the actual work of disconnecting was done after dusk, and so adroitly in one instance that no one other than a skilled lineman could detect the severance of the lead wire. On the other hand, plaintiff is a small concern, evidently created for neighborhood accommodation, and not as a source of profit to its stockholders. Its resources are slender, and its ability to serve its customers and keep its plant in condition for efficient service depends upon prompt payment of the rentals charged. If a considerable fraction of its subscribers become contentious and refuse to pay the tolls and charges unless counterclaims for faulty service or for insignificant acts performed for its benefit are deducted from the rental, plaintiff would be without means to pay for switching charges and maintenance of its lines and instruments: *Vanderberg v. Kansas City M. G. Co.*, 126 Mo. App. 600, 105 S. W. 17; *Rushville Co-operative T. Co. v. Irvin*, 27 Ind. App. 62, 59 N. E. 327. Although defendant was not specifically informed that, if he did not pay, he would not be permitted to receive service, we are of opinion that he did know who was responsible for the discontinuance of the service and the reasons therefor. Defendant's demand to be paid three dollars for bringing the instrument from Kearney to his home was exorbitant, and was properly disallowed. It appears from the evidence that none of the other stockholders or the directors of the company had ever charged for like services, and, had defendant intimated that he did not intend to abide the custom, some other stockholder or one of the directors, all of whom resided in the neighborhood, would have returned the telephone to his place. Also the demand for a rebate of

twenty-five cents was uncalled for. A telephone subscriber must be presumed to know that the instrument is liable to get out of order, and, if situated in the country, that a reasonable time must pass to ⁸⁴⁴ secure its repair. There is nothing in the record to warrant a holding that the delay of one week was unreasonable in the instant case; and unless the delay was unreasonable, he would not have been entitled to any allowance for impaired service: *Eastern Kentucky T. & T. Co. v. Hardwick*, 32 Ky. Law Rep. 582, 106 S. W. 307. The subsequent charges are based upon the efforts of defendant to forcibly and against the will of plaintiff, and while defendant was in default in the payment of his rental for that very term of six months, compel plaintiff to give him service, and we do not think that he is entitled to collect from plaintiff therefor.

Defendant insists that, as plaintiff had not formally adopted a rule that if subscribers did not pay in advance they would not be given service, the case of *Rushville Co-operative T. Co. v. Irvin*, 27 Ind. App. 62, 59 N. E. 327, does not apply. We are of opinion that, in the circumstances of all the parties to this squabble, it was not necessary for plaintiff to prove the formal adoption of said rule. There is no evidence in the record to indicate that plaintiff arbitrarily discriminated against defendant, or that the same remedy would not have been applied to any other contumacious subscriber. Defendant occupies the unenviable distinction of being the only subscriber who absolutely refuses to pay for the use of a telephone and service. Nor is this case within the principle of *State v. Nebraska Telephone Co.*, 17 Neb. 126, 52 Am. Rep. 404, 22 N. W. 237. In the cited case the relator had refused to pay an accrued charge and his telephone had been taken out. He thereafter tendered the regulation charge for re-installing said instrument, and it appeared that he was able, ready and willing to pay according as other subscribers paid, and the rules of the respondent did not exact a prepayment of charges. In the instant case defendant is able, but neither ready nor willing, to pay the charges according to the rules of plaintiff, nor has he tendered the payment exacted from all subscribers alike.

2. In one particular the decree, we think, is erroneous. Plaintiff charges that defendant and members of his ⁸⁴⁵ family in the use of the telephone would take down the transmitter when other patrons on the party lines were called, and would listen to conversations not intended for them; that they would sing and whistle into the receiver, and break in

on conversations between the other subscribers, and so conduct themselves as to become a nuisance. There is a general finding for plaintiff and a perpetual injunction against defendant. There is not one scintilla of evidence to sustain the charges above referred to. The evidence shows that plaintiff maintains the only telephone service available for defendant, and he should not be precluded from its benefits if he will pay therefor. Defendant, by tendering six dollars to plaintiff, will be entitled to telephone service for six months, and thereafter, by paying that sum twice a year, may have the continued use of plaintiff's telephone, provided that he and the members of his family conduct themselves within the reasonable rules of plaintiff in that use.

The decree should be modified by finding in favor of defendant as to the charges of misconduct in the use of the telephone, and so that he may receive service from plaintiff by paying in advance every six months therefor and abiding by the reasonable rules of the corporation. As thus modified, the decree should be affirmed, and we so recommend.

Fawcett and Calkins, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the decree in this case is modified by finding in favor of defendant as to the charges of misconduct in the use of the telephone, and so that he may receive service from plaintiff by paying it six dollars semi-annually in advance therefor and abiding by the reasonable rules of said corporation. As thus modified, said decree is hereby affirmed.

Judgment modified.

If a Telephone Company cuts out a subscriber for nonpayment of dues on one contract of service, it must reinstate that service for him upon tender of the amount due, and it cannot coerce payment of the amount due on another and separate contract for telephone service with his wife by demanding that that amount be paid before it will reinstate the other service: *Cumberland Tel. etc. Co. v. Hobart*, 89 Miss. 252, 119 Am. St. Rep. 702, and see cases cited in the cross-reference note thereto.

A Regulation of a Water Company that one year's rent will be required in all cases, payable in advance, on the first day of July of each year, is not reasonable, and cannot be enforced. Therefore, a year's rent cannot be collected of one who has used water a few months: *Rockland Water Co. v. Adams*, 84 Me. 472, 30 Am. St. Rep. 368. See, also, *American Water Works Co. v. State*, 46 Neb. 194, 50 Am. St. Rep. 610.

CASES

IN THE

SUPREME COURT

OF

SOUTH DAKOTA.

GARVEY v. ELDER.

[21 S. D. 77, 109 N. W. 508.]

MINING CLAIMS, Relocation of Effected by Unlawful Threats.—If the employés of the claimants of a mine are in possession and proceeding with the assessment work, but are caused to leave such mine and discontinue the work by threats that if they continue work they will be arrested, a relocation based upon the failure to complete the work, and for the benefit of the persons making the threats will not be permitted to destroy the rights of the former claimants. (pp. 705, 706.)

Joseph B. Moore, for the appellants.

William H. Parker and William S. Elder, for the respondents.

77 HANEY, J. This is an action to determine adverse claims to certain mining ground situate in Lawrence county. Defendants' 78 rights rest upon valid lode relocations made in 1896. Plaintiffs' claim is founded upon attempted lode locations made on January 1, 1901. Assessment work having been resumed by the defendants December 26, 1900, and continued until the 31st, it is conceded that defendants are entitled to judgment, provided plaintiffs' conduct constituted a sufficient excuse for defendants' failure to complete the required annual labor for 1900. On this issue the learned circuit court found in substance that during the afternoon of the thirty-first day of December, 1900, the plaintiff Garvey wrongfully entered upon the premises in question and forcibly and by means of threats of violence against the defendants and their employé, one J. T. Roberts, who was then engaged in doing the assessment work for the year 1900, took exclusive possession thereof; that Garvey retained forcible possession, and by force and threats of violence prevented Roberts from continuing work on the morning of January 1, 1901; that

Garvey made pretended locations at 1 o'clock A. M., January 1, 1901, and thereafter retained exclusive and forcible possession until May, 1901, when the defendants re-entered and caused more than one hundred dollars in labor to be expended on each of the claims during the balance of the year 1901; that the ground in dispute was not subject to location at the time of plaintiffs' attempted locations; and that the defendants were forcibly prevented from doing assessment work for the year 1900 by the threats and tortious acts of the plaintiffs.

Though the evidence may not have justified all the expressions employed by the trial court in its decision, with respect to Garvey's conduct, it certainly was sufficient to sustain the finding that, as to these plaintiffs, the ground was not subject to location or relocation on January 1, 1901. On the preceding day Roberts was in actual and peaceable possession, when Garvey notified him that neither he nor any other person representing the defendants would be allowed to work on the ground after that day. This was reported to one of the defendants, who sent Roberts to the grounds on January 1st, when the latter was again told by Garvey that neither he nor anyone representing the defendants could work thereon, that anyone attempting to do so would be arrested, and because of what Garvey said, Roberts refused to return to the claims, though requested ⁷⁹ to do so by the defendants. It may be that Garvey's threats did not imply that he would do more than cause Roberts' arrest. It may be that Roberts did not apprehend or have reason to apprehend any bodily injury if he returned. Nevertheless, it is evident that Garvey's conduct was the direct and only cause of his refusal to return, and, as such conduct was without color of right, we think the plaintiffs should not be permitted to profit by Garvey's wrongful acts. A locator is entitled to protection in the possession of his claim, and cannot be deprived of his rights by the tortious acts of others; nor can an intruder and trespasser initiate any rights which will defeat those of the prior locator: *Erhardt v. Boaro*, 113 U. S. 527, 5 Sup. Ct. Rep. 560, 28 L. ed. 1113. In any view of the evidence, Garvey was an intruder and trespasser, with actual knowledge of defendants' possession. He intended to prevent further work by the defendants. His efforts were successful. "No man can take advantage of his own wrong": Rev. Civ. Code, sec. 2416. On this maxim rests the rule that he who prevents a thing being done shall not avail himself of the nonperformance he has himself occasioned: *Miller v. Taylor*, 6 Colo. 41.

Though it may have been the fear of being arrested rather than the fear of bodily injury which deterred the defendants from continuing the work, it is clear that it would have been continued in good faith but for the unlawful interference of the plaintiff Garvey, and as to him and his coclaimant we think the ground was not subject to location or relocation when their attempted locations were initiated. There may be decisions which seem to hold that the prior locator in this class of cases should persist in his efforts to perform the required labor until prevented by the apprehension of imminent physical violence. If so, we respectfully decline to follow them, believing they do not rest upon sound principles and are calculated to engender unnecessary resorts to physical force.

The judgment of the circuit court is affirmed

Corson, J., not sitting.

For Authorities upon the Question decided in the principal case see the note to McKay v. McDougall, 87 Am. St. Rep. 412.

ROY v. HARNEY PEAK TIN MINING, MILLING AND MANUFACTURING COMPANY.

[21 S. D. 140, 110 N. W. 106.]

PUBLIC LANDS, Contract Respecting, When Void.—An agreement not to protest against an application for a homestead on the public lands is against public policy and void, because a protest in such a case is giving the land department information that the applicant has concealed facts which he ought to have disclosed, or is proceeding to make an entry on false testimony or some other fact which would show the department that the applicant was not entitled to a patent. (p. 709.)

PUBLIC POLICY, Canceling a Deed Which is Founded on an Agreement Against.—Neither law nor equity will ordinarily aid a party who has knowingly entered into a contract void as against public policy by canceling an executed deed made in pursuance of such contract, and restoring to him the property which he has voluntarily parted with in execution of the contract. (p. 709.)

PUBLIC LANDS—Deed Given in Pursuance of a Contract not to Protest Against Application for, Canceling of.—If an applicant for a homestead on the public lands enters into an agreement with a third person that if the applicant will convey a portion of such homestead to such person, he will not contest, protest nor in any manner oppose a claim of such homestead or the issuance of a patent therefor, and the conveyance is accordingly made, but the grantee does, nevertheless, protest against the entry of the homestead, a court of equity will not cancel such conveyance. It is founded on a contract

void as against public policy, and the courts will not aid either party. (p. 709.)

CONDITIONS SUBSEQUENT, Effect of.—The failure of a condition subsequent does not ordinarily confer the right to rescind an executed contract where there has been no fraud or misrepresentation, but the party must rely upon an action to recover the consideration, or damages for breach of the agreement. (p. 710.)

Chauncey L. Wood, Edwin Van Cise and Frank L. Grant,
for the appellants.

Fred H. Whitfield, for the respondents.

140 CORSON, J. This is an appeal from orders of the circuit court overruling defendants' demurrers to the complaint.

The plaintiffs in their complaint, after setting forth the incorporation of the defendant, the Harney Peak Tin Mining, Milling and Manufacturing Company, the appointment of defendant Ledoux as receiver, the application of the plaintiffs to enter a one hundred and sixty-acre tract of land as a homestead near Keystone in Pennington county, alleges as follows: That thereafter the defendant A. R. Ledoux, as receiver for the defendant corporation, by and through his local resident agent, one Frank P. Williams, threatened to oppose said final entry and have said final receipt canceled, and prevent the plaintiffs from receiving a patent to said lands and homestead on **141** behalf of the defendant corporation, and was about to file a protest or contest, after said final proof, for said purpose. Thereupon the plaintiffs and the defendant A. R. Ledoux, as such receiver, by and through his said local agent, Frank P. Williams, made and entered into a contract or agreement whereby it was mutually agreed that, if the said plaintiffs would convey to the defendant A. R. Ledoux, as receiver, a certain five-acre strip of said homestead lands above mentioned, the defendants would withhold all opposition to said final entry and the issuance of patent, and would not contest, protest or oppose in any manner the claim of plaintiffs to their said homestead lands or the issuance of patents therefor, and would put plaintiffs to no costs, expense, trouble or annoyance in regard thereto. That pursuant to said agreement, and for no other consideration, the plaintiffs duly made, executed, acknowledged and delivered to the said defendant A. R. Ledoux, receiver, their certain warranty deed, dated October 15, 1900, and thereby conveyed to the said defendant A. R. Ledoux, in fee, five acres of said homestead lands as therein described, being the identical strip and portion of said land which was so mutually agreed should be conveyed. That the plaintiffs did and performed all the conditions and obligations

of said agreement on their part to be kept and performed; and said defendant A. R. Ledoux, receiver, has, ever since said delivery of said deed, kept and retained the same. Defendants further allege that said Ledoux, in violation of said agreement, filed in behalf of the said corporation a protest against the plaintiff's said entry of his said homestead and demanded the cancellation of the said entry; that thereupon a hearing was had and the said protest dismissed; that subsequently a second protest was filed, and, upon a hearing, the same was dismissed; that Ledoux filed and had recorded the said deed so executed and delivered to him by the plaintiffs; that the plaintiffs, by reason of the said protest, were put to great expense in procuring counsel and witnesses, and that the defendants are insolvent. Plaintiffs further allege that the United States circuit court, in which the action was pending, in which the said Ledoux was appointed receiver, authorized the plaintiffs to bring this action against the said receiver and the said corporation; that demand has been made upon ¹⁴² said receiver for the cancellation and surrender of said deed, which has been refused by the defendant, and the plaintiffs therefore demand judgment against defendants for the cancellation and return of the deed, . . . and for the reconveyance and return to the plaintiffs of the said tract of land therein described and thereby conveyed, and for such other and further relief, etc. The demurrer of the defendant corporation was interposed upon the following grounds: (1) The court has no jurisdiction of the subject of the action; and (2) that the complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiffs, or either of them, against this defendant. The demurrer of the defendant Ledoux, as receiver, was upon the same grounds.

The learned counsel for the appellant have specified in their brief a large number of objections to the sufficiency of the complaint, but in the view we take of the case, it will only be necessary to notice the third and sixth objections. The third objection is as follows: "Another objection to this complaint is it states a contract or consideration for this deed both contrary to the policy of express law and contrary to good morals." It will be observed that it is alleged in the complaint that the defendants, in consideration of the execution of the deed set forth therein, agreed not to contest plaintiffs' application for a patent and not to file a protest against the same. While the defendants undoubtedly had the right to agree not to contest plaintiffs' application for a patent, as that was a matter affecting defendants' own property, and

they could lawfully contract not to contest plaintiffs' application for patent, the agreement not to protest against the plaintiffs' application was clearly against public policy and void. A protest in such a case is giving the land department information, or supposed information, that has come to the knowledge of the protestant that the applicant for a patent has concealed from the land department facts which he ought to have disclosed to them, is proceeding to make the entry upon false testimony or some other fact that would show to the land department that the applicant was not entitled to the patent. It is not competent, therefore, for a party having knowledge of such facts to enter into a contract or agreement that he ¹⁴³ will not present them to the land department, and, as before stated, such a contract is clearly against public policy and void: *Damrell v. Meyer*, 40 Cal. 166; *Huston v. Walker*, 47 Cal. 484; *Snow v. Kimmer*, 52 Cal. 624; *Hoyt v. Macon*, 2 Colo. 502; *Oaks v. Heaton*, 44 Iowa, 116; *McCue v. Smith*, 9 Minn. 252, 86 Am. Dec. 100; *Evans v. Folsom*, 5 Minn. 422; *Mellison v. Allen*, 30 Kan. 382, 2 Pac. 97; *Nichols v. Council*, 51 Ark. 26, 14 Am. St. Rep. 20, 9 S. W. 305. It will be observed from the allegations of the complaint that the defendant *Ledoux* has performed the legal part of his agreement by omitting to file any contest against plaintiffs' application, but has failed to perform the illegal part of the agreement which is against public policy. The plaintiffs, therefore, have no right to a cancellation of the deed executed for the consideration of that part of the agreement as they were parties to the illegal contract. Neither law nor equity will aid a party who has knowingly entered into a contract void as against public policy by canceling an executed deed in pursuance of such contract and restoring to him the property which he has voluntarily parted with in the execution of such a contract except in certain classes of cases not necessary to be noticed in this opinion. It will be noticed that this is an executed contract so far as the plaintiffs were concerned, they having executed and delivered to the defendant *Ledoux* the deed to the property in controversy. Clearly, therefore, the plaintiffs have no right of action against the defendants for the cancellation of the deed in controversy because of *Ledoux's* failure to carry out the terms of that part of the contract which was illegal and void, there being no allegations of fraud in procuring the deed on the part of the defendant *Ledoux*.

The sixth objection is as follows: "This is a case, in any event, by the allegations of the pleading, of a failure of a

condition subsequent existing only in parol. In such a case, the right of action is not to cancel the deed, but for damages for a breach of the agreement." It appears from the complaint that the defendant complied with that portion of the contract on his part by which he agreed not to contest plaintiff's entry, and that no contest was filed, but that, subsequently to the entry, he did, in violation ¹⁴⁴ of his agreement, file a protest in the land office against the plaintiff's entry, and that such protests filed by the defendant Ledoux in behalf of himself and the defendant corporation were dismissed in the land office. It will be seen that the plaintiffs are not entitled to a rescission of the contract for the reason that fraud in obtaining the contract is not alleged, and that the defendants cannot be placed in the same situation that they were before the time for final entry had expired as they could not initiate any contest after the expiration of the time limited against the plaintiff's entry. It further appears from the complaint that the agreement of the defendants was, in effect, a condition subsequent, and the violation of such an agreement does not ordinarily confer upon a party a right to a rescission of an executed contract where there has been no fraud or misrepresentations in obtaining the contract, but the party must rely upon his action to recover the consideration or damages for the breach of the agreement. The only cases, so far as our researches extend, in which it is held that an executed conveyance may be canceled for the failure to comply with the subsequent condition or agreement, and where there was no fraud or misrepresentation in procuring it, is where it is so specified in the deed. In discussing this last objection we have assumed, for the purposes of the discussion, that the agreement of the defendants not to protest the application of the plaintiffs was a valid and binding agreement, but, as before stated, that part of the agreement not performed by the defendant was clearly illegal and void, and could afford no grounds for plaintiff's action. In our view of the case, therefore, the plaintiffs are not entitled to the relief prayed for in their complaint.

We are clearly of the opinion that the demurrers should have been sustained, and the orders overruling the same are reversed.

Contracts Entered into in Contravention of Law are not enforceable: *State v. Wilson*, 73 Kan. 343, 117 Am. St. Rep. 479; *Cheney v. Unroe*, 166 Ind. 550, 117 Am. St. Rep. 391; *Presbyterian Ministers' Fund v. Thomas*, 126 Wis. 281, 110 Am. St. Rep. 919. Neither are contracts which contravene public policy: *King v. Raleigh etc. R. R. Co.*, 147 N. C. 263, 125 Am. St. Rep. 546; *Giblin v. North Wisconsin Lumber*

Co., 131 Wis. 261, 120 Am. St. Rep. 1040; *Schneider v. Local Union No. 60*, 116 La. 270, 114 Am. St. Rep. 549; *Aged Men's Home v. Pierce*, 100 Md. 520, 108 Am. St. Rep. 450. But the power of courts to declare a contract void for being in contravention of public policy is very delicate and undefined, and should be exercised only in cases free from doubt: *Equitable Loan etc. Co. v. Waring*, 117 Ga. 599, 97 Am. St. Rep. 177; *Wood v. Casserleigh*, 30 Colo. 287, 97 Am. St. Rep. 138. While public policy forbids the enforcement of an illegal or immoral contract, it is equally insistent that those which are lawful and contravene none of its rules be duly enforced, and not set at naught nor held invalid on a bare suspicion of illegality: *Stroemer v. Van Orsdel*, 74 Neb. 132, 121 Am. St. Rep. 713.

HEFFRON v. TREBER.

[21 S. D. 194, 110 N. W. 781.]

LEASE, Construction of as to Duration.—A lease of real property executed in April, 1901, for the term of three years, with the privilege of two years additional from and after the first day of July, 1901, at a monthly rental to be paid monthly in advance on the first day of each month commencing July 1, 1901, is a lease for three years from the last-named date, with the privilege of two years additional. (p. 712.)

LEASE with Privilege of Renewal with Guaranty of the Payment of Rent.—If a lease purports to be for three years from a specified date, with the privilege of two years additional, and is accompanied with a guaranty for the payment of the rent during the term of the lease, the guarantor is liable for the additional term, if the tenants avail themselves of their privilege. (p. 712.)

LANDLORD AND TENANT—Lessee, When Deemed to Remain in Possession Under Privilege for an Additional Term, and not as a Tenant Holding Over After Expiration of His Term.—If, under a lease purporting to be for three years, with the privilege of two years additional, the tenants remain in possession after the expiration of the three years, they are to be deemed as electing to be tenants for the two years additional, and not to be tenants remaining in possession after the expiration of the hiring and who are, on the reception of rent by the landlord, deemed, under section 1437 of the Civil Code of South Dakota, to have renewed the hiring but for one year only. (pp. 713, 714.)

Martin & Mason, for the appellants.

Adoniram J. Plowman, for the respondents.

¹⁹⁵ **FULLER, P. J.** Whether appellants have stated facts sufficient to constitute a cause of action against respondent Treber is the only question presented by this appeal from a judgment entered in his favor on sustaining a general demurrer to the following complaint: "(1) That on or about April 5, 1901, they leased in writing unto the defendants Thomas Riley and John W. Ryan lot three (3), in block fourteen (14), in the

city of Deadwood, 'for the term of three years, with privilege of two years additional, from and after the first day of July, A. D. 1901,' at the monthly rental of one hundred and fifty dollars (\$150.00), to be paid monthly in advance on the first day of each and every month, commencing July 1, 1901, which rental the defendants Riley and Ryan agreed to pay therefor. (2) That thereupon, and before the delivery of said lease the defendant John Treber executed and signed the following agreement upon the back of said lease, to wit: 'In consideration of \$1.00 in hand paid me, receipt of which is acknowledged, I guarantee payment of within rent promptly at times it shall become due during term of within lease. Dated April 5th, 1901.' (3) That thereupon possession of said premises was delivered to the said lessees, who have remained in the possession thereof ever since; that at the expiration of three years from the execution of said lease, the said lessees, Ryan and Riley, exercised their privilege of two years' additional time thereon, and remained in the possession of said premises without any new or different agreement or lease with these plaintiffs than the one heretofore set out, and that said lessees are still occupying the said premises under said lease of April 5, 1901. (4) That the said lessees, Riley and Ryan, have paid the rental of said premises stipulated for in said lease up to the 20th day of September, A. D. 1904, and no more, and that there is now due and owing from the said lessees and from the defendant John Treber the rent for said premises since the date last named, September 20, 1904, at the rate of one hundred and fifty dollars (\$150.00).'

The language employed by the contracting parties, aided by the presumption that they intended to avoid absurd consequences, renders unavailable the contention of counsel for respondent that, according to the terms of the lease, the occupancy of the tenants ¹⁹⁶ thereunder for the additional two years must commence on the first day of July, 1901. Plainly the lease should be construed as being for the term of three years from and after the first day of July, 1901, with the privilege of two years additional, at the uniform monthly rental of one hundred and fifty dollars, payable monthly in advance on the first day of each month, commencing July 1, 1901. Although the tenants were given the privilege to terminate the lease at the end of three years, respondent's liability as guarantor is coextensive with the term provided for therein, and consequently the important question presented is whether such tenants were legally occupying the premises under and in strict pursuance of the terms of the lease after the expira-

tion of the three years and during the time the rent accrued to recover which this action was instituted. Because no new or different agreement was made prior to or at the expiration of the three years, it is urged by counsel for respondent that the lessees were holding over after the expiration of their term and had thereby renewed their lease for the period of one year by operation of the following statutory provision: "If a lessee of real property remains in possession thereof, after the expiration of the hiring, and the lessor accepts rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one year": Rev. Civ. Code, sec. 1437. Had the lease provided for notice of renewal for two additional years, or the right to make a new lease for that period, there might be some reason for the contention that the term expired on July 1, 1904, and that the tenants were holding over under the foregoing statutory provision. However, if the tenancy terminated at the end of three years, the lessees were not given the privilege of occupying the premises under the lease for two years additional at the same monthly rental payable as before, and such plain and explicit statements of the parties can be given no effect whatever. As to the rights of the parties, and in legal effect, the instrument does not essentially differ from a lease for a term of five years, in which the landlord gives the tenant an option to terminate such lease by vacating at the end of three years, and his specified term under either lease gives him the absolute right to occupy the premises during the last two years, if he so desires.

¹⁹⁷ For the purposes of the demurrer it must be conceded that the lessees exercised their privilege of two years' additional tenure, and "are still occupying the said premises under said lease of April 5, 1901," as alleged in the complaint. This being true, the conclusion is irresistible that a default exists in the payment of rent which became due during the term of the lease, and for the payment of which respondent became responsible by the express terms of his contract. In construing a lease exactly like this, it is said by the Indiana court: "The term did not necessarily terminate at the expiration of three years. Its termination depended upon the option of the appellee. If the option was exercised, the term continued for five years. There was to be no renewal, nor was there to be more than one term. That term was to be for either three or five years. Its duration depended upon the appellee. Until its termination there could be no tenancy from year to year. If the option was exercised, the term did

not terminate at the end of three years. How was the option to be exercised? Simply by retaining possession. Nothing else was contemplated by the parties. Notice was not required, nor expected, and all the appellee had to do to exercise the option was to keep the premises": *Montgomery v. Board of Commrs.*, 76 Ind. 362, 40 Am. Rep. 250. So, in New York, "where a lease for one year provides that it may be extended for a term of two additional years, and the lessee retains possession after the end of the first year, he thereby elects to extend the term for two years": *Voegel v. Ronalds*, 31 N. Y. Supp. 353. For a valuable consideration, and without the necessity of a renewal or notice of extension, the lessees were here given the privilege of occupying the premises for a term of five years, and, presumably for their accommodation, respondent voluntarily undertook to answer for any default that might occur in the payment of rent at any time during the life of the lease, which is for three years with the privilege of two years additional. The proposition that a tenant under such a lease is not required to give notice in order to lawfully continue in possession during the extended term is further sustained by the following authorities: *Andrews v. Marshall Creamery Co.*, 118 Iowa, 595, 96 Am. St. Rep. 412, 92 N. W. 706, 60 L. R. A. 399; *Terstegge v. First German Mut. Ben. Soc.*, 92 Ind. 82, 47 Am. Rep. 135; *Stone v. St. Louis Stamping Co.*, 155 Mass. 267, 29 N. E. 198 623; *Peehl v. Bumbalek*, 99 Wis. 62, 74 N. W. 545; *Kelso v. Kelly*, 1 Daly (N. Y.), 419. As conclusive of the point that respondent's liability as guarantor applies as well to the rent accruing for the last two years as to the first three years, see *Deblois v. Earle*, 7 R. I. 26; *Decker v. Gaylord*, 8 Hun, 110; *Defau v. Wright*, 25 Wend. 636.

It being thus demonstrated that the lessees were not holding over within the meaning of the statute herein quoted, but were legally occupying the premises under their lease, and by virtue of the fact that the term prescribed therein and for which respondent became liable for the payment of rent had not expired, there is no escape from the conclusion that the complaint states facts sufficient to constitute a cause of action against him; and the judgment appealed from is reversed.

Haney, J., dissenting.

If a Tenant, Under a Lease for a definite period, with the privilege of a certain number of years more, holds over, he is bound for the further term: Montgomery v. Board of Commissioners, 76 Ind. 362, 40 Am. Rep. 250; Terstegge v. First German Benevolent Soc., 92 Ind. 82, 47 Am. Rep. 135; Delaskman v. Berry, 20 Mich. 292, 4 Am. Rep.

392. And the general rule as laid down by the authorities seems to be that if a tenant for one or more years holds over at the expiration of his term, the landlord may either treat him as a trespasser or as a tenant for another year upon the terms of the prior lease as far as applicable: See *Gladwell v. Holcomb*, 60 Ohio St. 427, 71 Am. St. Rep. 724; *Haynes v. Aldrich*, 133 N. Y. 287, 28 Am. St. Rep. 636.

If a Lease Provides that the Tenant may have, at his option, an extension, for a specified time after the expiration of the term agreed upon in the lease, or may occupy for an extended term including the term specified, the mere holding over after the expiration of the specified term constitutes an election to hold for the additional or extended term. There is a broad distinction between a right of extension for a specified time and a right of renewal. Under the first provision a mere holding over constitutes an election to hold for the extended term, but a mere holding over is not a sufficient election to renew the lease. To constitute a renewal, some additional affirmative act or acts must be shown to establish the exercise of the right: *Andrews v. Marshall Creamery Co.*, 118 Iowa, 595, 96 Am. St. Rep. 412. Covenants for the renewal of leases are discussed in the note to *Drake v. Board of Education*, 123 Am. St. Rep. 460.

WINDHORST v. BERGENDAHL.

[21 S. D. 218, 111 N. W. 544.]

BILLS AND NOTES, Parties to, When may be Shown to have Signed as Sureties.—Under section 1994 of the Civil Code of South Dakota, where two or more persons sign a promissory note, it is competent to prove by parol evidence that all but one were in fact sureties, except as against persons who have acted on the faith of their apparent characters as principals. (p. 716.)

THE LAW OF ANOTHER STATE Wherein a Contract was Executed will be presumed to be the same as that of the forum. (p. 716.)

CONFLICT OF LAWS—Defense, by What Law Controlled.—Though the validity and interpretation of a contract may be controlled by the laws of a sister state, in determining what shall be a good defense to actions instituted in this state, its courts must administer its own laws and not those of another state. (p. 716.)

SURETIES, When Discharged by the Taking of a New Note. If the principal two days before anything could be collected on the original note pays the interest thereon in full and executes another note for the same amount as the original, due one year from date, it may be inferred that there was an agreement for an extension of the time of payment of the original note, based on a sufficient consideration, which will discharge the sureties who did not consent to the extension. (p. 719.)

John I. Davis, A. Sherin and Thomas Davis, for the appellant.

Hanten & Loucks, for the respondent.

219 FULLER, P. J. The trial of this action on a promissory note resulted in the discharge of the respondents Trageser from all liability on the theory that they signed the same as sureties for the nonappearing defendant, B. A. Bergendahl, and that appellant, to whom the note was given, extended the time of payment for one year for a valuable consideration and without their knowledge or consent. While by the terms of the promissory note the three signers appear to be joint makers, the record discloses facts amply sufficient to charge appellant with knowledge that P. A. Trageser **220** and Stephen Trageser signed the instrument for and at the request of B. A. Bergendahl to enable him to obtain a loan of three hundred dollars for one year at the bank of which appellant, the payee named in such note, was president, and that neither of the Tragesers expected to be, or ever were, benefited by the transaction.

Consonant with the rule in equity, section 1994 of the Revised Civil Code provides that: "One who appears to be a principal, whether by the terms of a written instrument or otherwise, may show that he is in fact a surety, except as against persons who have acted on the faith of his apparent character of principal." Now, it clearly appears from the testimony that all the parties understood that Bergendahl, to whom the loan was made, executed the note as principal, and induced the Tragesers to sign the same to enable him to get the money, and appellant had actual knowledge that they were to sign as sureties, and not otherwise. As the purpose of securing their signatures was to give credit to Bergendahl without any personal benefit to themselves, their obligation was merely that of suretyship, and there is no merit in the contention of counsel for appellant that their true relation to the contract could not be shown by parol: *Bailey Loan Co. v. Seward*, 9 S. D. 326, 69 N. W. 58.

After Bergendahl had negotiated for the loan and signed the note at appellant's bank in the village of Holloway, Minnesota, he sent it to respondents by United States mail, and obtained their signatures at Gary, South Dakota. For the reason that the note was executed by Bergendahl in Minnesota and made payable in that state, it is contended by counsel for appellant that the laws of Minnesota govern its interpretation and enforcement; but even in that event, and in the absence of anything before us to the contrary, it might be presumed that the Minnesota statute is the same as our own. In the recent case of *Barry v. Stover*, 20 S. D. 459, 129 Am. St. Rep. 941, 107 N. W. 672, this court, speaking

through Mr. Justice Haney, said: "The validity and interpretation of a contract may be controlled by the laws of a sister state; but in determining what shall be good defenses to actions instituted in this state, its courts must administer its own laws and not those of other states."

²²¹ The three hundred dollar note which respondents signed with Bergendahl as sureties bears date November 30, 1903, and was made payable on or before December 1, 1904, together with nine per cent interest per annum. Concerning the transaction by which these sureties claim to be discharged from all liability, Bergendahl testified that on the second day of December, 1904, he called at the bank of appellant, where the note above mentioned was executed, and requested an extension for one year, which was granted upon the payment of twenty-seven dollars interest and the execution of a renewal note for one year, signed by Bergendahl alone, which was taken by appellant pursuant to an agreement then and there expressly made and entered into by and between appellant, Windhorst, and Bergendahl, that the time of payment was to be extended for one year from that date, and neither of the respondents consented to the extension, nor were present when such second note was executed. Bergendahl was then entirely solvent, and had abundant property subject to legal process, but since that time has become a voluntary bankrupt, and had been discharged in bankruptcy when this action was tried in the circuit court. According to his testimony, which the jury had a right to believe, though controverted in some material particulars, he paid the twenty-seven dollars interest and executed the new note for three hundred dollars, due December 1, 1905, two days before anything was legally due and collectible on the original note, which was retained and marked "collateral" by appellant, with whom all the business was transacted. This payment of accrued interest before the expiration of the three days of grace, when it might legally be demanded, and the execution and delivery of the new note, which is presumptive evidence of a lawful consideration, discloses a mutual understanding that the amount for which it was given would become due according to its terms, and the inference is strengthened by the fact that no attempt was made to enforce immediate collection.

For the reason that usury as a defense is personal to the borrower, and may be waived, it was held by this court that the payment of usurious interest constituted sufficient consideration for an extension that discharged a surety not assenting thereto, and that the indorsement, "5-24. Int. Paid,

and extended 60 days — consent of both parties," was a written instrument and presumptive ²²² evidence of a valuable consideration: *First Nat. Bank v. Peavy Elevator Co.*, 10 S. D. 167, 72 N. W. 402; *Corbett v. Clough*, 8 S. D. 176, 65 N. W. 1074; *McCormick Harv. Mach. Co. v. Rae*, 9 N. D. 482, 84 N. W. 346. "An agreement by a creditor to give time to his principal debtor, in a contract for the payment of money, need not be made in express language, in order to discharge a surety. It is sufficient if a mutual understanding and intention to that effect are proved": *Brooks v. Wright*, 13 Allen, 72; *Lambert v. Shitler*, 62 Iowa, 72, 17 N. W. 187; *Hollingsworth v. Tomlinson*, 108 N. C. 245, 12 S. E. 989; *Rebell v. Thrash*, 132 N. C. 803, 44 S. E. 596. By the new note, appellant secured the right to charge and collect the same rate of interest for an additional period of one year, which, without the extension, Bergendahl might terminate at any time by paying the principal with accrued interest; and the relinquishment of this right to pay the indebtedness, and the postponement for one year of the right to collect the same, is generally considered a valuable consideration for the contract, and sufficient to release sureties.

From the case of *McComb v. Kittredge*, 14 Ohio, at page 351, we quote as follows: "It is just as competent for the principals to a note to extend the time of payment for a specified period as it was to fix the time of payment originally. If the lender of money, secured by a note, after the same becomes due, contracts with the borrower that the time for paying the same shall be extended for one year, or for any other period, upon consideration that the borrower shall pay the legal or less rate of interest, why is not that a binding contract? The lender, by this contract, secures to himself the interest on his money for the year, and the borrower precludes himself from getting rid of the payment of the interest by discharging the principal. It is a valuable right to have money placed at interest, and it is a valuable right to have the privilege, at any time, of getting rid of the payment of interest by discharging the principal. By this contract, the right to interest is secured for a given period, and the right to pay off the principal and get rid of paying the interest is also relinquished for such period. Here, then, are all the elements of a binding contract." To the same effect, see *People* ²²³ *v. Grant*, 138 Mich. 60, 100 N. W. 1006; also, *Brandt's Suretyship and Guaranty*, 3d ed., 388, and numerous cases there collated.

The payment of the twenty-seven dollars interest a short time before it could be lawfully demanded, and the execution and delivery of a new note payable by its terms one year later, is competent evidence of an extension for a consideration sufficient to discharge the sureties, and the conclusion of the jury, based upon conflicting evidence, submitted by the court under proper instructions, cannot be disturbed.

Merited consideration of all that is contained in the brief of counsel for appellant discloses no errors of law occurring at the trial, and the judgment of the court below is affirmed.

One of Two Joint Promisors whose names appear on the face of a negotiable instrument may show as against the payee with notice that he signed only as surety; but he cannot make such a showing as against an indorsee in due course without notice: *Lewis v. Long*, 102 N. C. 206, 11 Am. St. Rep. 725. See, also, *Jenkins v. Bass*, 88 Ky. 397, 21 Am. St. Rep. 344; *Aultman & Taylor Co. v. Gunderson*, 6 S. D. 226, 55 Am. St. Rep. 837; *Gillett v. Taylor*, 14 Utah, 190, 60 Am. St. Rep. 890; *Burkhalter v. Perry & Brown*, 127 Ga. 438, 119 Am. St. Rep. 345; note to *Hughes v. Crooker*, 128 Am. St. Rep. 613.

POLK v. CARNEY.

[21 S. D. 295, 112 N. W. 147.]

STATUTE OF FRAUDS—Contract for the Sale of Standing Timber.—Present title to standing timber cannot be transferred by an oral contract, though such may have been the intention of the parties, but a license to enter and remove such timber may rest in parol. (p. 720.)

TIMBER, Written Contract to Cut and Deliver, When Revocable as a Parol License.—A contract in writing between a land owner and another that the latter is to cut timber on a specified tract and deliver a specified amount thereof at a place designated merely creates a license, revocable by the subsequent sale of the land to another person. (p. 721.)

W. G. Rice and M. McMahon, for the appellant.

Charles W. Brown, Wesley A. Stuart and Ivan W. Goodner, for the respondents.

295 **CARNEY, J.** In affirming the order of the circuit court granting defendants' application for a new trial, this court decided that the contract under which plaintiff's assignor claimed title to certain standing timber constituted a non-assignable and revocable license, which had been revoked by a conveyance of the land upon which such timber was standing: *Polk v. Carney*, 17 S. D. 436, 97 N. W. 360. The plain-

tiff in his petition for a rehearing did not ²⁹⁶ seriously dispute the proposition that a mere license to enter and remove standing timber is not assignable, and is revoked by a sale of the realty to which the timber is attached, but he strenuously contended that the contract in this case operated to transfer an interest in real property, and was not revocable at the will of the owner of the realty. An examination of the authorities, conflicting as they are, will disclose that all contracts of this class present two important features, namely, the effect of the statute of frauds and the intention of the contracting parties. In this state growing trees must be regarded as a part of the realty: Rev. Civ. Code, secs. 186, 188. "An estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law, or by an instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized by writing": Rev. Civ. Code, sec. 938. Hence present title to standing timber cannot be transferred by an oral contract, notwithstanding such may be the intention of the parties, but a license to enter and remove such timber may rest in parol; and, though a written instrument is essential to the transfer of a present interest, a mere revocable license may also be in writing: *Price & Baker Co. v. Madison*, 17 S. D. 247, 95 N. W. 933. The contract in this case, having been reduced to writing and subscribed by the owner of the realty, meets the requirements of the statute of frauds. Therefore effect should be given to the intention of the parties, and whether they intended to transfer a present interest in the realty or to confer a revocable license should be determined from the writing itself, viewed in the light of the circumstances attending its execution. This usually has been the course pursued in deciding these cases, though the reasons assigned are not at all consistent. Thus in Massachusetts, where tenants claimed under a deed containing apt words for the conveyance of an interest in realty which was duly executed and delivered, it was held that the parties intended to grant a present interest in the trees while growing, and not merely a right to enter and cut with title to same when severed from the soil: *White v. Foster*, 102 Mass. 375; while in Rhode Island it was held that the sale of standing timber by a written instrument, not acknowledged or recorded as a deed, amounted only to an executory ²⁹⁷ contract or revocable license, which was revoked by a subsequent conveyance of the land to another person: *Fish v. Capwell*, 18 R. I. 667, 49 Am. Am. St. Rep. 807, 29 Atl. 840, 25 L. R. A. 159.

The contract in this case was in the following form: "Rapid City, S. D., Dec. 19th, 1895. This contract is entered into between Ernest Schleuning of the first part and D. Twitchell of the second part, whereby the party of the second part is to cut the timber on a certain tract of land in Meade county and agrees to deliver thirty thousand feet in good merchantable lumber at track at Piedmont. The lumber to be delivered in 10,000 ft. lots. Ernest Schleuning, D. Twitchell." It was not acknowledged, a fact to be considered in ascertaining the intention of the parties, though the absence of an acknowledgment did not preclude an immediate transfer as between the parties. It contains no apt words expressive of an intention to convey a present interest in the property. It has none of the phrases usually found in real estate conveyances. It was evidently not intended for record. The parties were contracting with reference to the timber—not the land. Twitchell was not entitled to use the land for any purpose other than to enter and cut the trees. He accepted a writing which was not entitled to be recorded, and hence no protection against purchasers of the land without notice. Neither the language of the contract nor the circumstances surrounding its execution justify the conclusion that the parties intended or understood the transaction to be anything other than an executory contract for the sale of growing timber—a license which was revocable by the subsequent sale of the land to another person.

So the views announced in our former decision are adhered to, and the order of the circuit court granting a new trial is affirmed.

Corson, J., not sitting

The Application of the Statute of Frauds to Transfers of Timber is discussed in the note to *Wilson etc. Co. v. Alderman & Sons Co.*, 128 Am. St. Rep. 875. The general rule is that a sale of growing or standing timber is a contract concerning an interest in land and within the statute of frauds: *Richbourg v. Rose*, 53 Fla. 173, 125 Am. St. Rep. 1061; *Ives v. Atlantic etc. R. R. Co.*, 142 N. C. 131, 115 Am. St. Rep. 732, and cases cited in the cross-reference note thereto. It is said that a parol sale of standing timber is only a license to enter, cut and remove it, and such license may be revoked so that acts done thereafter on the land by the licensee may constitute a trespass: *Hodson v. Kennett*, 73 N. H. 225, 111 Am. St. Rep. 607. See, also, *Ives v. Atlantic etc. R. R. Co.*, 142 N. C. 131, 115 Am. St. Rep. 732; *Emerson v. Shores*, 95 Me. 237, 85 Am. St. Rep. 404.

Am. St. Rep., Vol. 130—46

PLANO MANUFACTURING COMPANY v. THOMPSON.

[21 S. D. 300, 112 N. W. 149.]

JUDGMENT, Motion to Cancel Satisfaction of, by What Rules Controlled.—Whatever mode of procedure is pursued to cancel the record of the satisfaction of a judgment, the remedy sought is governed by equitable rules, the ultimate question being whether it is inequitable for the person relying thereon to avail himself of the entry of satisfaction. (p. 724.)

JUDGMENT, Satisfaction of, Produced by Sale of Exempt Property, When will not be Vacated on Motion.—Where a judgment creditor, after levying on exempt property, receives notice of a claim of exemption, and nevertheless proceeds with the sale, and knowingly and maliciously puts the defendant to great expense and inconvenience, and the officer making the sale is subjected to a suit for conversion of the property, and the judgment debtor and his indemnitor are compelled to pay the latter judgment, a motion to set aside the apparent satisfaction produced by the sale of the exempt property is properly denied. Under these circumstances, it would be inequitable to restore the satisfied judgment. (p. 724.)

Joe Kirby, for the appellant.

300 HANEY, J. This appeal is from an order denying the plaintiff's application to have a partial satisfaction of judgment canceled of record. The application was heard upon affidavits, **301** without objection to the mode of procedure, which disclosed the following state of facts: That a judgment in favor of the plaintiff and against the defendant for \$71.10 damages and \$11.15 costs, aggregating \$82.25, was docketed in the circuit court on December 21, 1897. "That on the twentieth day of October, 1899, one G. R. Krause, who was then the attorney for and acting on behalf of the plaintiff, issued an execution on said judgment and placed it in the hands of Den Donahoe, the then sheriff of Minnehaha county, South Dakota, and caused him to levy upon certain of the personal property of the defendant, and that thereafter, and within the time allowed by law, the wife of this defendant claimed her exemptions and those of the defendant by serving the usual notice, schedule and affidavit upon the said sheriff, Den Donahoe, who accepted service upon the same, and that thereupon the said sheriff, Den Donahoe, served upon the defendant a notice that he would on November 27, 1899, appraise the said property of the defendant, and thereupon this defendant and his appraiser were present at the time and place appointed by said sheriff for the appraisal, and there was also present the said sheriff by his deputy, Paul Meyer, and the said attorney G. R. Krause, and two other appraisers, and this defendant thereupon offered to permit

the said appraisement of his property, and demanded of the said deputy sheriff then and there that the said appraisement be then and there had, but the said deputy sheriff consulted with said attorney and they then and there refused to appraise said property, but threatened to have the defendant arrested if he did not pay the debt set forth and referred to in said judgment, and the execution issued therein and then in the hands of the said deputy sheriff, and the said deputy sheriff then and there departed for Sioux Falls, South Dakota, without making any appraisement of the property of this defendant. That thereafter the said plaintiff in this action caused this defendant to be arrested and brought before one F. L. Rowland, a justice of the peace in the office of Joseph Kirby, Esq., the attorney for this plaintiff, on the criminal charge of unlawfully and willfully taking personal property from the custody of said sheriff, Den Donahoe, and the testimony of the deputy sheriff and G. R. Krause, Esq., was then and there taken, and the said justice, after considering the ³⁰² evidence, then and there dismissed said prosecution, and the defendant was then and there discharged from custody. That thereafter, and on or about the seventeenth day of December, A. D. 1899, the plaintiff by the said sheriff, Den Donahoe, went to the granary of this defendant, and broke into the same and took therefrom a large quantity, which the said sheriff alleges to be two hundred and eighty-six bushels and ten pounds of wheat, and advertised and sold the same under said execution to the said attorney for the said Plano Manufacturing Company, the said G. R. Krause, for \$134.50, and made his return on said execution of expenses in the sum of \$52.40, and the balance of \$81.90 was applied on said execution and judgment. That all the acts aforesaid were done maliciously and for the purpose of compelling the defendant to relinquish his claim to his exemptions. That thereafter this defendant brought an action against the said Den Donahoe, as sheriff, for the conversion of such grain, and thereupon, and upon the fourth day of May, A. D. 1900, recovered a judgment against him for the value thereof in the sum of \$148.75 and costs of suit in the sum of \$40.18, and that said judgment was appealed to the supreme court of this state and there affirmed, and that when the remittitur was received from the supreme court, a judgment was also entered against the said Den Donahoe, as sheriff, for the costs on appeal to the supreme court." That defendant's judgment against the sheriff was paid by the plaintiff, it having indemnified the sheriff; but, by reason of

defendant's illegal arrest and the carrying away of his exempt property, he was put to great expense and inconvenience, having paid out the sum of \$100 as attorney's fees in defending such criminal prosecution and securing the value of his property so taken from him.

To vacate the record of a satisfaction of judgment, either upon motion or in an independent action, involves the cancellation of a written instrument, one of the recognized subjects of equity jurisdiction, and involves the exercise of a sound discretion. Whatever mode of procedure be pursued, the remedy sought is governed by equitable rules; the ultimate question being whether it is inequitable for the person relying thereon to avail himself of the entry of satisfaction: 2 Beach's Mod. Eq., sec. 552; 2 Freeman on Judgments, sec. 478a. Cases wherein such records have been vacated, or canceled, ³⁰³ are numerous; but none has been found strictly analogous to the one at bar. Here the entry was not procured through fraud or mistake. Defendant's property was sold by direction of the plaintiff, and the proceeds applied in payments of the judgment after due notice of the debtor's claim of exemption. It conclusively appears that the plaintiff acted knowingly, unlawfully and maliciously, that it wrongfully put the defendant to great expense and inconvenience, and that the parties would not be restored to the position they occupied prior to the entry of satisfaction. True, the plaintiff paid the judgment recovered against the sheriff for the conversion of the property sold, and it may have gained nothing by the sale, but it cannot be said that the defendant lost nothing, because he was compelled by the plaintiff's wrongful conduct to expend more in defending his rights than the amount of the judgment.

Such being the undisputed facts, it clearly would be inequitable to restore this judgment, and the learned circuit court was justified in refusing to do so. Its order is affirmed.

Corson, J., not sitting.

Satisfaction of Judgment may be Canceled when it appears that the execution upon which it was indorsed was satisfied out of property not belonging to the defendant, and that he has had to refund the money he received to the owner and has made reparation to him for the injury caused by the wrongful seizure: Maguire v. Marks, 26 Mo. 193, 75 Am. Dec. 121. See, also, Watson v. Reissig, 24 Ill. 281, 76 Am. Dec. 746.

BOWLER v. FIRST NATIONAL BANK.

[21 S. D. 449, 113 N. W. 618.]

BANKRUPTCY—Recording of a Mortgage or Conveyance, When Deemed to be Necessary Within the Meaning of the Clause Avoiding Preferences.—Under that portion of the bankruptcy act declaring that, where a preference consists of a transfer, the period of four months shall not expire until four months after the date of the record or registry of the transfer, if by law such recording or registry is required, a transfer or encumbrance may be avoided by the trustee in bankruptcy, though it was valid between the parties, if it was recorded within such four months, if the recording was necessary to make the transfer or encumbrance effective against any class of persons, as, for instance, purchasers or encumbrancers in good faith and without notice. (pp. 729, 731.)

PLEADING—Averment of Insufficiency of Assets.—An averment that the bankrupt's estate is insolvent and that there is not property enough to pay the general creditors is a statement of facts and not a mere conclusion of law. (p. 731.)

BANKRUPTCY, Action to Set Aside Preferences.—A Demand is not Necessary before bringing an action by a trustee in bankruptcy to set aside a conveyance or mortgage as a preference. (pp. 731, 732.)

ACTIONS, Joinder of Causes of When Against the Same Person as Trustee.—If a mortgage is executed and a conveyance made to a creditor affecting different parcels of real property, one of which is situate beyond the state, one suit may be maintained by the trustee in bankruptcy to avoid both as preferences, under a statute permitting a plaintiff to unite in the same complaint several causes of action, where all arise out of claims against a trustee by virtue of a contract or by operation of law, because the creditor receiving such preferences becomes thereby an involuntary trustee. (p. 732.)

JURISDICTION of the Person, Estoppel to Deny.—A defendant who appears generally in an action is estopped from claiming that the court has no jurisdiction of his person. (p. 733.)

JURISDICTION of Property Situate in Another State.—An action can be maintained in one state by a trustee in bankruptcy to set aside as a preference a conveyance of lands situate in another state, if the court has jurisdiction of the person of the defendant to whom such preference was given. (p. 733.)

Joe Kirby, for the appellant.

Davis, Lyon & Gates, for the respondent.

450 CORSON, J. This action was instituted by the plaintiff as trustee in bankruptcy of the estate of John H. Bruins, a bankrupt, to vacate and set aside a certain mortgage and deed executed by the said Bruins to the defendant bank and recorded within four months preceding the filing of the petition in bankruptcy. A demurrer was interposed to the complaint, stating, in substance: (1) That said complaint does not state facts sufficient to constitute a cause of action; (2) that several causes of action are improperly united; (3) that

as to the second cause of action therein stated the court had no jurisdiction of the person of the defendant nor of the subject ⁴⁵¹ matter of the action. The demurrer was sustained, and from the order sustaining the same the plaintiff has appealed.

The plaintiff, in the first paragraph of his complaint, alleges the incorporation of the defendant under the laws of the United States for banking purposes. The plaintiff, in the five following paragraphs, sets out the proceedings taken in the bankruptcy court of South Dakota resulting in the adjudication of the said Bruins as a bankrupt and the appointment and qualification of the plaintiff as trustee in bankruptcy. In the seventh paragraph of the complaint it is alleged that the said John H. Bruins at the time he was adjudged a bankrupt, and for a long time prior thereto, was the owner in fee simple of certain lots in the city of Garretson, in Minnehaha county, of the value of about three thousand dollars, not exempt from execution, but liable to his creditors for the payment of his debts.

The eighth, ninth, tenth, and eleventh paragraphs of the complaint are as follows:

“That on the twentieth day of May, 1905, and within four months next preceding the filing of said petition to have the said Bruins adjudged a bankrupt, and while he, the said John H. Bruins, was insolvent and known to defendant to be such, the said defendant caused to be filed in the office of the register of deeds of Minnehaha county, South Dakota, and recorded, a mortgage theretofore executed by the said John H. Bruins, to the said defendant, upon all the property mentioned in the last preceding paragraph, which mortgage purported to mortgage to the said defendant as mortgagor all of said real estate to secure the payment of the sum of nineteen hundred and eighty dollars and thirty-five cents alleged to be owing from the said John H. Bruins to the said defendant, and which mortgage still remains and appears of record, untransferred and unsatisfied, and that the enforcement of said mortgage by the defendant would work and give a preference to said defendant, over the general creditors of the said bankrupt, and in executing said mortgage the said Bruins intended to create an illegal preference in favor of said defendant.

“That said mortgage heretofore mentioned was not given for a present consideration, and was not accepted nor given in good faith, but was in contemplation and in fraud of the bankrupt act of the United States.

⁴⁵² "That the said bankrupt's estate is insolvent, and if the said defendant is allowed to enforce the lien of said mortgage and receive the amount thereof from the proceeds of such property, the general creditors of said bankrupt will suffer loss and cannot be paid from said estate in full.

"That said mortgage constitutes of record an apparent lien and encumbrance upon the property above described, and that this plaintiff is unable to sell or dispose of said property, or convert the same into cash, and will be unable to realize more than a nominal sum out of said property unless said mortgage is, as against him, canceled, set aside, and held to naught."

The plaintiff for a second, further and separate cause of action alleges that he "repeats, reiterates and restates each and all of paragraphs 1, 2, 3, 4, 5, and 6 of the foregoing amended complaint, and now presents and sets forth the same to this court as part of this cause of action, the same as if they were written herein in full." The plaintiff then alleges, in substance, that in July, 1905, and within four months next preceding the filing of said petition, and while the said John H. Bruins was insolvent, and known to the defendant to be such, he was the owner of a tract of land in Pipestone county, Minnesota (describing it), having an interest therein of the value of two thousand dollars; that thereupon, and while the owner of such property as aforesaid, the said Bruins did, for the purpose and with the intent of creating a preference among his creditors in favor of the defendant, convey to the defendant by deed all of said land and premises, which deed was recorded in the office of register of deeds in and for said Pipestone county in said state of Minnesota, causing thereby the title of said premises to appear in the name of the said defendant; that said deed was not given for a present consideration, and was not given in good faith, but was in contemplation and in fraud of the bankruptcy act of the United States; that said bankrupt's estate is insolvent, and if said defendant is allowed to retain said property there will not be assets enough to pay said bankrupt's debts, and the defendant will receive a preference at the expense of the general creditors of said estate; that said deed constitutes a cloud upon the title and an encumbrance as against the plaintiff on said property; and that the ⁴⁵³ plaintiff will be unable to sell or dispose of said property so as to realize anything herefrom unless said deed is canceled and held for naught, and the said defendant compelled to convey to the plaintiff the title which it received from the said Bruins. The plaintiff con-

cludes by praying for judgment that the said mortgage of the said Garretson property be vacated, and that the defendant be required to execute and deliver to the plaintiff a satisfaction or assignment of the same, and that the conveyance of the land before described in Pipestone county be adjudged to convey no title as against this plaintiff, and that the defendant be compelled to reconvey to the plaintiff all of the right, title and interest purporting to have been conveyed to it by the said bankrupt.

Sections 60a and 60b of the bankrupt act of July 1, 1898 (c. 541, 30 Stat. 562 [U. S. Comp. Stats. 1901, p. 3445]), as amended by act of February 5, 1903 (c. 487, 32 Stat. [U. S. Comp. Stats. Supp. 1907, p. 1031]), under which this action was instituted, provide as follows: "A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required. If a bankrupt shall have given a preference and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person." The concluding clause of paragraph "a," which provides that: "Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required" ⁴⁵⁴ —was added as an amendment by an act of Congress of February 5, 1903.

It is contended by counsel for the defendant that in this state a mortgage is not required to be recorded or registered to be valid as between the parties thereto; hence that the mortgage described in the first cause of action was valid as against this plaintiff, and in support of their contention they rely upon the cases of *In re Hunt* (D. C.), 139 Fed. 283, decided by the district judge of the northern district of New

York, and Meyer Bros. Drug Co. v. Pipkin Drug Co., 136 Fed. 396, 69 C. C. A. 240, decided by the United States court of appeals of the fifth circuit. These probably were the cases upon which the learned circuit court relied in sustaining the defendant's demurrer to the complaint in this action; but since the decision of the court upon the demurrer in the case at bar, this amendment has been very fully considered by the court of appeals of the sixth circuit, and that court, in a very able and exhaustive opinion in a case involving a chattel mortgage for thirty-seven thousand dollars, arrived at the conclusion that, where a mortgage was required by law to be recorded in order to make it valid as against any class of persons, it came within the provisions of the amendment, though it might be valid as between the parties thereto. That learned court, in speaking of the decision of Meyer Bros. Drug Co. v. Pipkin Drug Co., 136 Fed. 396, 69 C. C. A. 240, seems to treat it as a decision made upon the act prior to the amendment of February 5, 1903. The court then proceeded to discuss the case of *In re Hunt*, 139 Fed. 283, in which that court relates the history of the amendment at the time of its adoption, and says: "Independently of this legislative history, Judge Archibald, in *English v. Ross*, 140 Fed. 630, and the circuit court of appeals for the eighth circuit in *First Nat. Bank v. Connett*, 142 Fed. 33, 73 C. C. A. 219, 5 L. R. A., N. S., 148, reached an opposite conclusion, and held that a recording statute, which required a conveyance or transfer to be recorded to be effectual against a certain class or classes of persons, was a law which required the recording of the transfer in question, within the meaning of section 60 as amended. With this conclusion we agree." The court then proceeds to give its reasons at length with its decision, and says: "In view of all of the foregoing considerations, ⁴⁵⁵ we reach the conclusion that the word 'required,' as used in the amendment, refers to the character of the instrument giving preference or making the transfer, without reference to the fact that as to certain persons or classes of persons it may be good or bad according to circumstances. If to be valid against certain classes of persons, the law of the state requires the constructive notice of registration and its transfer, which is 'required' to be recorded. This takes account of the purpose and policy of recording acts, remedies the evil which flourished under the law before the amendment, gives effect to the plain purpose of Congress, and gives some effect and force to a provision which would otherwise be meaningless, and brings sections 3 and 60a and 60b into harmony of

purpose and meaning." And the court in its conclusion says: "We conclude from the general purpose and policy of recording statutes that the words 'or permitted' are of no vital signification in section 3. If the instrument giving the preference is one which is 'permitted' to be recorded in order to give it validity as against certain classes of persons, though perfectly valid without record as to other classes, it is an instrument 'required' to be recorded within the meaning of the word as there used. The words 'required' and 'permitted,' in the connection used, are of synonymous legal meaning. The dropping of the words 'or permitted' by the Senate is therefore of no vital signification, if we are right in regarding section 3 and section 60a as closely connected provisions. It is only in extremely doubtful matters of interpretation that the legislative history of an act of Congress becomes important. If the word 'required,' as used in sections 3 and 60a, is used as referring to the character of the instrument giving the preference, and not as to the persons as between whom it may be valid without recording or the persons as to whom it is void for failure to record, the words 'or permitted' in section 3 were surplusage, and the Senate might well omit them from the amendment; the plain purpose being to tie the two provisions together. . . . Under section 4150, Revised Statutes of Ohio of 1906, a mortgage of chattels, not followed by immediate delivery and no actual and notorious change of possession, is 'required' to be recorded. Otherwise it is invalid as to some persons and valid as to others. That such a mortgage ⁴⁵⁶ is 'required' by the law of Ohio to be recorded within the meaning of section 60a as amended, we have no doubt."

We conclude from the general purpose and policy of recording statutes that the words "or permitted" are of no vital signification in section 3. The court, in the case of *In re Hunt*, 139 Fed. 283, in discussing this amendment, used the following language: "The writer of this opinion regrets that such amendment (or permitted) as proposed did not become a part of the act. Secret liens of any character ought not to be tolerated by the act. The date of the beginning of the four months' period referred to ought to be the date of recording or filing the instrument or of taking open possession of the property." The court of the sixth circuit, in discussing this subject, says: "If we say that, unless the law of the state where the transfer is made makes void all such transfers as to all the world, it is not a law which 'requires' recording, the evil will continue, and judges will continue to bewail the

iniquity of a law which makes such a secret transfer an act of bankruptcy and yet holds the preference valid against the bankrupt's estate because made more than four months before starting bankrupt proceedings against the maker. See the lament of Judge Ray in *Re Hunt*, 139 Fed. 286, 287." Section 986 of the Revised Civil Code of this state provides: "Every conveyance of real property, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or encumbrancer, including an assignee of a mortgage, lease, or other conditional estate, of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded." And section 987 provides: "The term 'conveyance,' as used in the last section, embraces every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged or encumbered, or by which the title to any real property may be affected, except wills, executory contracts for the sale or purchase of real property, and powers of attorney." It will be observed from the reading of these sections that a mortgage not recorded is void as against certain classes of persons. Hence if a mortgagee desires to protect himself, his mortgage must be recorded. It is quite clear from these later decisions that the learned circuit court was in error in ⁴⁵⁷ sustaining the demurrer to the causes of action alleged in the amended complaint notwithstanding the code provides that a mortgage is valid as between the parties thereto and those who have notice thereof. Without regarding the mortgage as we have seen, it is not valid as against certain classes of persons, namely, subsequent purchasers and encumbrancers, and therefore under the provisions of our code referred to the mortgage is required to be recorded, and comes within the provision of the amendment of the bankruptcy act.

It is further contended by counsel for the defendant that the allegations of paragraph 10 of the complaint that the bankrupt's estate is insolvent, and that there is not property enough to pay the general creditors, is a conclusion of law, and not a statement of facts. We cannot agree with the counsel in this contention. As will be observed, it is stated in that paragraph of the complaint "that the said bankrupt's estate is 'insolvent.'" This is a positive allegation, and must, for purposes of this demurrer, be taken as true.

It is further contended by the counsel for the defendant that no demand is alleged, and inasmuch as a preference is not void, but only voidable, a demand was necessary before action.

We cannot agree with counsel in this contention. The case is not, in our opinion, one where a demand before action can be maintained is necessary.

The second ground of demurrer is that several causes of action have been improperly united. It will be observed that the first cause of action is to set aside a mortgage executed by the bankrupt to the defendant upon real property situated in the county of Minnehaha, in this state, and the second cause of action therein set forth is to set aside a conveyance by the bankrupt to the defendant of real property situated in the county of Pipestone in the state of Minnesota. It is insisted by the counsel for the defendant that the two causes of action are improperly united, for the reason that one relates to real estate situated in this state, and the other to real estate situated in Minnesota. It is contended by the appellant that, assuming the facts of the complaint to be true, the defendant was an involuntary trustee by operation of law as to both the mortgaged property situated in this state and the property ⁴⁵⁸ conveyed by the bankrupt to the defendant in the state of Minnesota, and hence comes within the provision of subdivision 7 of section 144 of the Revised Code of Civil Procedure, which reads as follows: "The plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, where they all arise out of . . . claims against a trustee by virtue of a contract or by operation of law." We are inclined to agree with the appellant in its contention. Section 1609 of the Revised Civil Code provides: "An involuntary trust is one which is created by operation of law." And section 1615 provides: "One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner." And section 1616 provides: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." These sections have been construed by this court and the late territorial supreme court in the cases of *Fideler v. Norton*, 4 Dak. 272, 30 N. W. 128, 32 N. W. 57; *Suessenback v. Bank*, 5 Dak. 477, 41 N. W. 662; *Farmers' & Traders' Bank v. Kimball M. Co.*, 1 S. D. 388, 36 Am. St. Rep. 739, 47 N. W. 402; *Van Dyke v. Grigsby*, 11 S. D. 30, 75 N. W. 274; *Luseumbe v. Grigsby*, 11 S. D. 408, 78 N. W. 357. See, also, *Wright v. Skinner*, 136 Fed. 694. Under the construction given to those sections by this court and the ter-

ritorial supreme court, it is quite clear that under the facts alleged in the complaint the defendant at the time this action was commenced was holding the properties as an involuntary trustee, and was at the time, in the language of subdivision 7 of said section 144, a trustee by operation of law as to both the mortgage of the property in Minnehaha county and the property situated in Minnesota. It will be observed that the parties to the action are the same; that the facts leading up to the institution of the action are the same and fall within the same class under the bankruptcy act, namely, "voidable preferences"; and that the claims of the plaintiff against the defendant as trustee arise by virtue of the operation of the bankrupt laws as mentioned in subdivision 7. In discussing similar ⁴⁵⁹ questions, Mr. Justice Story, in his work on Equity Pleading (sections 531 to 534, inclusive), concludes that: "Where there is a common liability in the defendants and a common interest in the plaintiffs, different claims to property, at least if the subjects are such as may without inconvenience be joined, may be united in one and the same suit. . . . If the general objects of a bill will be promoted by their being united in a single suit, the court will not hesitate to sustain the bill against all of them." Certainly in the case at bar nothing could be gained by requiring the plaintiff to bring separate actions, instead of uniting the two in the one action. The defenses that the defendant could make could as well be made in this action as in separate actions, assuming, of course, that the courts of this state have jurisdiction of the person of the defendant and of the subject matter of the action.

It is contended by the defendant that the second cause of action cannot be sustained, for the reason that the court did not have jurisdiction of the person of the defendant or of the subject matter of the action; but we are unable to agree with counsel in this contention. The action, as we have seen, is to vacate and set aside a deed executed by the bankrupt Bruins to the defendant, and to establish plaintiff's rights as trustee of said bankrupt to the said property for the benefit of the creditors of the said bankrupt. The object of the action is not to recover possession of the property, but to establish the right of the plaintiff thereto as trustee as against the defendant. The contention of the defendant that the court had no jurisdiction of his person is not tenable, for the reason that he appeared generally in the action and is estopped from claiming that the court did not have such jurisdiction of his person: *Ramsdell v. Duxberry*, 17 S. D. 311, 96 N.

W. 132. In the class of cases involved in this action, the courts of this state have jurisdiction of the subject matter, notwithstanding the property be situated in another state. This question was discussed in the early case of *Massie v. Watts*, 6 Cranch (U. S.), 148, 3 L. ed. 181, in which the supreme court of the United States, speaking by Mr. Chief Justice Marshall, uses the following language: "In the case of fraud, or trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although ⁴⁶⁰ lands not within the jurisdiction of that court may be affected by the decree." In the case of *Lindley v. O'Reilly*, 50 N. J. L. 636, 7 Am. St. Rep. 802, 15 Atl. 379, 1 L. R. A. 79, that learned court held, as appears from the headnote, that: "In cases of contract, trust or fraud, the equity courts of one state or country, having jurisdiction of the parties, are competent to entertain a suit for specific performance, or to establish a trust, or for a conveyance, although the contract, trust or fraudulent title pertains to lands in another state or country." And in the recent case of *State v. District Court*, 94 Minn. 370, 102 N. W. 869, the supreme court of Minnesota, in discussing this subject, says: "As to lands within the various states, the courts have generally recognized that, when a court of equity acts upon a matter over which it has jurisdiction, it is immaterial that real estate may be indirectly involved. A court of equity will afford proper relief to parties to contract in cases of equitable cognizance; the fact that the relief granted may incidentally concern land does not at all determine the subject matter before the court. Accordingly, a suit to set aside a deed and obtain specific enforcement of a contract has been held to be transitory": See *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Johnson v. Gibson*, 116 Ill. 294, 6 N. E. 205; *Pillow v. King*, 55 Ark. 633, 18 S. W. 765; *McGregor v. McGregor*, 9 Iowa, 65; *Gilliland v. Inabnit*, 92 Iowa, 46, 60 N. W. 211; *McQuerry v. Gilliland*, 89 Ky. 434, 12 S. W. 1037, 7 L. R. A. 454.

It is quite clear from the foregoing decisions, that the courts of this state had jurisdiction of the subject matter of the action, and that the court was in error in sustaining a demurrer to that cause of action. We have not overlooked the other points discussed by the counsel for the defendant in their brief, but in our opinion they have not sufficient merit to entitle them to a separate discussion.

The order of the circuit court sustaining a demurrer is reversed, and that court is directed to enter an order overruling the same.

If the Holder of an Unrecorded Chattel Mortgage, executed two years before the bankruptcy of the mortgagor and while he was solvent, first takes possession under his mortgage three weeks before the mortgagor files his petition in bankruptcy, he being insolvent at the time, and the mortgagee having reasonable cause to believe him insolvent, the transfer dates from the time that the mortgagee takes possession, and is voidable as an unlawful preference under the United States bankruptcy act of 1898: *Tatman v. Humphrey*, 184 Mass. 361, 100 Am. St. Rep. 562.

The Jurisdiction of Equity Over Lands situated in another state is considered in *Ewing v. Lamphere*, 147 Mich. 659, 118 Am. St. Rep. 563; *West Point Min. etc. Co. v. Allen*, 143 Ala. 547, 111 Am. St. Rep. 60, and cases cited in the cross-reference note thereto. It has recently been held that where one obtains money in another state by fraud, and with it purchases real property in this state which he causes to be conveyed to another to hold in trust, a suit to impress the property with a trust in favor of the defrauded person may be brought in the county of the state in which the property is situated: *Morris v. Vyse*, 154 Mich. 253, 129 Am. St. Rep. 472.

FLINT & WALLING MANUFACTURING COMPANY v. McDONALD.

[21 S. D. 526, 114 N. W. 684.]

INTERSTATE COMMERCE, Contracts cannot be Prohibited Because of.—A contract of an Indiana corporation by which it sells a water-tank and tower and agrees to put them up as a part of a waterworks plant in South Dakota, is within the interstate commerce clause of the constitution of the United States, and a statute of the last-named state cannot prevent the maintenance of an action, based upon such contract, though the corporation plaintiff had not filed its articles of incorporation nor appointed a resident agent, as required by the laws of the state. (p. 740.)

Joe Kirby, for the appellants.

Bailey & Voorhees and Frederic B. Eaton, for the respondent.

526 CORSON, J. This action was instituted by the plaintiff, a corporation organized and existing under the laws of the state of Indiana, to foreclose a lien for machinery furnished and set up by the plaintiff as subcontractor at the village of Carthage, in this state. Findings and judgment being in favor of the plaintiff, the defendants, Western Surety Company, E. G. Kennedy, and Van Buren, Heck & Marvin Company, have appealed.

In the spring of 1904 the village of Carthage entered into a contract with the defendant A. D. McDonald, who seems to have been transacting business under the name of the Sioux

Falls Construction Company, for the construction of a plant for waterworks in the village of Carthage. In July of that year the said Sioux Falls Construction Company entered into a contract with the plaintiff, as a subcontractor, to furnish and erect a water-tank and tower, and thereupon the said plaintiff proceeded to erect in accordance with the contract the said tank and tower as a part of said waterworks system. Late in the fall of 1904 the system of waterworks was completed by McDonald to the satisfaction of the trustees of the village of Carthage, and there remained a balance due him thereon of something over nineteen hundred dollars, which that village holds ⁵²⁷ for such parties as the court may adjudge to be entitled to the same. Certain smaller lienholders who are made parties defendant to this action filed liens upon the property amounting to something over four hundred dollars, which liens are conceded by the plaintiff and the other defendants to be valid liens, and hence will not be further considered in this opinion. The plaintiff also filed its claim for lien in the proper office, and judgment was thereafter entered thereon in favor of the plaintiff, subject to be paid pro rata with the other liens heretofore referred to. The defendant, the Western Surety Company, claims to be entitled to one hundred and fifty dollars of the money so held by the village of Carthage, under and by virtue of attachment proceedings against the defendant McDonald; and the defendant Van Buren, Heck & Marvin Company claims the money in the possession of the village of Carthage under and by virtue of a judgment entered in the United States circuit court for the southern division of the district of South Dakota, and execution issued thereon against the said McDonald. At the time the contract was entered into between McDonald and the plaintiff, the plaintiff had not filed its articles of incorporation or appointed a resident agent as required by the code of this state, and no such copy was filed or resident agent appointed until on or about December 3, 1904—two days before the filing of its lien.

It is contended by the appellants, the attaching and judgment creditors, that by reason of the failure of the plaintiff to file its articles of incorporation and appoint a resident agent prior to entering into the contract, as required by the provisions of the code as construed in the case of *American Copying Co. v. Eureka Bazaar*, 20 S. D. 526, 108 N. W. 15, 9 L. R. A., N. S., 1176, it is not entitled to recover, as the contract between the contractor and the plaintiff was a Dakota contract, which was to be performed within this state. It is

further contended by the appellants that as the plaintiff contracted to erect and set up the plant as well as to furnish the same, it ceased to be a transaction within the commerce clause of the federal constitution. The plaintiff, in support of the judgment of the circuit court, insists that notwithstanding the agreements to erect and set up the tower and tank as a part of the waterworks system of the village of ⁵²⁸ Carthage, the contract was still within the provisions of the commerce clause of the federal constitution, and the plaintiff is therefore entitled to recover for the machinery so furnished.

We are inclined to take the view that the plaintiff is right in its contention. The sale of its machinery by the plaintiff comes clearly within the commerce clause of the federal constitution, and such a contract is valid in this state notwithstanding the provisions of its constitutions and laws. In the case of *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. Rep. 739, 28 L. ed. 1137, Mr. Justice Matthews in a concurring opinion, in speaking upon this subject, says: "Whatever power may be conceded to a state to prescribe conditions on which foreign corporations may transact business within its limits, it cannot be admitted to extend so far as to prohibit or regulate commerce among the states, for that would be to invade the jurisdiction which, by the terms of the constitution of the United States, is conferred exclusively upon Congress. In the present case the construction claimed for the constitution of Colorado, and the statute of that state passed in execution of it, cannot be extended to prevent the plaintiff in error, a corporation of another state, from transacting business in Colorado, which of itself is commerce. The transaction in question was clearly of that character. It was the making of a contract in Colorado to manufacture certain machinery in Ohio, to be there delivered for transportation to the purchasers in Colorado. That was commerce; and to prohibit it, except upon conditions, is to regulate commerce between Colorado and Ohio, which is within the exclusive province of Congress. It is quite competent, no doubt, for Colorado to prohibit a foreign corporation from acquiring a domicile in that state, and to prohibit from carrying on within that state its business of manufacturing machinery. But it cannot prohibit it from selling in Colorado, by contracts made there, its machinery manufactured elsewhere; for that would be to regulate commerce among the states." The views expressed by Mr. Justice Matthews in the foregoing concurring opinion are fully approved by the supreme court of the United

States in *Crutcher v. Commonwealth of Kentucky*, 141 U. S. 47, 11 Sup. Ct. Rep. 851, 35 L. ed. 649. In that case the commonwealth of Kentucky required a license of certain parties ⁵²⁹ doing business of interstate commerce in that state, and the act was sustained by the supreme court of the state, but reversed by the supreme court of the United States. In its decision the latter court says: "To carry on interstate commerce is not a franchise or a privilege granted by the state. It is a right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject. . . . The prerogative, the responsibility and duty of providing for the security of the citizens and the people of the United States in relation to foreign corporate bodies, or foreign individuals with whom they may have relations of foreign commerce belong to the government of the United States, and not to the governments of the several states, and confidence in that regard may be reposed in the national legislature without any anxiety or apprehension arising from the fact that the subject matter is not within the province or jurisdiction of the state legislatures. And the same thing is exactly true with regard to interstate commerce as it is with regard to foreign commerce. No difference is perceivable between the two": *Western Union Tel. Co. v. Texas*, 105 U. S. 460, 26 Sup. Ct. Rep. 1067; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. Rep. 826, 29 L. ed. 158; *Philadelphia & S. S. S. Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. Rep. 1118, 30 L. ed. 1200; *McCall v. California*, 136 U. S. 104, 10 Sup. Ct. Rep. 881, 34 L. ed. 392; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 10 Sup. Ct. Rep. 958, 34 L. ed. 394. As was said by Mr. Justice Lamar in the case last cited: "It is well settled by numerous decisions of this court that a state cannot, under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce within its limits." That learned court further says: "We have repeatedly decided that a state law is unconstitutional and void which required a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it": *Pickard v. Pullman* ⁵³⁰ *Southern Car Co.*, 117 U. S. 34, 6 Sup. Ct. Rep. 635, 29 L. ed. 785; *Robbins*

v. Shelby County Taxing Dist., 120 U. S. 489, 7 Sup. Ct. Rep. 592, 30 L. ed. 694; *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. Rep. 1380, 32 L. ed. 311; *Asher v. Texas*, 123 U. S. 129, 9 Sup. Ct. Rep. 1, 32 L. ed. 368; *Stoutenburgh v. Hen-nick*, 129 U. S. 141, 9 Sup. Ct. Rep. 256, 32 L. ed. 637; *Mc-Call v. California*, 136 U. S. 104, 10 Sup. Ct. Rep. 881, 34 L. ed. 392; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 10 Sup. Ct. Rep. 958, 34 L. ed. 394.

It is further stated by that learned court that as a summation of the whole matter it was aptly said by the present chief justice in *Lyng v. Michigan*, 135 U. S. 161, 10 Sup. Ct. Rep. 725, 34 L. ed. 150: "We have repeatedly held that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce or on the occupation or business of carrying it on, for the reason that taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

It was held by the supreme court of Michigan in the case of *Coit v. Sutton*, 102 Mich. 324, 60 N. W. 690, 25 L. R. A. 819, construing the provisions of their statute, which are substantially the same as our own, in regard to foreign corporations doing business in that state, that the Michigan statute had no application to foreign corporations whose business within the state consisted in the sale and delivery of goods or commodities made in other states, whether the contract for such sale be made in or out of the state. And the supreme court of Pennsylvania in *Wolff Dryer Co. v. Bigler & Co.*, 192 Pa. 466, 43 Atl. 1902, an analogous case to the one at bar, says: "The contention that the plaintiff could not maintain an action in this state because it was a foreign corporation, and had not complied with the provisions of the act of April 22, 1874 (Pub. Laws 108), is without merit. It had no office or place of business in Pennsylvania, and no part of its capital was here. The machinery sold was shipped either directly from its factory in Chicago or upon its orders given to other manufacturers. The fact that its agent came into this state and made contracts for machinery to be delivered here did not bring it within the inhibition of the act of 1874: *Mearshon & Co. v. Lumber Co.*, 187 Pa. 12, 67 Am. St. Rep. 560, 40 Atl. 1019." In the case of *Milan Milling* ⁵³¹ etc. v. *Gorton*, 93 Tenn. 590, 27 S. W. 971, 29 L. R. A. 135, the supreme court of Tennessee, construing the statutes of that state relating to foreign corporations doing business therein, held that they did not apply to a contract for the purchases of milling ma-

chinery sold by a corporation in the state of Indiana and set up in Tennessee, as such a sale came within the commerce clause of the federal constitution, and that the corporation could recover for the value of the machinery in the courts of that state notwithstanding the failure to comply with its laws in not filing its articles of incorporation, and appointing a resident agent therein. In the case of *Pembina Min. Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. Rep. 737, 31 L. ed. 650, the supreme court of the United States in construing a similar act of the state of Pennsylvania uses the following language: "The only limitation upon this power of the state to exclude a foreign corporation from doing business within its limits or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate or foreign. The control of such commerce, being in the federal government, is not to be restricted by state authority": *Belle City Mfg. Co. v. Frizzell*, 11 Idaho, 1, 81 Pac. 58.

It is contended by the appellants that, conceding that the plaintiff might be protected by the commerce clause of the federal constitution in making the sale of the tank and tower to McDonald, yet its contract, connected with the erection of the tower and tank at the village of Carthage, took it out of the commerce clause of the federal constitution; and they cite in support of their contention the case of *Diamond Glue Co. v. United States Glue Co.*, 187 U. S. 611, 23 Sup. Ct. Rep. 206, 47 L. ed. 328. But this contention is clearly untenable. The case cited is clearly distinguishable from the case at bar. In that case the contract was to erect buildings for the manufacture of glue in the state of Wisconsin and to carry on the business of manufacturing therein. In the present case the contract of the plaintiff was for the sale of the machinery, and incidentally the setting up of the same upon foundations prepared by the contractor McDonald, and such an adjustment of the tower ⁵³² and tank did not, in our opinion, so far change the contract as to take it out of the protection of the commerce clause above referred to. In nearly all the cases referred to from which we have quoted it was a part of the contract that the machinery should be set up and adjusted by the seller, but this was not regarded as changing the nature of the contract or taking it out of the commerce clause.

In the view we take of the case at bar, it is not material to determine whether the contract made by the plaintiff was

made within the state or in the state of Indiana, as the sale was clearly within the commerce clause provisions of the federal constitution, and the plaintiff would be entitled to recover without regard to the place where the contract was made. The court in its opinion in the case of *American Copying Co. v. Eureka Bazaar*, 20 S. D. 526, 108 N. W. 15, 9 L. R. A., N. S., 1176, made no reference to the commerce clause of the constitution, as that question was not presented in that case; but, of course, the opinion is to be understood as excepting from the provisions of our statute cases coming within the commerce clause of the federal constitution, not affecting the police powers of the state, as it would not be competent for this state to pass any law that might in any manner interfere with that clause of the federal constitution. The circuit court was clearly right, therefore, in holding that the plaintiff was entitled to recover notwithstanding its failure to comply with the provisions of our law. In the view we have taken of the case, it will not be necessary to express any opinion upon the other questions presented on this appeal, as the judgment of the circuit court necessarily disposes of all of the funds held by the trustees of the city of Carthage among the lienholders.

The judgment of the circuit court and order denying a new trial are affirmed.

A Foreign Corporation Having All of Its Capital invested in the state of its origin may execute orders taken by its agents for the delivery of goods in another state, without complying with the statute of that state requiring a foreign corporation doing business within the state to appoint a resident agent therein: Mearshon v. Pottsville Lumber Co., 187 Pa. 12, 67 Am. St. Rep. 560. See, further, the note to People v. Wemple, 27 Am. St. Rep. 547.

LOISEAU v. ARP.

[21 S. D. 566, 114 N. W. 701.]

PROXIMATE and Remote Cause of Injury, Definitions of.—

Where the result of an unlawful act is a natural one, and one which would naturally flow from the act done, it is not remote, but proximate. On the other hand, if the damages complained of would not usually or naturally flow from the negligent act or were brought about through some unforeseen casualty, they are remote. (p. 745.)

TRESPASSING ANIMALS, Damages by, When not Proximate, but Remote.—If horses trespassing on the highway by an inclosure in which other horses are confined approach a barbed wire fence, biting and striking at the confined horses, and one of the latter,

either in striking back or in attempting to jump over the fence, catches and cuts its foot, and is thereby ruined, this damage is deemed remote and not proximate, and its owner cannot recover therefor from the owner of the animals so trespassing. (p. 746.)

G. R. Krause, for the appellant.

Robertson & Dougherty, for the respondent.

⁵⁶⁸ CORSON, J. This is an appeal by the defendant from a judgment on a directed verdict in favor of the plaintiff. The action was instituted by the plaintiff against the defendant in claim and delivery to recover the possession of two colts alleged to have been wrongfully detained by the defendant. The complaint is in the usual form, and the defendant in his answer denies each and every allegation therein contained, except as thereafter expressly admitted; and the defendant alleges that on May 1, 1906, and for several days prior thereto, the two animals described in plaintiff's complaint were trespassing upon the land owned by the defendant and by him occupied as a homestead; that while so trespassing the said animals caused damage to the defendant, in that ⁵⁶⁹ they caused the defendant's two year old colt to be cut and wounded in a barb-wire fence upon the defendant's land by fighting and biting him, and crowding said fence over onto and against him, thereby causing defendant's colt to be so severely wounded and cut as to render him helpless and of no value, and making it necessary to kill him; that said colt was a two year old stallion, and before said injury of the value of one hundred dollars; that the defendant thereupon took up the plaintiff's said two colts, and notified the plaintiff that they had so trespassed upon his land, and had so caused injury and damage as aforesaid to this defendant, and the amount thereof, and also that he, the defendant, was retaining and keeping in his custody the said offending animals, until said damage was paid or secured. The defendant, as a further answer and counterclaim, alleged substantially the same facts, and that plaintiff had refused to pay or secure the said damage, and that he did thereafter, on May 3, 1906, wrongfully cause the offending animals to be taken from his possession by means of this action, and has ever since kept the same, thereby depriving the defendant of his security for payment of said damage so caused by said animals. The defendant prays judgment, that plaintiff's complaint be dismissed, and that he have judgment for the amount of his damages; that the defendant be adjudged to have a lien upon the said animals as security for his said damages and costs; and that the same

may be ordered sold, and the proceeds applied in satisfaction of defendant's judgment.

It is disclosed by the evidence that the plaintiff was the owner of the two colts described in the complaint, and that on the day of the injury, and for two or three days prior thereto, the colts were running at large in the highway along the defendant's premises, which were inclosed by a barb-wire fence, which consisted of two wires, one about two feet from the ground and the other about four and one-half feet from the ground, attached to posts in the usual manner. The only witness as to what occurred at the time of the injury was the defendant, Arp, who testified in substance as follows: "I know the colts of the possession of which the plaintiff has brought his action. I had them in my possession when he came for them some time about the 1st of May. These colts were ⁵⁷⁰ there on my premises for two or three days before the accident happened. I chased them off several times, but they came back again. On the day of the injury to my colt I heard the horses squealing and fighting, and looked up and saw those colts fighting with mine. I hurried over, and saw they were fighting over the fence. The plaintiff's colts came against mine, biting and fighting, and mine got into the wire, raised up his front foot, and got caught in the wire, and was completely ruined. When I started over there, I saw a lunge made by the colts outside of the fence, and saw that they pushed the fence over and against my colt, and that mine in fighting back got onto the wires. When I got there, my colt was standing back from the others, had his foot nearly cut off, and was bleeding badly, and subsequently I had to kill him." The defendant further testified that he took up plaintiff's two colts, and kept them in his possession, and served a written notice upon plaintiff that he would hold the same until the damage sustained by him was either paid or secured as provided by law. On cross-examination he testified: "Plaintiff's colts were on the outside, and mine on the inside of the fence." The witness was then asked the following questions: "Q. Did he (your colt) catch on the top wire? A. I don't know. Q. The top wire was bloody? A. Yes, sir. Q. You said he lifted up his foot? A. Yes. Q. And in that way he cut his foot? A. Yes, sir. Q. And he caught on the top wire? A. I don't know about the wire. Q. You saw blood on the top wire? A. Yes, sir. Q. And when he got his foot on the top wire he commenced backing and pulled the wire back trying to get out? A. Yes, sir." At the conclusion of the evidence plaintiff moved the court

to direct a verdict in his favor, for the reason that it appears from the evidence that the colts of the plaintiff were on the highway and outside of the fence inclosing the defendant's land, and under the facts as disclosed by the evidence the defendant was not authorized under the statute to take the possession of the colts and hold them by distress as security for the payment of the value of defendant's colt; and for the further reason that it appears from the testimony that the colt belonging to the defendant put his foot on top of the wire fence, and, if any injury was sustained by it, it was sustained ⁵⁷¹ in its attempt to jump over the fence, and that, if he sustained any damage by reason of the presence of the plaintiff's colts, the damage was too remote to entitle the defendant to recover in this action. The court seemed to have adopted this view, and directed a verdict, as before stated, in favor of the plaintiff.

It is contended by the defendant that the plaintiff's colts were trespassing upon his property, and that the plaintiff, therefore, was liable for all the damages sustained by him by reason of such trespass, as under the code of this state the defendant was authorized to take up and hold possession of the said colts until the damages sustained by him were either paid or secured, and therefore the plaintiff was not entitled to recover in this action. The defendant in his brief discusses at considerable length and cites many authorities to the effect that the plaintiff's colts, not being upon the highway for the purpose of passing over the same, were, when near the fence of the defendant, trespassing upon his property, and that he had a right to distrain them and hold them, under the provisions of sections 817 and 820 of the Revised Code of Civil Procedure, until his damages were paid or secured; but in the view we take of the case, we do not deem it necessary to determine whether or not the plaintiff's colts were trespassing upon the defendant's property within the purview of the sections cited, and for the purpose of this decision we may assume that defendant is right in his contention.

As will be noticed, the plaintiff claims that the injury to defendant's colt was caused by his apparent attempt to jump over the fence, and the fact that plaintiff's animals were trespassing upon the defendant's property was not of itself the proximate cause of the injury. We are inclined to the opinion that plaintiff is right in his contention, and that the proximate cause of the injury to defendant's colt was its attempt to jump over the fence, and in that effort its foot became entangled in the barb wire, resulting in the injury

complained of. Had the injury resulted to the defendant's colt by reason of the biting or kicking by the plaintiff's colts over or through the barb-wire fence, the plaintiff clearly would have been liable for such injury: *Ellis v. Loftus*, 10 C. P. 10 (English case). But in the case at bar no injury was ⁵⁷² directly inflicted upon defendant's colt by the colt or colts of plaintiff, and the injury to defendant's colt seems to have been caused by its own act, presumably, in its attempt to jump over the fence, and that the damages caused were too remote to render the plaintiff liable therefor. In 13 Cyc. 25, the rule as to proximate damages is thus stated: "A proximate loss or injury is usually a consequential loss or injury, but is one so nearly connected with the original wrong that the law concerns itself to award damages therefor. It is a fundamental principle of law, applicable alike to breaches of contracts and to torts, that, in order to found a right of action, there must be a wrongful act done and a loss resulting from that wrongful act. The wrongful act must be the act of the defendant, and the injury suffered by the plaintiff must be the natural, and not merely a remote, consequence of the defendant's act. . . . Where the effect could reasonably have been foreseen, and where in the usual course of events it was likely to follow from the cause, the person putting such cause in motion will be responsible, even though there may have been many concurring events or agencies between such cause and its consequences." On page 27 it is stated: "The question as to what damages will be considered the natural and proximate consequence of the injury, and what damages will be considered remote, is one difficult of decision. It may be stated as a general rule, however, that where the result of an unlawful act is a natural one, and one that would naturally flow from the act done, it is not remote, but proximate. If, upon the contrary, the damages complained of would not naturally or usually flow from the negligent act, but were brought about by some unforeseen casualty, then they would be remote. Within the rule which limits a recovery for injury to those damages which are its natural and proximate effects, the natural effects are those which might reasonably be foreseen, those which occur in the ordinary state of things, and proximate effects are those between which and the injury there intervenes no culpable and efficient agency." In 8 American and English Encyclopedia of Law, page 542, the rule is thus stated: "Again, damages are either direct or consequential. The former are such as result from an act without the intervention of any intermediate ⁵⁷³ controlling or self-

efficient cause. The latter are such as are not produced without the concurrence of some other event attributable to the same origin or cause. Proximate damages are those that are the ordinary and natural results of the defendant's act, such as are usual, and might therefore have been expected. Remote damages are such as are the result of accident or an unusual combination of circumstances which could not be reasonably anticipated, and over which the party sought to be charged had no control."

In the case of *Pielkie v. Chicago etc. Ry. Co.*, 5 Dak. 444, 41 N. W. 669, Mr. Justice Tripp in a very able and exhaustive opinion fully reviews the authorities bearing upon the question of proximate and remote damages, and cites with approval the case of *Milwaukee & St. P. Ry. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256. In that case the learned supreme court of the United States says: "The question always is: Was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the fact constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of the injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen, in the light of the attending circumstances." In the case at bar the injury resulting to defendant's colt could not have been anticipated by the plaintiff in permitting his colts to remain in the highway adjoining defendant's land. It is true the remote cause of the injury was the fact that the plaintiff's colts were upon the defendant's land, but the proximate cause seems to have been the efforts of the defendant's colt to get over the fence and thereby becoming entangled in the barb wire, resulting in its injury. The proximate cause of the injury, therefore, was the act of the defendant's colt. This fact being established by the undisputed evidence, it is quite clear that the plaintiff was not liable for the injury, and the court was clearly right in directing a verdict in favor of the plaintiff.

The judgment of the court and order denying a new trial are affirmed.

The Doctrine of Proximate and Remote Cause is the subject of an extended note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 807. Recent cases discussing this question are *Cooper v. Richland*

County, 76 S. C. 202, 121 Am. St. Rep. 946; *Smith v. Norfolk etc. R. R. Co.*, 145 N. C. 98, 122 Am. St. Rep. 423; *Martin v. Southern Ry.*, 77 S. C. 370, 122 Am. St. Rep. 574; *Phillips v. St. Louis etc. R. R. Co.*, 211 Mo. 419, 124 Am. St. Rep. 786. The proximate cause of an injury is that which in a natural and continuous sequence, unbroken by any new independent cause, produces the injury, without which the injury would not have occurred. It is not necessary to show that the wrongdoer ought to have anticipated the particular injury which did result; it is sufficient to show that he ought to have anticipated that some injury was likely to result as the reasonable and natural consequence of his negligence: *Mize v. Rocky Mt. Bell Tel. Co.*, 38 Mont. 521, 129 Am. St. Rep. 659. See, also, *Western Union Tel. Co. v. Milton*, 53 Fla. 484, 125 Am. St. Rep. 1077; *Pilmer v. Boise Traction Co.*, 14 Idaho, 327, 125 Am. St. Rep. 161; *Rogers v. Rio Grande Western Ry. Co.*, 32 Utah, 367, 125 Am. St. Rep. 876; *Miller v. Baltimore etc. R. R. Co.*, 78 Ohio St. 309, 125 Am. St. Rep. 699; *Bell v. Rocheford*, 78 Neb. 304, 126 Am. St. Rep. 595.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

DUTTON v. KNOXVILLE.

[121 Tenn. 25, 113 S. W. 381.]

DEFINITION.—"Forestalling" is Buying Victuals on their way to market with intent to sell again at a higher price. (p. 750.)

DEFINITION.—"Regrating" is the Buying of Grain or Other Dead Victual in any market and selling it again in the same market. (p. 750.)

MUNICIPAL ORDINANCE Forbidding Sale of Products by Persons Who do not Raise or Produce Them.—If a municipal corporation is by statute authorized to restrain and punish forestalling and regrating, its ordinance forbidding and punishing the sale of produce by persons who do not raise it, but have purchased it for the purpose of sale, is valid. (pp. 750, 752.)

CONSTITUTIONAL LAW—Classification, Discriminating Between Persons Who Produce Foodstuffs and Those Who Purchase for Resale.—A municipal ordinance discriminating between persons who produce provisions and sell them to consumers at first hand and persons who purchase them for resale by allowing the former to sell their products within the municipality and denying to the latter the right to make sales, does not make an unlawful discrimination. (p. 753.)

MUNICIPAL ORDINANCES.—A License to Huckster granted by the state and county does not authorize the violation of a municipal ordinance by forestalling or regrating, when those acts are specially prohibited by such ordinance, and it will be possible to carry on the business of huckstering without engaging in them. (p. 753.)

John W. Green and F. M. De Armond, for the complainants.

J. Pike Powers, for the defendants.

27 NEIL, J. The complainants charge in their bill that they are hucksters, each engaged on his own account in selling from wagons direct to consumers in the city of Knoxville, vegetables, butter, eggs, poultry, fruit, and other products

of the farm, garden, and orchard; that each has a license from Knox county authorizing him to carry on the trade of a huckster and has paid to the county the tax fixed by the legislature for carrying on business of this character; that each is a resident, citizen and taxpayer of Knox county; that all of the complainants have been engaged in the business referred to for a long period of time, and many of them for years; that this business constitutes their only means of livelihood.

It is further alleged that the complainants buy the articles thus handled by them sometimes direct from the producer and sometimes on the market; that they do not raise the articles themselves.

It is further alleged that the city of Knoxville affords the principal and practically the only market for the sale of their goods; that when they took out their licenses from the county court of Knox county, they did so with a view to, and for the purpose of, selling to the people of the city of Knoxville; that a business of this character has been carried on, not only by themselves, but by others for years in the city of Knoxville without arrest.

It is further alleged that the city refused to permit them, or any of them, to carry on the business referred to inside the city limits; that whenever one of complainants begins to sell, or to offer his goods for sale, he is required to cease selling, and, if he persists, he is arrested; that complainants have offered to pay the city authorities, and have tendered to them money to pay for a huckster's license, and not only so, but have agreed to pay any reasonable tax the city might require of them; that the city, however, has refused to accept their money, or to issue licenses to them, and has warned complainants that, if they persist in selling, they will be arrested, and that some of the complainants have been arrested and fined; that the result of this condition of affairs is that the complainants' business has been destroyed, and they have lost their occupation and means of livelihood.

It is further alleged that the defendant, while refusing to permit the complainants to carry on the trade of hucksters inside the city limits, permits any person who grows his fruit or vegetables or raises his poultry or other produce on his own land to carry on the trade of a huckster from wagons in the city of Knoxville without license, and without hindrance.

It is further alleged that chapter 207, page 755, Acts of 1907, incorporating the city of Knoxville, expressly confers

the power upon the city to license hucksters, hawkers, peddlers, grocers, merchants, etc.

It is further alleged that allowing persons who raise their own produce to sell the same from the wagons without license, and refusing to allow persons who do not raise the produce which they offer for sale the right ²⁹ to sell from their wagons without license, is an unlawful and unjust discrimination between the complainants and the citizens last referred to.

It is further alleged that such ordinance of the city is void as in violation of the constitution of this state, and of the United States.

Thereupon the complainants asked for and obtained an injunction to restrain the execution of the ordinance under which the city is acting.

To this bill the defendant city filed a demurrer, making several points, but we need only notice the following:

That the charter referred to in the bill gave to the city the power "to regulate the inspection of milk, butter and lard, and other provisions and fish and vegetables; to restrain and punish forestalling and regrating of provisions; to establish and regulate markets," and that the right exercised by the city falls within the provisions of the charter just quoted, particularly within the provisions against "forestalling and regrating," that the complainants and persons who raise their own produce are not in the same class, but are in a different class, and a discrimination between the two is reasonable and natural.

We think the chancellor acted correctly in sustaining the demurrer.

The city had the right under its charter to protect its inhabitants against the unlawful raising of the price of the necessities of life, such as would naturally result ³⁰ from the practice of forestalling the market by persons who would buy from the producers of market products for the purpose of resale within the city. "Forestalling" is defined: "Buying victuals on their way to market before they reach it, with intent to sell again at a higher price": 1 Bouvier's Law Dictionary, p. 677. "Regrating" is the buying of corn or other dead victual in any market, and selling it again in the same market, since this enhances the price of the provisions, as every successive seller must have a successive profit: 4 Blackstone's Commentaries. In *Re Nightingale*, 28 Mass. 168, an ordinance was sustained reading as follows: "That no inhabitant of the city of Boston, or any town in the vicinity thereof, not offering for sale the produce of his own farm, or of some

farm in his neighborhood, shall at any season of the year, without permission of the clerk of Faneuil Hall Market, be suffered to occupy any stand with cart, sleigh or otherwise, for the purpose of vending commodities in either of the streets mentioned in the first section of this ordinance; and every such person, on being so ordered, shall remove from out of said streets." Responding to the objection that this ordinance was partial because it did not operate upon all of the citizens of the commonwealth equally, but made a distinction between the citizens of Boston and its vicinity and the inhabitants of distant towns in the commonwealth, the court said: "We cannot think that there is any weight in this objection. A regulation of this description could hardly be framed so as to avoid a partial operation arising from local ³¹ situation and other circumstances. But the partial operation of the ordinance can be no objection to its validity, providing it does not infringe private rights, and it is very clear that it does not. The city government had an undoubted right to prohibit the occupation of a stand in the streets by anyone, or by anyone not having a license or permission for that purpose from the clerk of the market. In the case of *Vanderbilt v. Adams*, 7 Cow. (N. Y.) 349, it was decided that an act authorizing the harbor-masters to regulate and station vessels in East and North rivers in New York, and imposing a penalty for disobeying their orders, extends to wharves in the hands of private owners, and is not unconstitutional, but is valid as a police regulation. There is certainly nothing contained in the ordinance in question which can be pretended to operate as a violation of private rights; nor does it operate as an improper restraint of trade, but is a wholesome regulation of it, to prevent the market from being unnecessarily thronged and encumbered": 28 Mass. 168, 171. In *Louisville v. Roupe*, 45 Ky. 591, the Kentucky court of appeals had under consideration a controversy wherein the following facts appeared: An act amending the charter of the city of Louisville authorized the mayor and council, by ordinance, to define the offense of forestalling, regrating or engrossing, and more effectually to suppress the same by adequate fines and penalties. The tenth section of an ordinance relating to the market prohibited, under a penalty of twenty dollars, the sale or offer for sale within any of the ³² market-houses, and during market hours, of articles of provision or other kind of marketing which was sold, purchased or forestalled at any place within the city. The eleventh section of the same ordinance prohibited, under a penalty of four dollars, any per-

son residing within the city from occupying any part of the market-house, during market hours, for the purpose of selling, or offering for sale, any provisions, or any kind of marketing, except vegetables of their own growth, meat of their own slaughtering, or flour, meal or sausage of their make. The court said in considering the question thus raised: "The question is whether the city council have power to prohibit and punish the sale, in market by a citizen, of marketing articles not produced or prepared by himself. The prohibited act implies necessarily that the articles have been, by some means, collected for the purpose of selling them in the market, which, in reference to particular articles, might constitute regrating or engrossing. It furnishes, also, a presumption that the articles have been purchased or contracted for on their way to market which may constitute the offense of forestalling. It may tend, also, to enhance the price in market, which is the great evil apprehended from each of those offenses, and the city council has power to extend the definition of the offense for the very purpose of preventing this evil. We are of opinion, therefore, that the selling at market of articles not produced or prepared by the vendor is so closely connected with the offenses mentioned in the statute, even according to their definition by common ³³ and statute law, and constitutes so palpable and convenient a means of committing those offenses, if they do not constitute the offenses themselves, that under the power of defining and suppressing them the mayor and council were authorized to prohibit and denounce penalties against such selling, and that, even if they might have included in the prohibition other persons besides citizens, they were not bound to do so. Wherefore, as the evidence proved, without contradiction, that the defendant, a resident of the city of Louisville, did on the day mentioned in the warrant sell in the market, in market hours, large quantities of turkeys, chickens, eggs, etc., and was in the habit of doing so on other market days and there was no evidence, nor upon these facts any presumption, bringing him within the exception in the ordinance, if as to all the articles he could be brought within the exception, we are of opinion that judgment should have been rendered against him for the penalty, and that the police court erred in dismissing the warrant": 45 Ky. 593.

There can be no doubt of the validity of the ordinance in the present instance, because it falls directly within the terms of the charter of the city.

There is no basis for the complaint of unlawful discrimination because the complainants belong to a distinct class from those persons permitted by the city to sell; the complainants being those who would violate the law by forestalling and regrating the market, and those permitted to sell being the reverse, those who are the ³⁴ producers of provisions and who sell them to consumers at first hand.

The ordinance is not rendered inoperative by the fact that the state and county have granted a huckster's license to each of the complainants. That would not authorize them to violate a city ordinance: *Commonwealth v. Fenton*, 139 Mass. 195, 29 N. E. 653; *Commonwealth v. Ellis*, 158 Mass. 555, 33 N. E. 651. Moreover, under their huckster's license, the complainants can sell other things besides the kinds of provisions referred to.

Affirm the decree of the chancellor, with costs.

An Ordinance or Statute imposing a license tax on peddlers seems not unconstitutional because it exempts those peddlers, such as farmers, who vend their own products: See note to *Hager v. Walker*, 129 Am. St. Rep. 277.

HEART v. EAST TENNESSEE BREWING COMPANY.

[121 Tenn. 69, 113 S. W. 364.]

CONTRACTS, When Void.—Contracts are void which provide for doing a thing contrary to law, morality or public policy. (p. 754.)

CONTRACTS, Effect of Statute Making Their Execution Unlawful.—If a lease of property is made for the purpose of carrying on thereon a business then lawful, which is subsequently by statute made unlawful, the lease thereupon becomes void and unenforceable at the instance of either party. (pp. 754, 755.)

Lewis Tillman, for the complainant.

Webb, McClung & Baker, for the defendant.

⁷⁰ SHIELDS, J. Complainant on August 31, 1902, leased a certain house and lot situated in Knoxville, Tennessee, and owned by him, to the defendant for a term of eight years, to be used as a saloon or place for the sale of intoxicating liquors, as expressed in the written lease that day made and executed by both parties. The defendant entered into possession of the property, and paid the rent contracted for to November 1, 1907, but after that declined to further use it or pay any rent. Complainant sues to collect rent accruing

since November 1, 1907. The contract of lease was exhibited with and made a part of the bill, and therein the terms of the contract and the purposes for which the property was to be used are fully set forth.

The chancellor sustained a demurrer to the bill upon the ground that by chapters 17, 206, 207, pages 81, 752, 755, Acts of General Assembly of 1907, the sale of intoxicating ⁷¹ liquors was made unlawful and prohibited in the city of Knoxville from and after November 1, 1907, and therefore the purpose for which the lease was made was from that time illegal, and the contract void and unenforceable, and complainant has brought the case to this court for review.

There is no error in the action of the chancellor. When the contract was made, the purpose for which the property was leased—the sale of intoxicating liquors in Knoxville—was lawful, and the lease valid and enforceable. Afterward, November 1, 1907, that purpose was made unlawful by the acts of the General Assembly above referred to, and thus by operation of law the lease became and is void and unenforceable at the instance of either party.

It is a principle of general application that all contracts are void which provide for doing a thing which is contrary to law, morality and public policy: *Yerger v. Rains*, 4 Humph. 259; *Wetmore v. Brien*, 3 Head, 723; *Henderson v. Waggoner*, 2 Lea, 134, 31 Am. Rep. 591; *Rhodes v. Summerhill*, 4 Heisk. 204; Page on Contracts, sec. 326.

It has been applied to contracts of this character, and held, for that reason, that the rent contracted to be paid could not be collected: *Ralston v. Boady*, 20 Ga. 449; *Sherman v. Wilder*, 106 Mass. 537; *Mound v. Barker*, 71 Vt. 253, 76 Am. St. Rep. 767, 44 Atl. 346; *Riley v. Jordan*, 122 Mass. 231; *Holmead v. Maddox*, ⁷² 2 Cranch C. C. 161, Fed. Cas. No. 6629; 2 Taylor's Landlord and Tenant, sec. 521.

The rule is the same when the purpose of the contract, although lawful when made, becomes unlawful by statute enacted before the full performance of its terms. In Mr. Parsons' work on Contracts (volume 2, page 674) it is said: "That the illegality of a contract is in general a perfect defense must be too obvious to need illustration. It may indeed be regarded as an impossibility by act of law; and it is put upon the same footing as an impossibility by act of God, because it would be absurd for the law to punish a man for not doing, or, in other words, to require him to do that which it forbids his doing. Therefore, if one agrees to do a thing

which is lawful for him to do, and it becomes unlawful by an act of the legislature, the act avoids the promise, and so if one agrees not to do that which he may lawfully abstain from doing, but a subsequent act requires him to do, this act also avoids the agreement."

In Hammon on Contracts, section 210, pages 345, 346, it is said: "Where the performance of an executory agreement which was lawful in its inception is made unlawful by subsequent enactment, the agreement is thereby dissolved and the parties discharged from its obligations."

Other text-books are to the same effect: Clark on Contracts, 681; Lawson on Contracts, secs. 423, 424.

⁷³ The rule has also been frequently applied by this and other courts of last resort. In Mississippi & T. R. R. Co. v. Green, 9 Heisk. 588, it was held that a contract for the payment of Confederate notes, lawful when made, but afterward made unlawful by law, could not be enforced. It is there said: "The law has therefore made it impossible for the plaintiff to perform that portion of the condition precedent which required them to demand payment in Confederate notes. The nonperformance of a contract will always be excused where it is occasioned by act of law."

The case of Gray v. Sims, 3 Wash. C. C. 276, Fed. Cas. No. 5729, is directly in point. This was a suit upon a policy of marine insurance. The vessel insured was to be employed in importing goods from Calcutta or Madras into the United States, and the contract of insurance specified this as one of the purposes of the voyage. After the policy was written, and before the return of the vessel, it became by act of Congress illegal to import goods into the United States from those points. The master undertook to do so, and the ship was seized and confiscated. The loss was within the terms of the policy. A recovery was denied. The court said: "But if the contract be legal when it is made, and the performance of it is rendered illegal by a subsequent law, the parties are both of them discharged from its obligation. The insured loses his indemnity and the insurer his premium."

⁷⁴ Other cases in accord are: Sauner v. Phoenix Ins. Co., 41 Mo. App. 480; Corrigan v. Chicago, 144 Ill. 537, 33 N. E. 746, 21 L. R. A. 212; Jamieson v. Indiana Nat. Gas & Oil Co., 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652; Presbyterian Church v. New York, 5 Cow. (N. Y.) 538.

It is not necessary in this case to determine whether or not the contract contained in the lease restricts the use of the property for the sale of intoxicating liquors. It was the pur-

pose of both lessor and lessee, as clearly expressed in the instrument, that it should be used as a saloon, and, this being made unlawful by law, the contract is no longer enforceable.

The decree of the chancellor is affirmed, with costs.

The Effect of Statutes Making Pre-existing Contracts Illegal is the subject of a note to American Mercantile Exch. v. Blunt, 120 Am. St. Rep. 468.

THOMAS v. STATE.

[121 Tenn. 83, 113 S. W. 1041.]

EVIDENCE—Res Gestae in Criminal Prosecution.—A statement made the next day after an assault by the person assaulted that he did not know whether he cut his assailant or not, but he struck at him two or three times, is not part of the *res gestae*, and is not admissible against the state in a prosecution for a felonious assault. (p. 757.)

EVIDENCE, Production of Incompetent, When Waives Objection to Like Incompetent Evidence in Rebuttal.—If defendant in a criminal prosecution, against the objection of the state, insists upon offering and having the court receive incompetent evidence, he will not be allowed to avail himself, as a ground for a new trial or reversal, of the fact that equally incompetent evidence of like character and on the same point was, against his objection, received against him. (p. 757.)

EVIDENCE.—It is not Erroneous to receive irrelevant evidence to rebut evidence of like character offered by the other. (p. 758.)

McCroskey & Peace, for Thomas.

Attorney General Cates and Young & Young, for the state.

⁸⁴ BEARD, C. J. Plaintiff in error was convicted of a felonious assault with intent to commit voluntary manslaughter upon the person of one Fayette Stewart. While the plaintiff in error did not testify, yet the theory of his defense was that Stewart was the aggressor, and in using the knife, which the plaintiff in error did, he was acting under a reasonable apprehension of death, or great bodily harm, by reason of the fact that he was then being assaulted with a knife in the hands of Stewart. No evidence was introduced tending to support this theory, save as found in the testimony of witnesses of the plaintiff in error to the effect that the day after the difficulty they heard Stewart say that he did not know whether he cut Thomas, but he struck at him two or three times.

This testimony went to the jury over the objection of the state.

Stewart being dead at the time of the trial, in rebuttal the state was permitted to show by witnesses that Stewart had stated to them, or in their presence, at a time subsequent to the date of the statement attributed to him by the witnesses of the plaintiff in error, that he had no knife at the time he was stabbed by Thomas, ⁸⁵ and that he made no effort to use a knife in this difficulty. The admission of this testimony over the objection of the plaintiff in error is assigned as a ground for the reversal of the judgment pronounced by the trial court in this case.

It is not seriously claimed by the counsel for the plaintiff in error that the statement attributed to Stewart as having been made after the difficulty, constituting no part of the *res gestae* and offered in evidence by the plaintiff in error, was competent as against the state; nor could a contention that such testimony was competent be maintained. The question, then, is, having opened the door for such incompetent evidence, will the plaintiff in error be heard in this court to urge a reversal upon the ground that other incompetent evidence directed to the same point was introduced by the state in rebuttal?

It would seem, as a matter of sound reason, that a party who has, over the objection of his adversary, given to the jury clearly incompetent testimony, should not be allowed to avail himself, as a ground for a new trial, and a fortiori for reversal in an appellate court, of the fact that his adversary had used in rebuttal neutralizing testimony equally incompetent, but directed to the same point. In such a case certainly the party who is unsuccessful, notwithstanding the error of which he was first guilty, should not be allowed to obtain relief, especially in a court of review, because the other party had followed a bad precedent which he himself ⁸⁶ had set, whether this was done with or without objection. The insistence of the state that this cannot be done is well supported by authority. Upon examination, we find that Mr. Wigmore, in his valuable work on Evidence (volume 1, section 15), discussing the question here presented, with his usual ability and learning, embodies the principle above suggested in the second of three rules prevailing in different jurisdictions. Under this rule the admission "of an inadmissible fact" justifies "the opponent in resorting to similar inadmissible evidence." This rule rests upon the idea of estoppel; that is, having himself first introduced incompetent testimony,

he should be estopped to object to similar testimony offered by the other side directed to the same point, as long as his own incompetent testimony remains in the record. This has been the holding of many English cases, and this rule is said by Mr. Wigmore to be now regarded as the "orthodox English rule." In a qualified form, the principle embodied therein has met the qualified approval of the author in Elliott on Evidence, as will be seen by referring to volume 2, section 889, and it is supported by many American cases. In *Morgan v. State*, 88 Ala. 223, 6 South. 761, it is held that "the party first in fault cannot take any advantage of the ruling of the court in favor of the other"; and in *Mobile & B. R. Co. v. Ladd*, 92 Ala. 287, 9 South. 169, it is said: "It is never erroneous to receive irrelevant evidence to rebut evidence of a like kind offered by the other party." *Perkins v. Hayward*, 124 Ind. 445, ⁸⁷ 24 N. E. 1033, *Sherwood v. Titman*, 55 Pa. 77, and *Fuller v. Valiquette*, 70 Vt. 502, 41 Atl. 579, all agree that, if a party opens the door for the admission of incompetent evidence, he is in no plight to complain that his adversary followed through the door thus opened; and this, although no objection was made in the first instance to the admission of such evidence.

We hold, therefore, that the trial judge committed no error in the matter now complained of; and the verdict of the jury being amply warranted by the weight of the testimony, the judgment of the court below is affirmed.

TO WHAT EXTENT AND IN WHAT CIRCUMSTANCES A PARTY MAY ESTOP HIMSELF FROM OBJECTING TO INCOMPETENT EVIDENCE.

I. Scope and Explanations, 758.

II. Three Prevailing Rules.

- a. A Popular Rule and Illustrations, 759.
- b. An Opposite Rule and Illustrations, 766.
- c. An Intermediate Rule and Illustrations, 768.

I. Scope and Explanations.

Our inquiry in this note is confined to the single question of estoppel which was raised in the principal case (ante, p. 756), namely, when a party may be estopped on appeal to complain of incompetent testimony admitted against him on the trial, when he himself, without objection, opened the door, by first resorting to such improper evidence. The present discussion, therefore, does not embrace the question of estoppel which may arise from admissions which the complaining party may have made regarding the incompetent evidence, or of that which may arise from his failure to observe some

rule of procedure; nor does it include the question of estoppel to reply in kind to incompetent evidence which has been admitted over proper objection, since the objection itself would afford sufficient protection on appeal. As thus limited, a solution of the inquiry here presented depends upon the single question whether the introduction of illegal evidence by one party to a case, without objection, entitles his opponent to protect himself by retorting in kind. At first blush this question would not seem to present much difficulty, nor would we expect to find any great number of cases bearing upon it. But though the adjudicated cases are not so numerous as those bearing upon some other questions, they present widely divergent views, and the conflict of judicial opinion is so marked that the cases establish three distinct rules regarding the subject, two of which are directly opposed to each other, while the third, which may be termed an intermediate rule, and one which, if modified to fit the circumstances of each particular case, would result in a flexible rule and harmonize the conflicting views presented in the two extreme rules, finds the least support.

We shall note these three different rules, and give illustrations under each, showing how they have been applied in the different jurisdictions which respectively uphold them, and it will be interesting to note from these illustrations, with respect to the two extreme and directly opposite rules, that the decisions on both sides are founded upon circumstances of waiver, both of which, Mr. Wigmore says, are true, and have led to opposite conclusions solely because of the relative emphasis which the different courts have placed upon them: 1 Wigmore on Evidence, sec. 15.

II. Three Prevailing Rules.

a. **A Popular Rule and Illustrations.**—The rule laid down in the principal case (ante, p. 756), that "if a party opens the door for the admission of incompetent evidence, he is in no plight to complain that his adversary followed through the door thus opened; and this, although no objection was made in the first instance to the admission of such evidence," is supported by a long line of cases, and may perhaps be said to voice the prevailing opinion in a majority of the jurisdictions.

"The party first in fault cannot take any advantage of the ruling of the court in favor of the other": *Morgan v. State*, 88 Ala. 223, 6 South. 761.

"It is never erroneous to receive irrelevant evidence to rebut evidence of like kind offered by the opposite party": *McIntyre v. White*, 124 Ala. 177, 26 South. 973.

"Evidence otherwise incompetent may be practically stripped of its objectionable character by the course pursued by the party who challenges its incompetency. If a party opens the door for the admission of incompetent evidence, he is in no plight to complain that his adversary followed through the door thus opened": *Perkins v. Hayward*, 124 Ind. 445, 24 N. E. 1033.

"Having enjoyed permission to successfully ask wholly incompetent and improper questions on a certain subject, it does not lie in the mouth of the party thus doing to complain of error in permitting his adversary to pursue a similar course": *State v. Palmer*, 161 Mo. 152, 61 S. W. 651.

"A party who draws from his own witness irrelevant testimony, which is prejudicial to the opposing party, ought not to be heard to object to its contradiction on the ground of its irrelevancy": *Sisler v. Shaffer*, 43 W. Va. 769, 28 S. E. 721.

The rule announced by the foregoing cases is founded upon the axiomatic principle of law that a party should not be permitted to take advantage of his own wrong, or, as was said in the principal case (*ante*, p. 756), "having himself first introduced incompetent testimony, he should be estopped to object to similar testimony offered by the other side directed to the same point, as long as his own incompetent testimony remains in the record."

It hardly seems deniable that one who voluntarily introduces evidence of certain facts thereby waives future objection to other evidence to the same class of facts, and the rule established by the foregoing quotations has been upheld by a great many cases, both civil and criminal: *Ford v. State*, 71 Ala. 385; *Gandy v. State*, 86 Ala. 20, 5 South. 420; *Gordon v. State*, 129 Ala. 113, 30 South. 30; *Longmire v. State*, 130 Ala. 66, 30 South. 413; *Cross v. State*, 147 Ala. 125, 41 South. 875; *German-Am. Ins. Co. v. Brown*, 75 Ark. 251, 87 S. W. 135; *Dow v. State*, 77 Ark. 464, 92 S. W. 28; *Barnes v. State*, 20 Conn. 254; *Merchants' Loan & Trust Co. v. Boucher*, 115 Ill. App. 101; *Coon v. Lantz*, 116 Ill. App. 472; *Perkins v. Hayward*, 124 Ind. 445, 24 N. E. 1033; *Pettit v. State*, 135 Ind. 393, 34 N. E. 1118; *Campbell v. Connor*, 15 Ind. App. 23, 42 N. E. 688, 43 N. E. 453; *Hoover v. State*, 161 Ind. 348, 68 N. E. 591; *Indianapolis Traction & Terminal Co. v. Romans*, 40 Ind. App. 184, 79 N. E. 1068; *Cronk v. Wabash R. Co.*, 123 Iowa, 349, 98 N. W. 884; *Roark v. Greno*, 61 Kan. 299, 59 Pac. 655 (reversing *Greno v. Roark*, 8 Kan. App. 390, 56 Pac. 329); *State v. Goddard*, 162 Mo. 198, 62 S. W. 697; *Trustees of Christian University v. Hoffman*, 95 Mo. App. 488, 69 S. W. 474; *Jetter v. Zeller*, 104 N. Y. Supp. 229, 119 App. Div. 179; *Sherwood v. Titman*, 55 Pa. 77; *Farley v. Charleston Basket & Veneer Co.*, 51 S. C. 222, 28 S. E. 193, 401; *Mealer v. State*, 32 Tex. Cr. 102, 22 S. W. 142; *Ramsey v. State* (Tex. Cr. App.), 65 S. W. 187; *Houston & T. C. R. Co. v. Hopson* (Tex. Civ. App.), 67 S. W. 458; *Gabler v. State*, 49 Tex. Cr. 623, 95 S. W. 521; *Sun Printing & Pub. Co. v. Edwards*, 113 Fed. 445, 51 C. C. A. 279; *Warren Livestock Co. v. Farr*, 142 Fed. 116, 73 C. C. A. 340.

Thus, in *Gandy v. State*, 86 Ala. 20, 5 South. 420, defendant was on trial for illegal voting, in that he had been previously convicted of larceny, which disqualified him from exercising the right of an elector. Defendant, under a mistaken belief that a certain docket would show that he had only been convicted of living in adultery

and not of larceny, had himself introduced evidence of his conviction for living in adultery and had made reference to such docket entry. It was held that the state could introduce the entry, the court saying: "The entry showing the conviction of the defendant for living in adultery would clearly have been inadmissible in evidence but for the fact that the defendant had himself introduced evidence of this conviction, as found on the docket after search made by his counsel. He had attempted to show that he believed he had been convicted only of living in adultery, and not larceny, and direct reference had been made to this judgment entry in the testimony introduced in his behalf. The state only introduced the very record to which the defendant's evidence referred, and in this there was no error."

And where on trial for assault to kill defendant testified as to his reputation for truth and veracity, the state having made no effort to impeach his reputation for truth and veracity, defendant could not complain on appeal of the introduction in rebuttal by the state of evidence of particular acts tending to show his low and immoral associations, since illegal evidence is admissible to rebut illegal evidence: *Morgan v. State*, 88 Ala. 223, 6 South. 761.

Likewise, in a prosecution for murder, where the defendant has introduced evidence of the particulars of a former difficulty between defendant and deceased, showing that the former was not at fault in such difficulty, and actually declined a combat, he could not object to testimony in behalf of the state of the particulars of the same difficulty, showing that the defendant was in fact the aggressor, and that he showed a disposition to bring on the encounter; nor is it error in such case for the court to refuse to limit the effect of this testimony improper. "This in nowise infringes the general rule that evidence as to the particulars of the former difficulty should not be admitted if objected to, but is simply the enforcement of the rule that, where one party introduces illegal evidence, his adversary may rebut it by testimony of the same nature and character": *Gordon v. State*, 129 Ala. 113, 30 South. 30; and to same effect is *Longmire v. State*, 130 Ala. 66, 30 South. 413.

So, also, in *Cross v. State*, 147 Ala. 125, 41 South. 875, the same principle was applied in a prosecution for trespass after warning, and it was held that, where defendant proved that the roadway in question was the only way of reaching a railroad station from his sawmill, he could not object to the state proving that when defendant closed up the old roadway, he cut a new roadway which could be, and was, used by people to reach the points to which the old roadway led. "It is not reversible error to permit immaterial evidence to be rebutted by immaterial evidence."

In *German-American Ins. Co. v. Brown*, 75 Ark. 251, 87 S. W. 135, plaintiff sought to recover on certain insurance policies, and it was claimed that the court erred in permitting plaintiff to introduce certain letters and telegrams sent to him by his partner, because

they contained expressions of opinion of the sender as to the value of the goods insured. The court was of opinion that the evidence was competent, but if not, that defendants were estopped from complaint at its introduction, because "They first drew out on cross-examination of appellee the testimony as to communications from McKibben, and read in evidence two of the telegrams received by appellee from him. When one party introduces incompetent testimony, he cannot complain at the action of the court in allowing the other party to introduce the same character of evidence, directed to the same point at issue. He waives all objection to error which he thus invites."

Likewise in *Dow v. State*, 77 Ark. 464, 92 S. W. 28, when defendant, on a prosecution for murdering his wife, testified as to his prior treatment of his wife, he could not complain that the state was permitted to show that he had abused his wife. "If testimony relating to his prior treatment of his wife was improper, defendant cannot complain, for he raised the issue by introducing testimony to the effect that he had never mistreated his wife, and that her parents were the cause of the separation. If there was error in such testimony, it was invited by the defendant."

And in *Sterckey v. O'Neal*, 86 Ark. 145, 109 S. W. 1164, it was held that, in an action by attorneys for a fee, where plaintiffs introduced evidence concerning a payment of money to a third person and the circumstances under which it was paid, which had no bearing on the issues, they could not complain of the admission of testimony bearing on the same subject by the defendant, since "plaintiffs brought it forward and introduced the first testimony concerning it."

So, too, in a prosecution for murder, when the defense has shown threats by decedent against accused, it is proper to allow the state in rebuttal to give evidence of threats and ill-feeling by accused against decedent, it not having touched that matter in its opening: *People v. Glaze*, 139 Cal. 154, 72 Pac. 965.

In *Barnes v. State*, 20 Conn. 254, defendant was on trial for the illegal sale of liquors. The state having introduced evidence to prove the facts alleged in the complaint, defendant introduced evidence to prove that at other times he had refused to sell; and thereupon the state, to show that such refusals of defendant were not real, but a mere pretense, and thus rebut the evidence offered by defendant, introduced in evidence a record of the court, showing the pendency, at the time of those refusals, of a prosecution against defendant for selling liquors in violation of the statute. It was held that if the evidence offered by defendant was irrelevant and for that reason inadmissible, he could not successfully claim a reversal of the judgment against him, on the ground that the evidence adduced to rebut his irrelevant evidence was also irrelevant. "He ought to have waived or withdrawn his own irrelevant evidence," said the court, "before he objected to such rebutting proof. It would be passing strange if the defendant could claim the benefit of evidence which

he had adduced, and, at the same time, exclude the evidence on the other side, to refute it, on the ground that his own evidence was irrelevant."

In *Coon v. Lantz*, 116 Ill. App. 472, the action was in assumpsit to recover for breach of warranty made by defendants that a bull purchased by plaintiff from defendant was a breeder. Judgment went for defendant, and plaintiff complained on appeal that defendant had been erroneously permitted to introduce testimony of a conversation between plaintiff's attorney and the defendants' relative to a compromise. Plaintiff's attorney as a witness for the plaintiff had previously testified regarding this conversation, and it was held that plaintiff having opened the door, he could not complain, although the testimony of both his attorney and of the defendants as to the compromise was "wholly beside any issue of the case," and the court might well have stricken out the testimony of plaintiff's attorney in its own motion and then refused to allow defendants to testify on the subject; and to same effect is *Chicago City Ry. Co. v. Bundy*, 109 Ill. App. 637 (affirmed in 215 Ill. 39, 71 N. E. 28).

Also, in *Campbell v. Connor*, 15 Ind. App. 23, 42 N. E. 688, 43 N. E. 453, when the suit was upon a note and the defense was non est factum, it was held that plaintiff having introduced witnesses who testified that they had seen defendant's intestate sign his name, and that the signature to the note in suit was genuine, without having asked the witnesses whether they were acquainted with decedent's signature, he could not complain that defendant introduced witnesses who testified that they had seen the deceased sign his name, and that the signature to said note was not genuine, without asking the witnesses whether they knew decedent's signature.

And in *Hoover v. State*, 161 Ind. 348, 68 N. E. 591, defendant, who was on trial for murder, pleaded insanity at the time the offense was committed, and offered evidence to show his insanity and his general reputation for sobriety, and also elicited testimony from one of his witnesses that defendant's "flushed face, inflamed eyes, and unnatural manner at sundry times were the result of mental derangement, and that he never drank intoxicating liquors." It was held that the court did not err in permitting a witness for the state to testify that he had drunk with defendant and "seen him drink beer and whisky." "A party who introduces evidence of a particular kind cannot complain if his adversary introduces evidence of the same kind to explain or contradict it. But this is true even when the rebutting evidence would otherwise be incompetent."

In *State v. Goddard*, 162 Mo. 198, 62 S. W. 697, it was held that when defendant in a prosecution for homicide introduces evidence that the wife of deceased said, when she heard the fatal shot, that she was afraid that deceased was shot, he cannot object to evidence of the statements of the daughter of deceased, made at the same time, that her father was shot, though such declarations tend to show

a guilty knowledge of the wife and daughter, since the defendant first called out such evidence.

Likewise, on a trial for murder, defendant cannot complain of the admission of evidence showing the details of a former difficulty between himself and deceased, when he cross-examined the state's witnesses as to such details, and also introduced one witness to prove the same fact: *Mealer v. State*, 32 Tex. Cr. App. 102, 22 S. W. 142.

So, too, in a prosecution for carrying a pistol, permitting the state to show that the accused was connected with a theft committed by a witness for the state was not error where the matter was first inquired into by accused's counsel, and no objection was raised to the introduction of the evidence: *Ramsey v. State* (Tex. Cr. App.), 65 S. W. 187.

And in a prosecution for murdering an officer while attempting to arrest, without a warrant, for an alleged theft of a mare, evidence of a witness for defendant that the mare, which he had traded a horse to defendant for, had not been stolen, but was good property, and had been in the neighborhood for over a year, was admissible, when the state had first introduced testimony tending to show that the mare was stolen, though the testimony offered by the state was itself incompetent: *Cortez v. State*, 44 Tex. Cr. 169, 69 S. W. 536.

Pettis v. State, 47 Tex. Cr. 66, 81 S. W. 312, was a trial for murder. Defendant testified that, at the time of a previous difficulty between the parties, he did not voluntarily make an affidavit against deceased, but that he was invited to do so by a justice of the peace. It was held that it was proper to permit the state to prove by the justice that the complaint was not made at his instance, but that defendants sought him out and stated that he wanted to file a complaint against deceased.

In *Sisler v. Shaffer*, 43 W. Va. 769, 28 S. E. 721, the question of fact involved was whether the defendant, when he purchased a certain lot of lumber of the plaintiff, made known that in making the purchase, he was acting as the agent of a certain company. Plaintiff testified he did not do so. Defendant testified that he did; and in support of his defense, while giving his testimony in chief, stated that at the time of the purchase in controversy he was not engaged in buying or shipping any lumber on his own account. Plaintiff was then permitted, over defendant's objection, to introduce witnesses who testified that about the same time defendant had purchased separate bills of lumber from them. This was held not error, the court saying: "His [defendant's] own evidence on the point was irrelevant, but, having introduced it in support of his evidence, the plaintiff had the right to contradict it. A party who draws from his own witness irrelevant testimony, which is prejudicial to the opposing party, ought not to be heard to object to its contradiction on the ground of its irrelevancy."

In *Grabowski v. State*, 126 Wis. 447, 105 N. W. 805, defendant was convicted of taking indecent liberties with a female child. On

his direct examination at the trial the accused testified as to what took place between him and his wife back of the bar in a saloon after his wife and the little girl came downstairs. It was held there was no error in allowing a witness for the state in rebuttal to testify as to what conduct or language he saw and heard between the accused and his wife when he went to the saloon, at the time in question. "Having opened the door for the admission of such testimony, the accused is in no position to take exception thereto."

In *Sun Printing & Pub. Assn. v. Edwards*, 113 Fed. 445, 51 C. C. A. 279, the action was for breach of contract. The contract was evidenced by letter passing between plaintiff and defendant. Plaintiff introduced evidence of the conversations and negotiations between himself and defendant before the exchange of the letters by which the contract was consummated, and it was held that he was estopped to object to evidence of such conversations and negotiations offered by defendant. The court was of opinion that the evidence of prior conversations between the parties might be competent in this case to explain the meaning of the contract, but said: "Whether the evidence was competent in this view or not, it was admissible, because the plaintiff having opened the door and availed himself of its benefit, was foreclosed from precluding the defendant from its benefit."

And the same question raised in the case of *Sun Printing & Pub. Assn.*, 113 Fed. 445, 51 C. C. A. 279, was before the supreme court of the United States in *Bogk v. Gassert*, 149 U. S. 17, 13 Sup. Ct. Rep. 738, 37 L. ed. 631, and in holding that a defendant who had first introduced incompetent testimony tending to attach conditions to a written contract was estopped from objecting to similar testimony on the part of the plaintiff, the court said: "The defendant himself having thrown the bars down, has evidently no right to object to the plaintiff having taken advantage of the license thereby given to submit to the jury their understanding of the agreement."

And again, in *Warren Livestock Co. v. Farr*, 142 Fed. 116, 73 C. C. A. 340, where plaintiff in an action for trespass, claiming that defendants conspired to break up its business of rearing and grazing sheep, introduced irrelevant testimony as to the intermingling of plaintiffs' and defendants' sheep, it was held that plaintiff was precluded from objecting to evidence on behalf of defendant to show that the intermingling was caused by the active efforts of plaintiff's foreman, the circuit judge saying that it was "a familiar rule that one who induces a trial court to let down the bars to a field of inquiry that is not competent or relevant to the issues cannot complain if his adversary is allowed to avail himself of the opening."

The foregoing cases fully uphold the rule that illegal evidence introduced by one party without objection can be met by similar illegal evidence from the other party. But it seems that in some jurisdictions which recognize the right to give counter-evidence in kind, the party first introducing such illegal evidence is estopped to object only to such other illegal evidence by his adversary as is strictly

in answer to the specific subject upon which the first illegal evidence was offered. Thus, on the prosecution of a husband for the murder of his wife, the fact that the state introduced evidence of specific acts of unkindness on the part of defendant toward his infant daughter does not justify the admission on his part of general evidence that he was kind to the child: *Pettit v. State*, 135 Ind. 393, 34 N. E. 1118. And the same rule was applied in a civil suit in *Pichon v. Martin*, 35 Ind. App. 167, 73 N. E. 1009.

And upon the trial of an indictment, the prosecution is not entitled to give in evidence an anonymous letter, written by a stranger, which had been spoken of on the direct examination by a witness for the prosecution, though the defendant had cross-examined the witness concerning the circumstances under which the letter was received, its contents not having been disclosed on such examination: *People v. Costello*, 1 Denio (N. Y.), 83.

Also in *People v. Cascone*, 185 N. Y. 317, 78 N. E. 287, when the defense on a trial for homicide showed on the cross-examination of a female witness for the state that she was living in meretricious relations, it was held that this did not justify the admission of evidence on the part of the state that the accused had caused the witness to live as a harlot.

So, too, in *Fischel v. State* (Tex. Cr. App.), 14 S. W. 391, it was held that, on a trial for assault with intent to murder, evidence by defendant that the assaulted person had instigated divorce proceedings by defendant's wife does not render competent either declarations by the wife that defendant told her he had other wives living besides herself or admissions by defendant to the same effect.

And in a prosecution for bigamy, the fact that defendant had permitted evidence to be introduced, without objection, proving, or tending to prove, seduction, and that he introduced a letter tending to disprove the seduction, would not authorize the state to introduce evidence to prove that he proposed to create or attempt to create an abortion on his first wife: *Welch v. State*, 46 Tex. Cr. 528, 81 S. W. 50.

b. An Opposite Rule and Illustrations.—Directly opposed to the rule supported by the foregoing authorities is another, namely, that a party who voluntarily introduces incompetent evidence, without objection, is not thereby estopped to object to his opponent retorting in kind, and this rule also has considerable support. "We cannot hold that it was error in law to rule out, objection being made, what it would have been error to admit, merely because the court had received without objection matter just as irrelevant before. The maxim, '*Similiar similibus curantur*,' has been applied to some extent in the science of medicine, but the principle has never been recognized as applied to the cure of errors in law": *Phelps v. Hunt*, 43 Conn. 194.

"The admission of illegal testimony on one side will not justify illegal rebutting testimony on the other. . . . Two wrongs do not make a right": *Woolfolk v. State*, 81 Ga. 551, 8 S. E. 724.

"There can be no equation of errors in the trial of a case": *Stapleton v. Monroe*, 111 Ga. 848, 36 S. E. 428.

"Parties cannot create a right to try an immaterial issue or introduce irrelevant evidence by mere silence or consent, where they might have had the adverse evidence kept out or stricken out": *Maxwell v. Durkin*, 185 Ill. 546, 57 N. E. 433.

"One party cannot, by consenting to the admission of irrelevant evidence offered by the other, acquire the right to introduce evidence equally irrelevant": *Shank v. State*, 25 Ind. 207.

Other cases supporting the rule established by the foregoing quotations are *Mason v. Missouri Pac. Ry. Co.*, 27 Kan. 83, 41 Am. Rep. 405; *Sturgis v. Robbins*, 62 Me. 289; *Walkup v. Pratt*, 5 Har. & J. (Md.) 51; *Gorsuch v. Rutledge*, 70 Md. 272, 17 Atl. 76; *Lake Roland El. Ry. Co. v. Weir*, 86 Md. 273, 37 Atl. 714; *Smith v. Dreer*, 3 Whart. (Pa.) 154; *Guinn v. State* (Tex. Cr. App.), 65 S. W. 376; *Stringer v. Young*, 29 U. S. (3 Pet.) 320, 7 L. ed. 693, the decision in this case, however, being somewhat qualified by the statement of Chief Justice Marshall, who delivered the opinion: "Whether a case may exist in which improper testimony may be calculated to make such an impression on the jury that no instruction given by the judge can efface it, and whether in such a case testimony not otherwise admissible may be introduced, which is strictly and directly calculated to disprove it, are questions on which this court does not mean to indicate any opinion."

We have seen that the cases which support the rule that a party is not estopped to rebut illegal evidence, admitted without objection, by similar illegal evidence, emphasize the fact that the party introducing it has voluntarily invited error, and cannot therefore object to his adversary accepting the invitation.

On the other hand, the cases which support the rule now under consideration emphasize the fact that by the failure of the injured party to object to the incompetent evidence at the time it was offered, he thereby waives the right to afterward claim that such evidence was incompetent, and hence cannot rebut it by irrelevant or incompetent evidence. The courts which think the greatest emphasis should be placed on this latter circumstance of waiver (failure to object), though not so numerous as those which place the greatest emphasis on the circumstance of waiver arising from the original party's voluntary action in inviting the error, are none the less confident of the correctness of their views. The supreme court of Connecticut, for example, in *Phelps v. Hunt*, 43 Conn. 194, after holding that it was not error to refuse to permit the plaintiff to even cross-examine the defendant as to irrelevant matter, which the defendant had testified to, without objection, in his examination in chief, remarked that the maxim of "*Similiar similibus curantur*" had never been applied to the cure of errors in law. In a strictly technical sense this may be correct, but the ruling in this case is clearly opposed, as we have seen, to the earlier decision of that court in *Barnes v. State*, 20 Conn. 254, as well as to a long line of decisions in other jurisdictions.

The rule, however, that the greatest emphasis should be placed on the failure of the injured party to object, rather than on the voluntary action of the original party in inviting the error, has considerable support. Thus in *Maxwell v. Durkin*, 185 Ill. 546, 57 N. E. 433, the supreme court of Illinois speaking to this question said: "It is in the power of a party, by objection, to prevent the introduction of evidence not relevant to the issue, or to have it excluded when introduced, or, by instruction, to direct the jury to disregard it; and the public interest demands that the time of the court shall not be wasted, and the record filled with irrelevant or immaterial evidence"; and in *Walkup v. Pratt*, 5 Har. & J. (Md.) 51, the court said: "It has been contended for the petitioner that if this testimony was improper upon general principles, that it was rendered admissible by the previous examination by the appellee. If the counsel for the appellee had offered improper evidence, the court, on application, would have rejected it, but the offering improper evidence by one of the litigant parties never even justifies the introduction of similar evidence by the other party; such doctrine would lead to endless confusion, and destroy all the established rules of evidence"; and this language was subsequently quoted with approval in the later cases of *Gorsuch v. Rutledge*, 70 Md. 272, 17 Atl. 76, and *Lake Roland El. Ry. Co. v. Weir*, 86 Md. 273, 37 Atl. 714. And the supreme court of the United States in *Stringer v. Young*, 29 U. S. (3 Pet.) 320, 7 L. ed. 693, speaking through Chief Justice Marshall, as to why the defendant in that case should not be permitted to rebut illegal evidence introduced by the plaintiff, without objection, advanced the same reason as that given by the state courts, saying that the plaintiff's testimony "was undoubtedly irrelevant, and had it been opposed, could not have been properly admitted. Had the defendant moved the court to instruct the jury that it must be utterly disregarded, that it must not be considered by them as testimony, and this instruction had been refused, the refusal to give it would have been error."

c. An Intermediate Rule and Illustrations.—A rule intermediate between the two above stated is, that where incompetent evidence has been introduced by one party without objection, the other party may meet it by other incompetent evidence, in so far only as may be necessary to counteract any prejudicial or harmful effect which the original improper evidence may have had upon the issue involved.

"The introduction of immaterial testimony to meet immaterial testimony on the other side is generally within the discretion of the presiding judge. But if one side introduces evidence irrelevant to the issue, which is prejudicial and harmful to the other party, then, although it came in without objection, the other party is entitled to introduce evidence which will directly and strictly contradict it": *State v. Witham*, 72 Me. 531.

"When a party introduces irrelevant testimony without objection, he cannot object to the other party meeting it, if it has a moral tendency to render a claimed fact more probable": *State v. Slack*, 69 Vt. 486, 38 Atl. 311.

In *State v. Witham*, 72 Me. 531, the rule was applied in a prosecution for adultery. The female implicated testified to sexual intercourse with the defendant at a certain time and to the birth of a child by her nine months afterward. The latter fact, though inadmissible, was not objected to, but to rebut the unfavorable inference from it the defendant offered testimony tending to show that some one other than himself was the father. It was held that the refusal to permit this testimony was not error, the court saying: "The respondent would have been authorized to prove, if he could, that a child was not born at all, or was not born at the time testified to by the paramour. The government waives the strict rule of law to this extent, by its misstep of introducing illegal evidence, and the respondent is entitled to no more relaxation of the common-law rule, because he could by objection have excluded the illegal or irregular evidence."

The rule was applied to a civil action in *Lyttle v. Bond's Estate*, 40 Vt. 618. In this case plaintiff was seeking to recover on a note payable at a certain bank and signed "Richard Bond, by Stellman Clark." The defense was that the note was executed without the knowledge, consent or authority of the decedent Bond. Plaintiff, without objection, introduced testimony tending to show that about the time the note in suit was due, the witness had certain dealings with decedent, and had been told by decedent that he wished to raise money to pay a debt due at the bank where the note was payable. The supreme court said this testimony was not competent, but in holding that the court erred in refusing to permit the defendant to introduce evidence in reply to the effect that several years previous to the death of decedent he had been in the habit of doing business with the bank where the note was payable, further said: "The introduction of evidence by one party that might have been excluded had the other party objected to it does not necessarily open the door to the other party to introduce incompetent evidence. But when the evidence introduced is a circumstance morally tending to render the disputed fact more probable, even if so remote as not to be admissible as legal evidence, the other party has a right to do away with the impression it may create in the minds of the jury, by evidence of the same character and force tending directly to meet and explain it."

We have already seen that the supreme court of the United States in *Stringer v. Young*, 29 U. S. (3 Pet.) 320, 7 L. ed. 693, intimated, though it did not decide, that incompetent evidence might be introduced to contradict other incompetent evidence when the original improper evidence was calculated to make an impression on the jury which an instruction by the judge could not efface.

The supreme court of Massachusetts also sustains the rule that a party can only protect himself against improper evidence admitted without objection, by retorting in kind when necessary to remove an unfair prejudice which might be created by the original improper evidence. In *Mowry v. Smith*, 9 Allen, 67, defendant, in an action

to recover damages for assault and battery for the purpose of showing provocation, introduced testimony, without objection, to prove that plaintiff had previously charged him with a crime, and it was held that the admission of evidence in reply, to prove facts tending to show that such charge was true, was sufficient ground for setting aside a verdict for the plaintiff. Bigelow, C. J., in delivering the opinion in this case, said: "The question then arises, how far the admission of incompetent and irrelevant evidence offered by one party, to which no objection is taken, renders it competent for the opposite party to introduce evidence of a similar character. There certainly must be some limit beyond which parties cannot be permitted to go, in extending issues of fact and bringing into a case matters which have no essential bearing on its real merits. Without indicating a general rule applicable to all cases of this nature, we think it may be safely said that a party should not be allowed to go further than to prove facts which have a direct tendency to contradict and control the irrelevant or incompetent evidence which his adversary has introduced into the case. To this extent it may be properly held that the latter has waived the strict rule of law applicable to such evidence, and is estopped from objecting to the proof of facts, by the opposite party, which can be properly deemed to be contradictory or in rebuttal of those offered by himself."

But it is to be gathered from other decisions in this state that the courts of Massachusetts do not give to an opponent the fixed right to reply to incompetent evidence, in kind, even when the original evidence is likely to create an unfair prejudice, but hold that the admission of the counter-evidence is entirely discretionary with the trial court: *Brooks v. Acton*, 117 Mass. 204; *Treat v. Curtis*, 124 Mass. 348; *Bennett v. Susser*, 191 Mass. 329, 77 N. E. 884; hence when the counter-evidence is rejected below, its ruling will not be disturbed by the appellate court: *Parker v. Dudley*, 118 Mass. 602.

McCONNELL v. BELL.

[121 Tenn. 198, 114 S. W. 203.]

PARTITION.—A Life Tenant cannot Maintain a Suit for Partition against a remainderman and have the property sold for a division of the proceeds. (p. 774.)

PARTITION—Unconstitutionality of Statute Authorizing Life Tenant to Maintain Suits for, Against Remainderman.—A statute authorizing a life tenant to maintain suit for the partition of the property by sale and the division of the proceeds among all parties interested, but denying such right to the remainderman, except with the consent of the life tenant, undertakes to establish a rule whereby one private citizen can use the property of another for his benefit without the latter's consent, and is therefore unconstitutional. (p. 777.)

Clift & Cooke, for McConnell.

Cooke & Swaney and F. A. Nall, for Bell.

200 NEIL, J. The bill in this case was filed by T. M. McConnell and his wife, Mrs. Mary McConnell, and against his daughter, Miss Queenie McConnell, at that time a minor, under twenty-one years of age, and against J. S. Bell.

The bill alleges that prior to the involuntary bankruptcy proceedings which were instituted against T. M. McConnell in the year 1902-03, he was the owner of certain real estate situated in the fifth civil district of Hamilton county, being a part of block 1, in the "L. E. and D. P. Montague" addition to Highland Park—the lot being minutely described in the bill; that in said bankruptcy proceedings, and by a regular meeting of the creditors of the complainant McConnell, held on the seventeenth day of January, 1903, this property was sold to defendant J. S. Bell, subject to the homestead of complainants and their minor child, the defendant, Miss Queenie McConnell, in a certain portion of the said property—this portion being likewise described in the bill; that this sale was confirmed by the decree of the United States district court for the southern division of the eastern district of Tennessee, on the seventeenth day of January, 1903, and the trustee, under orders of the court, issued a deed to J. S. Bell, which was duly recorded.

201 It is further alleged that complainant T. M. McConnell is about sixty-six years of age, and that Mrs. McConnell is about fifty-eight or fifty-nine years.

It is also alleged that the real estate referred to consists of some vacant lots in the territory recently annexed to Chattanooga; that the taxes on the property were charged to the complainants T. M. McConnell and wife, on account of their being life tenants; that these taxes are burdensome; that they cannot rent the property, nor can they sell their interest in it, nor can they handle the property in any way so as to derive an income from it on account of the fact that their life tenancy is such an uncertain estate, and the property is wholly unproductive, and it cannot be made to yield any income in its present shape.

The bill then continues: "They show unto your honor that it is manifestly to the interest of the minor defendant, Queenie McConnell, that said property be sold for partition among the life tenants and remainderman, because, in its present shape, to call it a homestead inuring to her benefit

is a mockery, and unless it is partitioned it is an expense which her parents can ill afford to bear, instead of a benefit, and if the value of the homestead is set apart in cash, it can be invested so as to be of lasting benefit to her as well as to her parents. Said property cannot be made to yield a support in its present existing condition, and it is to the interest of the life tenants that said land be sold for distribution.

202 "Complainants have made every reasonable effort to induce defendant Bell to consent to a partition of same, or to a sale for partition, or to make an offer to buy or sell; but they show to your honor that he is a very rich man, and will not consent to any arrangement whereby they can get any benefit from said property commensurate with its value as long as he can force complainants to pay all taxes on said property, and observe it constantly increase in value, until upon the falling in of complainants' life estate it shall become his property in its entirety.

"Complainants show to your honor that said property is not susceptible of partition in kind, and that they are entitled to have the same sold for partition, and the value of their life estate ascertained and paid over to them out of the proceeds of said sale. Complainants are the owners of a life estate in the portion above described as having been set apart for that purpose, and defendant Bell is the owner of the remainder of the same."

The prayer of the bill is for a decree ordering the land sold for partition, or division of proceeds, in bar of the equity of redemption, and that a reference to the clerk be had to ascertain the value of the life estate of the complainants in the portion of the land set apart as homestead, and also the value of the remainder interest, and that the proceeds be divided as to the court shall seem just and equitable.

203 A demurrer was filed to the bill, which was overruled, and thereupon the defendant Bell answered. He admitted that the real estate described in the bill was vacant property, and was vacant at the time the homestead was assigned. He admitted that the complainants were paying the taxes, as the law required of the life tenants, but denied that the property could not be rented, or used so as to produce an income. He also denied that the complainants could not sell an interest in the real estate, or handle it in any way so as to derive an income therefrom. It is averred in the answer that the defendant offered to pay the complainants five hundred and fifty dollars for their interest in the land, which was refused.

Continuing, the answer says: "Respondent denies that said property is not susceptible of partition in kind, and that complainants are entitled to have said property sold for partition, and the value of said homestead ascertained and paid over to them in money out of the proceeds of said sale. Respondent, for further defense to this cause, says that chapter 403, page 1371, of the acts of 1907 of the general assembly of Tennessee is unconstitutional, null and void for the reasons set out in the demurrer heretofore filed, as being in conflict with the constitution of Tennessee, and that it is also null and void because in conflict with that provision of the fourteenth amendment of the constitution of the United States, which prohibits the states from passing any law depriving any person ²⁰⁴ of life, liberty or property, without due process of law, and he pleads and relies upon said provision of said amendment to the constitution of the United States as a complete defense to this action."

Several sections of the constitution of Tennessee are referred to by number in the demurrer, but they need not be specially mentioned here, except that one which is mentioned by its substance, and which is equivalent in part to the fourteenth amendment, to the effect that "no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land": Art. 1, sec. 8.

The chancellor appointed a special commissioner, and directed him to report as to the ages of the complainants, and their minor daughter, and also "whether or not said property can be made to yield a support in its existing condition to said homesteaders, the complainants; whether or not it is to the interest of said life tenants that said land be sold for distribution."

The commissioner reported that complainant McConnell was seventy-three years of age and Mrs. McConnell fifty-eight; that the property could not be made, in its existing condition, to yield a support to the said homesteaders; and that it was manifestly to their interest (life tenants) that the said land be sold for distribution "for the reason . . . that the property cannot be made to yield a support in its existing condition ²⁰⁵ to the complainants." He also reported that Miss Queenie McConnell was, at the time the report was made, twenty-one years of age, and therefore had no interest in the homestead.

There were various exceptions filed to this report by the defendant; but, in the view we take of this matter, it is not necessary to go into the particulars of these exceptions.

The chancellor overruled the exceptions, and confirmed the report of the special commissioner, with the exception that he placed the age of Mrs. McConnell at fifty-nine years, instead of fifty-eight. Thereupon he decreed that complainants were entitled to have the real estate sold, because it was to the interest of the life tenants that it should be sold, since it could not be made to yield a support to them in its existing condition. Accordingly, the land covered by the homestead was sold and purchased by one W. A. Burns, at the price of two thousand and seventy-five dollars, and the sale was confirmed.

The court then ordered a reference to the special commissioner to fix the value of the life estate. He made a report, which, on exception, was modified by the chancellor so as to decree to the complainants one thousand and twenty-five dollars, having previously deducted from the whole fund seventy dollars and thirty-two cents, costs. Thereupon the defendant appealed in due form to this court, and has assigned errors.

In the view we take of this case, there are only two questions that need be considered.

206 First, it is insisted by the complainants that the homesteaders are life tenants, and, as such, they have the right to maintain a bill against the remainderman to have the property sold for division of proceeds, regardless of the act of 1907, to be presently mentioned; secondly, that if they are mistaken in this view, they are entitled to have this relief under the act just referred to.

The first point is fully covered by the case of *Holt v. Hamlin*, 120 Tenn. 496, 111 S. W. 241. It is there held that such a bill cannot be maintained. This decision is attacked in the brief and criticised at some length. We need only say that the decision referred to was reached after full argument of counsel, and an exhaustive examination of the questions involved by the court, and we are content to let the decision rest as it now stands, being fully satisfied of its correctness in all respects.

As to the second point: It is necessary that we should set out the act. It reads as follows:

“An act to amend section 3305 of the Tennessee Code of 1858, with reference to sales of real estate for partition and distribution.

"Section 1. Be it enacted by the general assembly of the state of Tennessee, that section 3305 of the Tennessee Code of 1858, be, and the same is, hereby amended, so as to provide that hereafter chancery courts in this state shall have jurisdiction upon the application of any person having an interest in real estate, whether as tenant in common, by curtesy, in ²⁰⁷ dower or in homestead, to sell for distribution among the parties in interest any lands owned by the tenants in common, or in which any person has a life estate, as a tenant in dower, in curtesy, or a homestead interest in the same, and may order the same sold in the same way as now provided by law for the sale of lands held by tenants in common; provided, however, no decree shall be passed ordering a sale of lands in which any party has an interest as tenant in dower, by curtesy, or as a homestead, unless it be alleged and shown that the property is so situated that it cannot be made to yield a support in its existing condition to said tenant in dower, curtesy, or homestead, and that it is to the interest of said life tenant that said land be sold for distribution; and, provided further, that in case the applicant's or petitioner's interest be a homestead right, it must be alleged and shown that said sale would be to the interest of any minors having any interest in the homestead right.

"Sec. 2. Be it further enacted, that when sold, the proceeds of the sale shall be apportioned between the said life tenants and reversioners and remaindermen according to the respective values of their interest, as ascertained by the court.

"Be it further enacted, that all laws and parts of laws in conflict with this act be, and the same are, hereby repealed, and this act take effect from and after its passage, the public welfare requiring it."

²⁰⁸ Section 3305 of the Code of 1858, referred to in the above act, is as follows: "The court may with the assent of the person entitled to an estate in dower, or by curtesy, or for life, to the whole or any part of the premises, who is a party to the proceedings, sell such estate with the rest."

The next section reads: "If such person is incapable of giving assent, the court may determine, under all the circumstances, and taking into view the interests of all the parties, whether such estate ought to be excepted from the sale or sold."

The next section reads: "When such interest is sold, the value thereof may be ascertained and paid over in gross or the proper proportion of the fund invested and the income paid over to the party during the continuance of the estate."

The next section reads: "If the person entitled to any such estate in dower, by the curtesy, or for life, be unknown, the court may determine whether the estate shall be sold or not, as in the case of persons under disability, and in the event of the sale, make such order for the protection of the rights of such persons in the same manner as far as may be as if the person were known and had appeared."

In the case of *Holt v. Hamlin*, *supra*, commenting upon these sections, it is said: "When we compare these sections with the preceding ones which we have quoted, it is observed that, while an estate for life in the whole of the premises does not and cannot enter ²⁰⁹ into the scheme of partition at all, yet it may enter into the scheme of a sale for division, but only in a qualified way. This can only be with consent of the life tenant, when that person is one *sui juris*. When the life tenant is a person under disability, the court will determine, under all the circumstances, and taking into view the interests of all the parties, whether such estate ought to be excepted from the sale or should be sold.

"The same rule applies when the life tenant is unknown. This does not mean that a life tenant, by consenting to a sale of the property through a bill brought by him for that purpose, can force a sale. We do not doubt that any one of the owners in remainder or reversion could bring a bill for sale of property against his cotenants in reversion or remainder and the life tenant, and with the assent of the latter, if a person *sui juris*, have the land sold, if for the benefit of all; nor do we doubt that, where the life tenant is a person under disability, that person could be made a defendant in the supposed bill and the court would order the land sold if for the benefit of all, even though the life tenant should be incapable of giving assent, because of disability, or because not known."

It is observed from the foregoing that a bill against the life tenant, under the circumstances above mentioned, can be maintained by the reversioners or remaindermen for the sale of a life estate only with the ²¹⁰ assent of the life tenant. Now, the amendment which the above-quoted act purports to make is to give the life tenant the right to sell the land of the remaindermen, or reversioners, without the assent of the latter. The only inquiry under this new act is whether it is for the benefit of the life tenant. The interest of the remaindermen, or reversioners, as the case may be, is to be disregarded entirely. In other words, the land of the remaindermen or reversioners is to be sold according to this act, because it is to the interest of a third party, rather than to their own

interest. The remainderman may be brought before the court under this act, and his property be sold without his having any right to interpose any defense whatever. The only question he can contest is one in which he has no interest, that is, whether it would be to the advantage of the life tenant to have the property sold. He is brought before the court formally, but without the right to defend in his own interest. This is not due process of law, nor does it come within the meaning of the expression, "the law of the land." It is not a question of classification under article 11, section 8; but there can be no circumstances under which we can imagine a reasonable classification which would bring a party before the court for the purpose of disseizing him of his land, at the same time denying him the right to defend in his own interest. An act would be equally reasonable which would justify the filing of a bill to sell the land of one man in order to remove ²¹¹ an obstruction to the view of another man; such obstruction existing by reason of houses on the land of the party proceeded against. An act would be equally reasonable which would authorize the selling of the land of one man in order that another might have a river front. In short, the act in question undertakes to establish a rule whereby one private citizen can use the property of another private citizen for his benefit without the consent of the latter.

We are of the opinion that the act is unconstitutional and void.

It results that the decree of the chancellor was erroneous, and must be reversed, and the bill dismissed.

The Partition of Estates in Reversion or Remainder is discussed in the notes to *Fitts v. Craddock*, 113 Am. St. Rep. 55; *Aydlett v. Pendleton*, 32 Am. St. Rep. 778. In chancery all persons legally and equitably interested in the subject matter and result of the suit must be made parties, but the interest, within the meaning of this rule, must be a present, substantial one, as distinguished from a mere expectancy of future contingent interest: *Collins v. Crawford*, 214 Mo. 167, 127 Am. St. Rep. 661. Under the Mississippi statute, rights in reversion and remainder cannot be affected by partition proceedings, and it is improper to make reversioners or remaindermen parties thereto: *Lawson v. Bonner*, 88 Miss. 235, 117 Am. St. Rep. 738. And in Wyoming it has recently been affirmed that the owners of reversionary interests without right of possession are not necessary parties in partition: *Field v. Leiter*, 16 Wyo. 1, 125 Am. St. Rep. 997. According to *Rutherford v. Rutherford*, 116 Tenn. 383, 115 Am. St. Rep. 799, remaindermen cannot compel partition or a sale for partition where their rights are purely contingent and it is impossible to say who are the ultimate owners of the remainder.

BANNON v. JACKSON.

[121 Tenn. 381, 117 S. W. 504.]

BUILDING CONTRACT—Extra Work—Architects' Certificate, Necessity for to Authorize Recovery.—If a contract provides that no new work or any work of any kind shall be considered extra unless written order for the same shall have been given to the contractors by the architects and their signature obtained thereto, no recovery, in the absence of a waiver by the owner, can be had for work claimed to be extra, but done without such order in writing. (pp. 784, 785.)

BUILDING CONTRACTS, Power of Architect to Waive Provision Requiring Written Order for Extras.—A provision in a building contract to the effect that no work shall be considered as extra unless a written order therefor is given by the architect to the contractors is not so modified by another provision making the architects supervisors of the building, with authority to direct its construction, that the owners can be bound by an oral order of the architects. (p. 784.)

BUILDING CONTRACTS—Order of Architects in Writing, When may not be Given After the Work is Done.—If a building contract provides that no work shall be considered extra unless a written order therefor is given to the contractors by the architect, such order cannot be given after the work is done. (p. 785.)

BUILDING CONTRACT—Requirement of Architects' Orders in Writing, Validity and Enforcement of.—A provision in a building contract that no work shall be considered extra unless a written order therefor shall have been given to the contractors, signed by the architects, is valid, and unless waived by the owner, must be strictly complied with. (p. 785.)

BUILDING CONTRACTS—Architects' Certificate as Condition Precedent.—A provision in a building contract that in each case of payment a certificate shall be obtained from and signed by the architects to the fact that the work is done in strict compliance with the plans and specifications, and that they consider the payment properly due, creates a condition precedent to the maintenance of suit by the contractor against the owner. (p. 785.)

CHANCERY PRACTICE—Supplemental Pleadings, Necessity for.—If, during the pendency of a suit, some event happens affecting the matters in issue, the court cannot consider it unless presented by a supplemental pleading, and hence an architects' certificate necessary for the maintenance of a suit and not given until after its commencement cannot be given in evidence in the absence of such pleading. (pp. 786, 787.)

BUILDING CONTRACTS, Provisions in, Exonerating Owner from Liability for Acts and Negligence of Other Contractors.—A provision in a building contract that where there are different contractors employed on the work, each shall be responsible to the other for damage to work or person or for loss caused by neglect or by failure to finish work at the proper time, precludes the contractor from maintaining an action against the owner for damage claimed to be due to the negligence of the other contractors. (p. 787.)

BUILDING CONTRACTS—Waiver of Nonliability for Acts of Other Contractors.—If a building contract provides that each contractor shall be responsible to the other for damage or for loss caused by neglect or by failure to finish work at the proper time, a payment

by the owner of a part of a claim for such damage cannot be regarded as an implied promise to discharge the remainder, nor as a waiver of the protection of the provision. (p. 787.)

E. A. Price and Ryan & Cain, for the complainants.

Hill McAlister, for the defendants.

³⁸⁴ BEARD, C. J. The late W. H. Jackson and Howell E. Jackson, the owners of a life estate in a lot in Nashville, contracted with various parties for the erection on it of a large business house. The complainants, P. & M. J. Bannon, under the name and style of the Louisville Fireproof Construction Company, on the 22d of September, 1893, entered into articles of agreement with the owner to furnish and place in the building the fireproofing required.

By the first article of this agreement, the complainants undertook that they would "well and satisfactorily erect, finish and deliver in a true and workmanlike manner the fireproofing materials required in the erection and completion of the new stores, offices and apartments, . . . agreeably to the plans, detailed drawings, and specifications, prepared for the said work, . . . to the satisfaction and under the direction and personal supervision of the architects."

The second article stipulated for the payment of the sum of thirteen thousand eight hundred and fifty dollars for this work by the owners, but with the proviso "that in each case of said payment a certificate shall be obtained from and signed by H. J. Dudley & Son, architects, to the effect the work is done in strict accordance with the drawings and specifications and that they consider the payment properly due."

The third article provided that the owners at any time during the progress of the work might require ³⁸⁵ alterations, deviations, additions to, or omissions from "the said contract, . . . and the same shall in no way injuriously affect or make void the contract; but the difference for the work omitted shall be deducted from the amount of the contract by fair and reasonable valuation, and for additional work required in alterations, as provided and hereafter set forth in article 6."

Article 6 is in these words: "No new work of any description done on the premises, or any work of any kind whatsoever, shall be considered extra, unless a written order for the same shall have been given to the contractors by the architects, and their signatures obtained thereto."

The seventh article in substance and effect provided that the owner should not in any manner be held responsible for

any loss or damage which the complainants might sustain in material or in work at the hand of any other contractor upon this building.

The work covered by this contract was begun by the complainants soon after the date, and was finished by them in June or July, 1895, and immediately thereafter they presented an account of the amount that they claimed to be due them to W. H. Jackson, who, by the death of H. E. Jackson, which occurred during the progress of the work, was the surviving owner. This account was not accompanied with a certificate from the architects, as required by the second article of the contract. It embraced items of extra ³⁸⁶ work aggregating five thousand eight hundred and nineteen dollars. Payment being refused, the present bill was filed, seeking a recovery for those amounts, as well as for eight hundred and eight dollars, which they claimed to be due them for damages they had sustained in their work and materials at the hands of other contractors on this building, which it was insisted by them the owners were obligated to pay.

In their bill the complainants admit that the extra work embraced in their account was done without written orders from the architects of the owners; but they allege that they did it by their direction, and that they and their representative, who was looking after the filling of their contract on this building, were assured by H. J. Dudley, the senior of this firm of architects, that written orders in strict compliance with the requirement of article 6 of the contract had been or would be prepared by him and delivered to the complainants, but that the demands for these written orders were constantly evaded by him and his firm. While it is alleged in the bill that during the progress of the work, H. J. Dudley uniformly recognized the obligation of the owners to pay for this work as outside the contract, and by his promise to give them orders in writing covering this extra work lulled complainants into security, yet after the completion of all the work the architects and the defendants denied the liability of the latter for the same.

To this bill an answer was filed by W. H. Jackson, as well as the other defendants, in which it was denied ³⁸⁷ that the several items claimed as extra work by the complainants were in fact such; but, on the contrary, it was averred that each one of these items was included in the original contract with complainants. It was further denied that the architect, H. J. Dudley, made any oral promise to pay any one of said items,

and in addition it was averred that, even if it were true he had made such oral promise, the defendants were not bound thereby, by reason of the provision of the sixth article of the contract, set out above. The owner also denied the liability of the defendants for the damage that complainants alleged they had sustained at the hands of others, or that there was any sum whatever due complainants on the original contract, because, as averred by the defendant, W. H. Jackson had been compelled to pay other parties sums of money which were properly the debts of complainants, and the sums so paid were relied upon by way of setoff and counterclaim against any demand which complainants may have had against them. It was further averred that complainants were not entitled to a recovery for any balance upon the original contract for the additional reason that the second article thereof made it a condition precedent to the right of complainants to demand payment of defendants for work done that the written certificate of the architect, certifying the money so demanded, was to be obtained, and that complainants had not produced such a certificate.

³⁸⁸ Much evidence was introduced in the cause, and finally the record assumed very large proportions. It is unnecessary, in the view we take of this case, to analyze the testimony. It is sufficient to say that certain matters were developed in the preparation of the cause for trial which throw serious discredit upon the claim of complainants, if in fact they do not impeach its integrity. Only two or three of these will be mentioned. As has already been stated, the work of complainants was finished in June or July, 1895. They were at once notified that their claim would not be recognized by the owners. The present bill was filed on the 17th of January, 1896. The depositions of the complainants to establish their claim were taken from time to time, so that all were finished by the 1st of September, 1897. This was the last step taken in the cause by them until the eighteenth day of March, 1905, when they took certain depositions in Louisville, Kentucky, with regard to the character and handwriting of M. J. Bannon.

As a reason for this long lull in the litigation, involving as it did the large amount of money claimed by these complainants to be due them, it is suggested by defendants that it is to be found in the fact that upon the cross-examination of M. J. Bannon in 1897, there was produced and submitted to him by their counsel a paper writing, which is in words and figures as follows:

389 "Nashville, Tennessee, September 9, 1896.

"For services rendered we hereby acknowledge indebtedness to H. J. Dudley in the sum of \$500, to be paid upon the settlement of the suit now pending, between ourselves and General Jackson and others, for fireproof construction in building corner Church and Sumner streets, Nashville, Tennessee.

"[Signed] LOUISVILLE FIREPROOF CONSTRUCTION COMPANY,

"M. J. BANNON,

"General Manager."

When interrogated with regard to it, the witness denied that the instrument had been written by him. Some eight years thereafter the testimony of experts was taken as to the genuineness of this writing. One of these experts, comparing it with writings admitted to be those of M. J. Bannon, testified that it was written and signed by him. Another expert, having like advantage, after a painstaking examination, testified that the writing and signature were not those of the complainant M. J. Bannon. A number of persons who have been familiar with the handwriting of this party for many years were examined as witnesses, and with one accord they testified that they were satisfied that this instrument and the signature thereto were not written by M. J. Bannon.

It is unnecessary for us to determine whether this paper is genuine or not; but it is urged by the defendants, as strongly corroborating their insistence that it is genuine, and strongly points to the fact of corrupt ³⁹⁰ dealing between complainants and H. J. Dudley, one of the architects of the defendants, that the latter, in his firm name, on the sixteenth day of July, 1896, gave to the complainants a certificate, in which it was stated that they were entitled to eight thousand five hundred and thirty-seven dollars and thirty-four cents "for fireproof tiling, including all extra work and connections by them in the building" in question, directing the same to W. H. Jackson for payment. With this certificate there is filed in the record a letter from H. J. Dudley to M. J. Bannon, in which he states he never had refused to give an order for extra work on that building, nor had he ever doubted the liability of the owners for this extra work, and yet, in the original bill in the cause, it was distinctly alleged that both the architects and the defendants denied their liability for such extra and additional work and material. There is no question but that this allegation was true as to the defendants, and as little that it was equally true as to the architects.

For a witness for the complainants, who, as an expert, made an examination for them of their work on this building in the spring of 1896, testifies that at the time of this examination he understood that the architects had declined to allow complainants anything for the work which they claimed as extra their contract, and as this party was making this examination at the instance of and, as we are satisfied, under the eye of, M. J. Bannon, we think it not only reasonably, but necessarily, to be inferred that he derived that information from him.

³⁹¹ Conceding, however, that the claim for extra work is honest, and that it was done upon the verbal orders of the architect, given from time to time, can a recovery for it be had, in view of article 6 of the contract, hereinbefore set out? That article was evidently introduced with the purpose of avoiding just such a controversy as we have presented in this record. It is apparent that, if the complainants had taken the precaution to obtain orders signed by the architect before undertaking this work, then there could have been no question as to the liability of the owners for it. But they saw proper to disregard it, and the result is that they were met with the defense that the work, if done, was within the terms of the contract, or, if this be not so, then it was done in the teeth of the contract and in utter disregard of the rights of the owners of the building. As is said in *Langley v. Rouss*, 185 N. Y. 201, 77 N. E. 1168, 7 Am. & Eng. Ann. Cas. 210: "Where contracts, including plans and specifications, involve a great amount of detail, and the merits of claims or alterations and extra work are difficult to determine and adjust after the work is completed, a provision requiring the contractor to submit itemized estimates of the expense of proposed alterations or extra work, and that the order of the architect therefor shall be in writing, is reasonable, and tends to a more definite understanding, and avoids controversies. The contractor is not required to make changes, or perform extra work, unless he first receives written authority ³⁹² therefor, and the contract is, therefore, neither unreasonable nor severe, and it should be enforced."

Many authorities may be found where it is held that, notwithstanding such a limitation in a contract, yet the contractor has been permitted to recover for extra work done by agreement with the owner or upon the order of the architect with his knowledge and consent. This, however, is upon the principle that the parties to the contract may, if they see proper, waive any provision made in the interest of either. Such cases, however, cannot be invoked where the record pre-

sents such facts as we have in this. In the absence of a waiver by the owner, as above indicated (and there is no pretense of either an actual or constructive waiver by the owner, or owners, of this contract provision), we understand it to be settled, by the overwhelming weight of authority, that a recovery cannot be had for extra work in the face of a requirement such as we find in the article in question.

In 30 American and English Encyclopedia of Law, 1285, the rule with regard to such a provision is thus stated: "Contracts conferring upon the architect, or the engineer, power to order extra work, frequently provide that the power shall be exercised only in a certain manner, and in such case a compliance with the particular provision is necessary in order to bind the builder." In 6 Cyc. 16, it is said that "a provision that the builder is not to execute any extra work, or make any modifications or alterations in the work mentioned in the specifications ³⁹³ and plans, unless ordered in writing by the engineer in charge, or claim payment for same, unless such written order be produced, is valid and should be enforced."

In 2 Page on Contracts, section 785, it is said: "If the contract requires a written order from the architect for extra work, no recovery can be had for extra work without such order, if the owner, or his authorized agent, have neither of them waived such a provision."

The rule thus announced is recognized among others, in *Langley v. Rouss*, 185 N. Y. 201, 77 N. E. 1168, 7 Am. & Eng. Ann. Cas. 210; *White v. San Rafael etc. R. R.*, 50 Cal. 417; *O'Keefe v. St. Francis' Church*, 59 Conn. 551, 22 Atl. 325; *Beers v. Wolf*, 116 Mo. 179, 22 S. W. 620; *Cooper v. Hawley*, 60 N. J. L. 560, 38 Atl. 964; *Stuart v. Cambridge*, 125 Mass. 102; *Condon v. Jersey City*, 43 N. J. L. 452; *Sheyer v. Pinkerton Construction Co.* (N. J. 1904), 59 Atl. 462.

It is insisted, however, inasmuch as by another article in the contract it was provided that the architects were made the supervisors of this building, with authority to order and direct in its construction, that the sixth article is so modified by this other provision as that the owners were bound by an oral order, given by these architects, for this extra work. This insistence, however, is obviously unsound. The architects, by the provision thus invoked, were the agents and representatives of the owners in superintending the work within ³⁹⁴ the terms of the contract. They had the authority to enforce a literal compliance upon the part of persons engaged in doing work with the contract which they entered into. It was their duty, as well as their right, standing in the shoes of the

owners, to see that proper materials were used and skillful workmanship was employed in the construction of the building. In other words, the architects were expressly made the agents of the owners for the purposes of the contract; but such agency, "so far as it related to making alterations, or directing that extra work should be done, was limited, as in the contract stated, to such orders as should be given in writing": *Langley v. Rouss*, 185 N. Y. 201, 77 N. E. 1168, 7 Am. & Eng. Ann. Cas. 210.

We are unable to discover any ambiguity in this sixth article. It contains a clear restriction upon the authority of the architects, made for the protection of the owner. If it be, as insisted by the counsel of complainants, that the writing required could be as well given after the work as prior thereto, within the terms of the article, then there would be no occasion for it, as the extra work might as well be included in the final certificate, signed by the architect, as provided for in another part of the contract.

Without an analysis of the various cases referred to by the respective counsel in this case, we are satisfied from an examination that the rule which, in the absence of a waiver upon the part of the owner or his authorized agent, requires a strict compliance with, and enforcement of, the provision found in the sixth article ³⁰⁵ of this contract, is justified by sound reason and is abundantly supported by authority.

This leaves open for determination only the claim made for the balance alleged to be due on the original contract, and that for damages sustained in their materials and work at the hands of other contractors upon the building. As to the first of these, it is conceded that the defendants are entitled to large credits upon it, the amount of these, however, not being definitely shown in the record. Waiving this, however, we are satisfied that this claim must also be rejected. By one of the articles in the contract, between complainants and the owners of the building, as has been seen, it was provided "that in each case of payment a certificate shall be obtained from and signed by Henry J. Dudley & Son, architects, to the effect the work is done with strict accordance with the drawings and specifications, and that they consider the payment properly due."

The authorities hold, save in certain exceptional cases, that where a provision of this sort exists, the obtaining of a certificate is a condition precedent to the maintenance of a suit by the builder against the owner for compensation: 30 Am. & Eng. Ency. of Law, p. 1239.

As is said in 6 Cyc., page 88: "Where the contract, either expressly or impliedly, makes a reference to arbitration, or a certificate, decision, or estimate of an architect, a condition precedent to the right of the ³⁹⁶ builder to sue on his contract, the builder must comply with the condition before suing for compensation on the contract, his employer being under no liability to pay unless this is done, if there is not sufficient excuse for the builder's failure to refer or obtain such certificates, decisions or estimates, such as a fraudulent, malicious, capricious or unreasonable refusal to determine the facts or issue the certificate, or a waiver of the condition, or the builder is prevented from obtaining such certificate, decision, or estimate, by some cause over which the builder himself has no control whatever." The text of these two works is supported by many cases; in fact, by an unbroken line of authorities.

In the present bill no reference is made to this provision, and no excuse is offered for a failure to obtain a certificate from the architect as to the balance alleged to be due on the original contract. The answer, with other grounds for resisting recovery, distinctly avers the failure of complainants to obtain this certificate. To meet this, in the progress of the cause, and in the taking of the testimony, the complainants disclosed the paper signed by the architects, executed, not only long after the completion of the building, but some six months after the institution of this suit; and this is done by them without bringing the instrument forward, by supplemental bill or otherwise. Thus it is complainants sought in their bill a recovery for this balance upon the averments, independent of and without ³⁹⁷ regard to this provision of the contract, and then, practically abandoning this theory, at last in their argument placed their right to a decree upon this subsequently acquired paper. Granting, notwithstanding a record which contains much to throw grave suspicion on the manner of obtaining this instrument, it was honestly given, and as honestly received, yet we think the well-established rule of chancery practice precludes relief as to this item. This rule is thus stated in 21 Encyclopedia of Pleading and Practice, page 9: "The rights of parties are to be determined as they were at the commencement of the action, unless some event happens subsequent which affects the matters in issue; and the court cannot consider such subsequent matter unless it is presented by a supplemental pleading. One of the reasons for requiring a party to file a supplemental pleading, to enable him to rely upon matters that have occurred since the filing of his previous pleadings, is that he should

enable his adversary to take issue as to such new matter." This rule is again announced on page 28 of the same work. On this last page the author cites many authorities in support of the text, and among them *Payne v. Beech*, 2 Tenn. Ch. 708, and *Riddle v. Motley*, 1 Lea, 468. To like effect will be found *Gibson's Suits in Chancery*, secs. 431, 782, and 683, and 4 *Elliott on Evidence*, sec. 213.

This leaves open for consideration only that part of complainants' claim for compensation for damage alleged³⁹⁸ to have been sustained by them for the negligence, or otherwise, of other contractors engaged in and about this building. A conclusive answer to this is found in the seventh article of the contract, which is as follows: "The owners will not in any manner be responsible or accountable for any loss or damage that shall or may happen to the said works, or part or parts thereof, respectively, or for any of the materials, or other things used and employed in the finishing and completing said works. . . . Where there are different contractors employed on the works, each shall be responsible to the other for damage to work and person, or for loss caused by neglect, by failure to finish work at proper times."

But it is said that, on an order of the architect, W. H. Jackson paid a part of this claim, and that in doing so he waived the benefit of this provision. As these damages were inflicted by independent contractors, and, so far as this record shows, without any concert of action on the part of either of the owners, it is difficult to see upon what ground the doctrine of waiver can be invoked. The owners were not liable in view of this provision, and a promise by them to compensate the complainants for such loss after its infliction, without more, would have been nudum pactum and unenforceable; and a fortiori a mere payment on a part of such claim cannot be regarded either as an implied promise to discharge the remainder or as a waiver of the protection of the contract provision.

³⁹⁹ The views expressed above relieve us of the necessity of considering a number of questions argued upon the briefs, and among them that made upon the admissibility of testimony tending to show that M. J. Bannon, one of the complainants, was the maker of the paper of September 9, 1896, which contained a promise to pay H. J. Dudley, one of the architects, five hundred dollars, upon the settlement of the present suit.

It follows that the decree of the chancellor in dismissing the bill of complainants is affirmed.

The costs of the court below and those incident to this appeal will be paid by the complainants and their sureties.

An Agreement that an Architect's Certificate shall be a condition precedent to a contractor's right to payment is valid, but is always deemed to embody the condition that the architect shall exercise his function as arbitrator in good faith: Halsey v. Waukesha Springs Sanitarium Co., 125 Wis. 311, 110 Am. St. Rep. 838. See, also, Young v. Stein, 152 Mich. 310, 125 Am. St. Rep. 412.

WALTON & CO. v. BURCHEL.

[121 Tenn. 715, 121 S. W. 391.]

NEGLIGENCE—Burden of Proof.—In an action to recover for injuries and death due to the negligent acts of the foreman of the defendant, the plaintiff must assume the burden of proving by a preponderance of the evidence that the injury was due to the negligence of such foreman. (p. 792.)

PRACTICE—Motion for Peremptory Instruction.—In considering whether a motion for peremptory instructions should have been given, the court must take as true the strongest legitimate effect of the evidence in favor of the verdict and discard all countervailing evidence. (p. 792.)

NEGLIGENCE, Evidence of.—Negligence may be Proved by Circumstances where there is no positive, direct evidence of such negligence and no evidence to show what the act was which is claimed to be negligent. (p. 792.)

NEGLIGENCE, Evidence of—Rashness.—Where a foreman in charge of the blasting by dynamite is shown to have been reckless in using that explosive, and also to have been under the influence of strong drink and guilty of reckless conduct immediately preceding an explosion, this is some evidence from which the jury may conclude that the explosion was caused by his negligence. (pp. 794, 795.)

NEGLIGENCE in the Use of Dynamite.—To have a whole box or case of dynamite brought out before the hole is ready, when only a few sticks are to be used, and leaving the whole thereof without returning it to a place of safety, is negligence, and may properly be found to be such when the explosion of the portion so failed to be returned has caused an injury and death. (p. 794.)

MASTER AND SERVANT, Charging Master with Knowledge of the Recklessness of His Vice-principal.—If a foreman is a drinking, reckless man, and his character and habits are known to his superior, they must be regarded as known to the common master. (p. 795.)

MASTER AND SERVANT—Charging a Minor with Knowledge of the Dangerous and Reckless Character of Another Employé.—If a foreman, whose duty it is to supervise the use of dynamite, is reckless in such use and dissipated in his habits, his son, less than sixteen years of age and employed by the same master, is not to be adjudged

to have assumed the risk of his father's recklessness, where the son was ignorant of the use and danger of dynamite and had been given no instruction in that line, and the father, notwithstanding the knowledge of his character and habits on the part of his employers, was retained by them and apparently had their confidence. (p. 795.)

SURVIVORSHIP, Determining Where There is No Proof Respecting.—Where there is no evidence to show which of two persons survived a common disaster, the question of actual survivorship is regarded as incapable of determination, and descent and distribution take the same course as if the deaths had been simultaneous. (p. 796.)

SURVIVORSHIP, Presumption of.—In the absence of statute, there is no presumption as to the survivorship of two persons perishing in a common disaster. Hence, for the purpose of settling property rights, it will be presumed that all such persons, irrespective of age or sex, died at the same time. (p. 796.)

SURVIVORSHIP Where Two or More Persons Perish at the Same Time—Descent.—Where a father and son perish at the same time and from the same disaster, the right of action for the death of the latter survives to his mother, brothers and sisters. (p. 798.)

Lucky, Sanford & Fowler and J. Will Taylor, for Walton.

Pickle, Turner & Kennerly and R. M. Harrell, for Burchel.

718 HENDERSON, S. J. This is an action for damages for the death of Burchel, intestate of defendant in error, caused by a premature dynamite explosion in the construction of the Knoxville, Lafollette & Jellico Railroad. There was verdict and judgment in favor of defendant in error for sixteen hundred and fifty dollars, and plaintiffs in error have appealed and assigned errors.

At the conclusion of the evidence of defendant in error before the jury, plaintiffs in error moved for instructions in their favor; this was refused; the motion was renewed at the conclusion of all of the evidence, and was refused. The second assignment of error is to this action of the trial judge.

719 Plaintiffs in error were contractors for the railroad company, and had undertaken the work of constructing a part of the road. This work consisted in the excavation of earth and stone, which required the use of dynamite as an explosive. The duties of the intestate of defendant in error were those of a helper and ordinary hand or laborer, and consisted in digging and transporting dirt and stone, and preparing stone for blasting; but it was no part of his duty to store or handle the dynamite further than the same is done under the immediate control and direction of the boss or foreman of the plaintiffs in error.

It is averred that the intestate of defendant in error was a minor, inexperienced, and uninstructed in the handling

of such explosives, and not acquainted with the dangers incident thereto; that it was the duty of the boss or foreman to superintend their use, which he undertook to do; and on account of his negligence in this particular, said intestate lost his life.

It is further averred that large quantities of dynamite were negligently exposed by the foreman, without sufficient safeguard, near the place where said intestate was at work; that the foreman knew of the defective and improper instruments for the purpose of tamping, packing and removing the dynamite, and used same in a negligent manner, producing a premature explosion of a small quantity of dynamite, causing the explosion of a large amount negligently placed near, resulting in the death of said intestate.

720 The second count contains the additional averments that the explosion was caused, first, by the failure of plaintiffs in error to provide a safe and good quality of dynamite; second, that said foreman was incompetent, negligent, and reckless; this had been evidenced by acts of recklessness prior thereto, of which plaintiffs in error knew; yet notwithstanding this, he was placed in position of the highest responsibility with reference to the handling, use and care of the dynamite, and that said intestate did not know of his incompetency.

Plaintiffs in error were excavating a cut in the construction of the railroad. The work was begun on each side at the same time. J. H. Burchel, the father of said intestate, as foreman or boss, was in charge of one crew of hands beginning on one side, and Hugh Jordan was in charge of the crew beginning on the other side, and they had worked up to within about six or eight feet of meeting. J. R. Johnson, known as the "walking boss," had the supervision of both crews, and employed the bosses or foremen, the latter having the right to employ hands under them, and to discharge them.

The cut upon which they were at work was about forty-five feet deep, and they had to make the excavation through limestone rock and dirt. Dynamite was the explosive used. The foreman had charge of the dynamite, and gave instructions as to its use. If he did not handle it himself, it was his duty to have a safe, reliable man to do that; but its use was directed under his personal supervision.

721 The dynamite is kept in a magazine some three or four hundred yards from the place of the work; when any is needed for blasting, it is the duty of the foreman to pro-

vide a safe and reliable man to go for it. When that which is needed for making the blast is put in proper position, the other dynamite should be removed in order to prevent the jar of the blast from causing that to explode.

Dynamite is in sticks about ten inches long, weighing a half pound. When the whole is ready for the blast to be made, the number of sticks necessary are placed therein; a wooden stick or pole about one inch in diameter and from seven to ten or twenty feet long, as may be needed, is used to tamp the dynamite and settle it down in its place. This tamping should be done very lightly. The cap, or fuse, or explosive, is then put in, then some tamping, and the dynamite is ready for the battery to be applied. It is the duty of the foreman to load the hole. Where he does not do it personally himself, he should provide a safe man for the purpose, and should superintend it.

There is some conflict in the evidence as to the exact cause of the explosion, or the manner in which it occurred. The witness Ridenour was engaged in laying the track upon which to run the cars for carrying out the dirt and rock. There was some rock in the way of laying the track, and Burchel, the foreman, ordered the witness to dobe it, to get dynamite and place mud blasts ⁷²² on it, which he did, placing nine sticks on the larger rock and three on the smaller. The witness testifies: "He [Burchel, the foreman] picked up a crowbar and walked up to about six feet from me, I guess, and commenced punching in the rock. It seemed to be a solid bench, except a crevice and some mud—and he was punching in there with a crowbar, and turned around after he punched a little while and hollowed and told McNeally to fetch him a case of dynamite, a box of caps, and a fuse, and McNeally brought them."

A case contains fifty pounds of dynamite or one hundred sticks. The mud blasts referred to were prepared by placing the sticks of dynamite on the rock and putting mud on them. Burchel, the foreman, had used a bar in jobbing down in the holes or crevice of the rock to prepare the place for the dynamite. After he had placed some sticks in the hole, he picked up a wooden stick some larger than a hoe handle, cut for a tamping stick, which was about seven feet long. The witness says he was punching or jobbing "pretty hard."

The foreman should have had removed to a safe distance the case of dynamite, while he was doing what is above stated, but it was not done. He called for a cap and fuse, and as he turned to the mud blasts, there was an explosion,

as result of which the intestate of defendant in error was killed, and three others, including the foreman. There was evidently a premature explosion of the small blast which caused the explosion of the dynamite in the case.

⁷²³ Just what the foreman did to cause the explosion does not appear with certainty. In order that the action may be maintained, the burden is on defendant in error to show by a preponderance of the evidence that the explosion was caused by some negligent acts of the foreman. This jobbing with the bar and stick, which the witness saw, did not do it. Then what other facts are shown in the record upon which the verdict of the jury could have been based? In determining the question as to whether the motion for peremptory instructions should have been granted, we must take as true the strongest legitimate view of the evidence in favor of the verdict, and discard all countervailing evidence: *Chattanooga Machinery Co. v. Hargraves*, 111 Tenn. 476, 78 S. W. 105.

If we have not the positive, direct evidence that the foreman was guilty of the particular act of negligence, and evidence to show what that act was, like any other act of negligence, it may be proven by circumstances. The foreman lost his life by the explosion, as did three of the bystanders. He and some of these, were they living, could furnish the evidence. As they cannot speak, we will have to look elsewhere.

Dynamite is an exceedingly dangerous explosive; it requires very great care in the handling of it, both in loading for the blast and in adjusting the cap, and should never be undertaken save by one who has had experience and is careful and cautious. It is shown that this foreman was a man of the most reckless character; reckless of his own life and that of others in the use ⁷²⁴ of dynamite. He had on the day before provided himself with a half gallon of liquor; was drinking on that day, and was evidently considerably under its influence. He had an ambition to outstrip Jordan and his crew, who were working on the other side of the cut. On Saturday before the explosion on Monday, he had said "He would beat the Jordan boys through that cut, or that he would kill every damn man that he had." And one of the men at work under him, who heard the remark, refused to return to work.

He was a violent, overbearing, dictatorial, profane man. He was exceedingly reckless and careless in the use of explosives, was in the habit of smoking his pipe while handling

large quantities of powder; had frequently put off blasts without warning his men, and would curse and abuse his men for being so afraid to die.

There were one hundred sticks of dynamite in the case. The witness Ridenour had used twelve of these to make the mud blasts. This left eighty-eight, of which the witness says the foreman had put into the hole where he was jobbing but very few, he thinks not over three or four sticks, and the rest were still in the case. There was evidently the initial explosion of the smaller quantity which produced the jar and caused the explosion of those in the case. Just precisely how it was done cannot be proven, because all of the eye-witnesses were killed. Some of the witnesses say that sometimes a very slight jar will cause an explosion, ⁷²⁵ sometimes it takes a harder jar. Morris, the engineer of plaintiffs in error, says that it is very rare that there is an explosion without some known cause. Raines, witness for defendant in error, has been at work with dynamite for fifteen years, and says that he never knew of an explosion "without somebody having caused it."

Evidently something was done which should not have been done that caused the premature explosion. Whatever it was, it was done by Burchel, the foreman. It would have been strong evidence in favor of plaintiff in error that the explosion occurred from some unknown cause, by some unavoidable accident that could not have been provided against, had he been the prudent, careful and cautious man which the occasion imperatively demanded. But he was not. In addition to being a reckless man in the use of dynamite, he was evidently under the influence of strong drink, and had been guilty of reckless conduct immediately preceding the explosion; so the jury thus had some evidence, and some very material evidence, from which to conclude that the explosion was caused by the negligence of the foreman.

In addition to this, when the hole is prepared for the blast, it is proper to bring from the magazine only the number of sticks of dynamite that may be reasonably needed for the purpose, and they should not be brought until the hole is ready. If more be brought than is found to be needed, the excess should be removed before the blast is made, as it is very dangerous to have other ⁷²⁶ dynamite near when the explosion occurs. There is evidence tending to show this, though Morris, engineer for plaintiffs in error, says that

usually they bring out a box, take out that which is needed, and carry the box back to the magazine. But none should be brought until the hole is prepared, ready to be charged.

In this instance Burchel had the whole box or case brought out before he was prepared for the blast although he evidently knew that but a few sticks would be needed; this was negligence, and the presence of this case, when the explosion occurred, caused the death of the intestate.

What is above said does not conflict with the rule in *East Tennessee etc. R. R. Co. v. Lindamood*, 111 Tenn. 457, 78 S. W. 99. In that case there was an injury to the brakeman claimed to have been caused by a defective brake, but there was no proof that the brake was defective. The witnesses were permitted to say that they presumed a defect in the brakestaff, because in its turning it lurched and jerked. And on this presumption, they then infer that it would not have done so, save for the existence of one of the defects alleged in the declaration or some other defect; and it is said: "Inferences may be drawn from established facts, but never, from mere presumptions: 2 Wharton on Evidence, sec. 1226. As said by the supreme court of the United States in *United States v. Ross*, 92 U. S. 281, 23 L. ed. 707, these were 'inferences from inferences; presumptions resting on the basis of another presumption. Such a ⁷²⁷ mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. . . . The law requires an open, visible connection between the principal and evidentiary facts and the deduction from them, and does not permit a decision to be made on remote inferences.' "

Such is not the case at bar. There is no proof that the dynamite was defective; on the contrary, it is shown to have been purchased from reputable manufacturers, and that the master had done his duty in this particular. It is not left simply as a matter of inference that the explosion occurred through the negligent act of the foreman. In addition to the proof of his previous reckless character and habits, and the facts that he was evidently more or less under the influence of strong drink at the time, just the moment before he was guilty of negligent acts which were liable to produce a premature explosion. These were "established facts," from which, together with all of the circumstances and proof, the legitimate inference could be drawn that he was guilty of the negligent act which caused the explosion, although no living witness saw it. This is strengthened by the proof of positive negligence in having

so much dynamite near the place where the blast was being prepared.

It is shown, as above stated, that Burchel, the foreman, was a drinking man, exceedingly reckless. His character and habits were well known to Johnson, the walking boss and superior of the foreman, and were ⁷²⁸ thus known to plaintiffs in error. As a matter of fact, Johnson had drunk with him. Johnson had been urged by some of the men to discharge him on account of his recklessness.

It is argued by plaintiff in error that these matters were well known to the intestate, who was his son; and having this knowledge, and continuing in the service, he will be held to have assumed the risk.

The boy was three months less than sixteen years of age, of course under the influence of his father, and was evidently dominated by such a man as he is proven to have been. It is averred in the declaration that the boy was ignorant of the use and danger of dynamite; and there is evidence tending to show that his father had given no instructions to him along this line. It would surely be too harsh an enforcement of the rule to repel the child for failure to distrust his natural protector, especially when he sees that his father, notwithstanding his reckless conduct and habits, had the confidence of his employers.

It is next insisted that defendant in error cannot recover, because the father survived the intestate, and being sole beneficiary, the entire cause of action abated, and that the surviving mother, brothers and sisters of the intestate have no right of action. This is a part of the assignment of error which we are now considering; it is included also in the sixth assignment of error, which is to the charge of the court on the subject, as follows: "But when the proof shows that two persons ⁷²⁹ are killed in a common, sudden disaster, the presumption is that they died simultaneously, that is, that they both died at one and the same time. Still, this presumption is a presumption merely, and is not conclusive upon the court and jury; and it is still a question of fact for the jury to determine; you may look to all the proof in this case and see whether J. H. Burchel survived C. E. Burchel, or whether C. E. Burchel survived J. H. Burchel, or whether under the proof you believe that the presumption above referred to maintains, and that both died at one and the same time. If you find that J. H. Burchel survived C. E. Burchel, was alive after C. E. Burchel was dead, then plaintiff cannot recover; but if you are of opinion that C. E.

Burchel survived J. H. Burchel, or that they both died at the same instant of time, then plaintiff can maintain this suit so far as that question may affect her right of recovery. But you will find how this fact is from the proof; if you fail to find from the proof that the father was alive after the son had died, then you will be warranted in finding that both died at the same time under this presumption of the law, and this should be your finding unless the evidence shows to the contrary."

The evidence before the jury as to which survived, the father or son, is conflicting. There is, however, ample evidence to sustain the verdict that the two perished at the same time; there is thus presented the question of the right of defendant in error to maintain the action.

⁷³⁰ In the absence of evidence as to which died first, there is no presumption in favor of either, the presumption being that both died at the same time. In such case, the question of actual survivorship is regarded as not capable of determination, and descent and distribution take the same course as if the deaths had been simultaneous.

There is a carefully prepared note to the case of *Police-men's Ben. Assn. v. Ryce*, 104 Am. St. Rep. 210, in which quite a number of authorities on the subject are cited, among them the following: "At common law there is no presumption of survivorship in case of persons who perish by a common disaster, and in the absence of evidence from which survivorship can be determined, it will be presumed, for the purpose of settling rights to property, that all persons, of whatever age or sex, perishing in a common disaster die at the same time, as the common law does not under any circumstances, even in the case where two or more perish of the same calamity, indulge in any presumptions of survivorship resting upon consideration of age or sex: *Balder v. Middeke*, 92 Ill. App. 227; *Middeke v. Balder*, 198 Ill. 590, 92 Am. St. Rep. 284, 64 N. E. 1002, 59 L. R. A. 653; *Russell v. Hallett*, 23 Kan. 276; *Newell v. Nichols*, 75 N. Y. 78, 31 Am. Rep. 424; *Cook v. Caswell*, 81 Tex. 678, 17 S. W. 385.

"It is a general rule that if husband and wife are shown to have perished in the same calamity, nothing appearing to the contrary, there is no presumption of ⁷³¹ survivorship, but it is presumed that both died at the same moment: *Kansas & P. Ry. Co. v. Miller*, 2 Colo. 442; *Fuller v. Linzee*, 135 Mass. 468.

"If husband and wife die together on the same night from escape of gas in the room, there is, in the absence of evidence upon the point, no presumption that one survived the other: *Southwell v. Gray*, 35 Misc. Rep. 740, 72 N. Y. Supp. 342.

"If a mother and her infant son perish in a common catastrophe, and there is no evidence as to which perished first, there is no presumption of survivorship, but it will be presumed that both perished at the same time: *Stinde v. Goodrich*, 3 Ref. Sur. 87. The same presumption prevails as to mother and child, regardless of age or the sex of the child: *Moehring v. Mitchell*, 1 Barb. Ch. 264; *Russell v. Hallett*, 23 Kan. 276."

In volume 22, *Encyclopedia of Law*, pages 1251, 1252, second edition, the rule on this subject of survivorship in common disaster, both at the civil law and at the common law, is stated. The author thus states the common-law rule: "The rule of the common law, as now established in England and as recognized in the several jurisdictions in the United States where the question has arisen, is that where persons perish in a common disaster, no presumption of survivorship arises from their strength, age or sex, and the party claiming such survivorship of one or the other of such persons must prove it, and in the absence of such proof, the rights of property as by succession, etc., are to be settled on the theory that all died at the same time."

⁷³² In the case of *Young Women's Christian Home v. French*, 187 U. S. 401, 23 Sup. Ct. Rep. 184, 47 L. ed. 233, Chief Justice Fuller cites quite a number of authorities in support of the following: "The rule is that there is no presumption of survivorship in the case of persons who perish by a common disaster, in the absence of proof tending to show the order of dissolution, and that circumstances surrounding the calamity of the character appearing on this record are insufficient to create any presumption on which the courts can act. The question of actual survivorship is regarded as unascertainable, and descent and distribution take the same course as if the deaths had been simultaneous."

In that case, Mrs. Rhodes, a corpulent lady fifty-two years of age, with her son twenty-two years of age, and a good swimmer, perished in the sinking of the steamer "Elbie." Even under these circumstances, in the absence of other proof, it is held to be the presumption that both perished at the same time.

In the case of *In re Willbor*, 20 R. I. 126, 78 Am. St. Rep. 842, 37 Atl. 634, 51 L. R. A. 863, it is held that in case of death by the same disaster of sisters who left wills in each other's favor, with no circumstances appearing from which it can be inferred that either survived the others, the rights of succession to the estates will be determined as if death occurred to all at the same moment.

There is an elaborate note to this case reported in 51 L. R. A. 863, citing the rule at the civil law and, at common law, by the English and American cases, containing ⁷³³ an extensive discussion of the authorities on the subject.

The jury by their verdict, having found that the father and son perished at the same time, the right of action for the death of the latter survived to the mother, brothers and sisters. It results that the assignment of error now under consideration is overruled.

Other questions are made by other assignments, but what is above said is decisive of the case.

There is no error in the judgment of the circuit court, and same is affirmed, with costs.

It is the Duty of an Employer to Exercise Reasonable Care to Select Competent Employés. If he fails to discharge his duty and employs men incompetent for the work, or retains them in the service after notice of their incompetency, other employés cannot be held to have assumed the risk incident thereto: *Jensan v. Great Northern Ry. Co.*, 72 Minn. 175, 71 Am. St. Rep. 475; *Williams v. Kimberly & Clark Co.*, 131 Wis. 303, 120 Am. St. Rep. 1049; *Norfolk and Western R. R. Co. v. Hoover*, 79 Md. 253, 47 Am. St. Rep. 392; *Hughes v. Baltimore etc. R. R.*, 164 Pa. 178, 44 Am. St. Rep. 597; *Beers v. Isaac Prouty Co.*, 200 Mass. 19, 128 Am. St. Rep. 374; *Still v. San Francisco & N. W. Ry. Co.*, 154 Cal. 559, 129 Am. St. Rep. 177.

The Degree of Care Required of Persons having the possession and control of dangerous explosives, such as dynamite, is of the highest. The utmost caution must be used to the end that harm may not come to others in coming in contact with them: *Mattson v. Minnesota etc. R. R. Co.*, 95 Minn. 477, 111 Am. St. Rep. 483.

Presumption as to Survivorship where persons perish in a common disaster is discussed in the note to *Policemen's Ben. Assn. v. Ryce*, 104 Am. St. Rep. 210.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

**REYNOLDS v. GALVESTON, HARRISBURG AND SAN
ANTONIO RAILWAY COMPANY.**

[101 Tex. 2, 102 S. W. 724.]

NEGLIGENCE—Proximate Cause—Escape of Infected Cattle.

A railway company which negligently permitted the escape from its feeding-pens into a neighboring pasture of cattle it was transporting from a place south of the quarantine line is not liable for damages occasioned to the owner of the pasture due to the action of sanitary officers in placing the pasture under quarantine because of the cattle escaping into it, it not appearing that they were infected or communicated infection to the pasture. (pp. 801, 802.)

J. A. Gilbert and J. M. Dean, for the plaintiff in error.

Baker, Botts, Parker & Garwood and Beall & Kemp, for the defendant in error.

³ BROWN, J. Plaintiff in error owned a pasture consisting of several thousand acres of land situated in Jeff Davis and Presidio counties, near to the line of the railroad of the defendant in error and its station, Valentine. The pasture is situated north or above the quarantine line established by the livestock commission of Texas and the city of San Antonio is situated below, or south, of that line. T. W. Ardoin shipped over the defendant's railroad to the city of El Paso twenty-six head of cattle for the purpose of slaughtering them, and at Valentine the cattle were unloaded, fed and watered and were put into a pen belonging to the railroad company to remain over night. There was a gate leading from that pen into a larger one belonging to the railroad company, from which there were gates leading into a pasture of the plaintiff in error. The owner of the

cattle and an employé of the railroad company placed the cattle in the smaller pen and fastened the gate, which led from that into the larger pen, with a sliding latch about four or five feet long and four inches wide which entered into the post of the gate about two or three inches. The next morning the gate between the two pens was found open and the cattle were scattered at large in the pasture of the plaintiff in error. The evidence does not show whether the cattle were shipped in compliance with the regulations of the sanitary commission or not. It does not appear that the cattle were actually infected with ticks, nor does it appear that the ranch of the plaintiff was ⁴ infected thereafter with ticks; nor that any of her cattle were ever known to have ticks upon them. The fact of the escape of the cattle into the pasture becoming known to the quarantine officers, a quarantine of the pasture was declared, whereby the shipment of the cattle was prohibited except in compliance with the general quarantine regulations. By reason of the quarantine of the pasture the plaintiff alleges that she was prevented from shipping the beef cattle out for sale in the spring of the year, and that she had to keep them until in the fall, and, during the summer, the grass became so scarce in her pasture that by reason of its being overcrowded by the presence of the steers that were there she lost seventy-five head of cows and seventy-five calves. She alleges some other consequences flowing from the quarantine of her pasture which inflicted injury upon her more or less, but under the view we take of the case it is unnecessary to go into details as to those matters of result to her.

The first question which presents itself to us is, assuming that the defendant railroad company was negligent in the manner of fastening the gate and that it was required, under the rules and regulations of the livestock commission, to take notice that the cattle being carried by it came from an infected territory and were to be treated as infected cattle until the law and regulations of the commission were complied with, then, was the act of declaring the quarantine against plaintiff's pasture by the officers of the state such a proximate consequence of the negligence of the defendant as to make it liable for the damage accruing therefrom?

The railroad company should be held liable for all injurious consequences which its agent could have foreseen as a result of the escape of the cattle into the pasture of the plaintiff. To express the rule in a different form: the railroad company should be held liable for such injuries to the

plaintiff as were the natural consequences of the escape of the cattle, such as ought to have been contemplated as the result of such escape: *Gonzales v. Galveston*, 84 Tex. 3, 31 Am. St. Rep. 17, 19 S. W. 284; *Mexican Nat. Ry. Co. v. Mussette*, 86 Tex. 708, 26 S. W. 1075, 24 L. R. A. 642.

The plaintiff alleges that her damages resulted from the act of the livestock sanitary commission of the state in declaring a quarantine against her pasture, because those cattle from below the quarantine line had escaped into that pasture, and in consequence of the declaration of quarantine against her she was unable to ship her cattle to market for sale; besides other consequences that she alleges to have flowed from the quarantine. We find no provision of the law which created the livestock sanitary commission, nor any rule or regulation adopted by the said commission, which forbids the shipping of cattle from a pasture above the quarantine line, except the seventh paragraph of the rules published by the commission which declared that some pastures lying north and west of the quarantine line were infected with the "cattle tick," and that cattle so infected had been in those pastures from which there was danger in driving or shipping from such pasture, declaring pastures of that class to be infected territory and subject to the rules prescribed for such territory. The commission then promulgated the following rule to govern in moving cattle from such pastures: "It is therefore ordered by the livestock ⁵ sanitary commission that from this date no cattle shall be moved, shipped or driven, transported or otherwise moved, or removed, from or out of any pasture or pastures lying north and west of the aforesaid quarantine line, when such cattle are infected with ticks, and that from this date no cattle shall be moved out of any such pastures where cattle in said pasture or pastures have been infected with ticks during the year 1903 to any other part of the state of Texas until such cattle have been inspected by an inspector of this commission and found free from ticks, fever, infection, contagion and disease, and a permit given therefor by this commissioner or dipped as required in rule 4." The language used clearly limits the rule to pastures in which cattle actually infected had been or were then running and to such pastures as at the time the removal should thereafter be effected might have in them cattle actually infected. There is no language in the order which could be applied to a case like this, where cattle from an infected territory, but

not themselves infected with the tick, have been temporarily in the pasture but then removed leaving no infection behind.

It may be true that under the authority given them by law the livestock sanitary commission had power to declare a quarantine around the plaintiff's pasture, for the reason that cattle from infected territory had been therein, but in order to make the defendant liable for the bad effects of the quarantine, the conditions must have been such that the agent of the defendant company at the time should have foreseen that the quarantine would be declared in pursuance of the provisions of the rule. We are unable to see how any man, looking at the matter from the viewpoint of the railroad company, could have foreseen that the sanitary commission, or any of its officers, under the rule quoted, would declare a quarantine against the plaintiff's pasture and thereby prevent her from shipping her stock; and if it could not have foreseen, and cannot be said to have been the usual and probable result of the conditions produced by the negligence of the defendant, then that negligence was not the proximate cause of the injury, and the plaintiff cannot recover: *Seale v. Gulf etc. Ry. Co.*, 65 Tex. 274, 57 Am. Rep. 602.

The judgment of the court of civil appeals is affirmed.

The Doctrine of Proximate Cause is the subject of a note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 807. A proximate cause is one that leads to, or produces, or directly contributes to producing, the result or loss. If the loss is not such as would likely or probably result from the negligence of the defendant, he is not liable, since he can ordinarily be held responsible only for the probable results of his negligence which he should have foreseen: *Western Union Tel. Co. v. Milton*, 53 Fla. 484, 125 Am. St. Rep. 1078; *Pilmer v. Boise Traction Co.*, 14 Idaho, 327, 125 Am. St. Rep. 161; *Mize v. Rocky Mt. Bell Tel. Co.*, 38 Mont. 521, 129 Am. St. Rep. 659. Proximate cause is construed as a cause from which a man of ordinary experience and sagacity could foresee that the result might ensue: *Haskell & Barker Car Co. v. Przewdziankowski*, 170 Ind. 1, 127 Am. St. Rep. 352.

LONERGAN v. SAN ANTONIO LOAN AND TRUST COMPANY.

[101 Tex. 63, 104 S. W. 1061.]

BUILDING CONTRACT—Defective Plans—Obligation of Contractor.—When a building nearly finished falls down solely because of defects in the plans and specifications prepared for the owner by an architect, and made a part of the building contract, the contractor is not relieved from his obligation to restore and complete the building. (p. 811.)

BUILDING CONTRACT—Defect in Plans.—A Property Owner is not Bound as guarantor of the sufficiency of the specifications for the erection of a building as a legal consequence of submitting them for bids on the work and entering into the contract. If there is any such obligation on his part, it must be found in the language of the contract. (p. 814.)

BUILDING CONTRACT—Duty to Restore Fallen Building.—When builders fail to comply with their contract to construct and complete a building in accordance with the contract and specifications, they are responsible for the loss, notwithstanding the building fell when nearly finished by reason of its weakness arising out of defects in the specifications and without any fault on their part. (p. 816.)

BUILDING CONTRACT—Guaranty of Plans.—The Sufficiency of the specifications prepared by an architect for the construction of a building are not guaranteed, as a matter of law, by either party to the building contract. (p. 817.)

BUILDING CONTRACT—Change in as Discharging Surety.—A material change in the terms of a building contract, made without the consent of the contractor's sureties, discharges them from liability. (pp. 817, 818.)

SURETYSHIP—Compensated or Voluntary Surety.—There is No Difference between the rights of a compensated and the rights of a voluntary surety; a material alteration in the principal contract, made without the consent of the surety, will discharge him although he received compensation for his undertaking. (p. 818.)

BUILDING CONTRACT—Changes in as Affecting Surety.—A stipulation in a building contract that changes therein must be agreed upon and indorsed on the contract is for the benefit of the surety as well as the owner of the property, and changes made without the consent of the surety discharges him from liability. (p. 820.)

MECHANICS' LIENS.—A Provision in a Building Contract that the fireproofing shall be left open to bidders for any good system, provided only the finest work will be allowed to go in, does not take from the contractor power to control the fireproofing and make the owner the principal in the contract for it so as to give the subcontractor a direct lien on the property. (p. 821.)

MECHANICS' LIEN.—A Proceeding by Which a Materialman fixes a lien for material furnished and used in an improvement does not create a debt against the owner of the property, but operates as a writ of garnishment to appropriate so much of the money in the hands of the owner as is then due or may become due to the contractor to the extent necessary to establish that claim. (p. 822.)

P. H. Swearingen, Newton & Ward and Thos. W. Bullitt, for the plaintiffs in error, the American Surety Co. and Thomas Lonergan & Co.

Stayton & Berry, for the plaintiff in error, Rapp.

Denman, Franklin & McGown, for the defendant in error.

⁶⁶ BROWN, J. The San Antonio Loan and Trust Company instituted this suit against Thomas Lonergan & Company as principals and the American Surety Company of New York as its surety, to recover damages for the breach of a contract and bond entered into by the said parties, which we here copy: "Agreement made this twenty-first day of February, 1899, between San Antonio Loan and Trust Company of the one part, and Thomas Lonergan & Co., contractors, of the other part. Witnesseth: Said Thomas Lonergan & Co., contractors, hereby agree in consideration of the sum of forty-seven thousand five hundred dollars to erect and build for said San Antonio Loan & Trust Company, as per plans and specifications, made by Alfred Giles, Architect, of San Antonio, Texas, a certain building corner of Navarro and Commerce streets, in the city of San Antonio, Bexar county, Texas. The entire work to be strictly in accordance with said drawings and specifications, and also do further agree to perform the whole of the intended works, matters, and things under the direction of, and to the entire satisfaction of the architect, whose decision is to be final and conclusive on all points. The entire Commerce and Navarro street front to ⁶⁷ be terra cotta set and pointed up in the best manner as per said plans and specifications and drawings."

Thomas Lonergan & Company executed a bond in the sum of forty-five thousand dollars with the American Surety Company of New York as surety, payable to the San Antonio Loan and Trust Company, the conditions of which are as follows: "Now, if the said Thos. Lonergan & Co. shall strictly and faithfully carry out and perform the said contract so entered into with said San Antonio Loan and Trust Company in all particulars as required by the terms thereof, and to the full approval of said architect, shall complete said works in the time required by this contract, shall save said San Antonio Loan and Trust Company harmless from all damages growing out of a negligent or unskillful performance of work under said contract, or resulting from any

violation of any of the provisions contained in said specifications, or from a failure to comply with the same, from any cause whatever which specifications and drawings are hereby especially referred to and made a part hereof, . . . then and in this case this instrument to be null and void. Otherwise to remain in full force and effect."

By indorsement on the bond it was made to embrace the following supplemental contract: "This agreement, made this twenty-sixth day of April, 1899, between The San Antonio Loan and Trust Co., of the one part, and Thos. Lonergan & Co., contractors, of the other part. Witnesseth, —. Said Thos. Lonergan & Co., contractors, hereby agree in consideration of the sum of four thousand four hundred and fifty dollars (\$4,450) to erect and build for said San Antonio Loan and Trust Company, as per plans and specifications made by Alfred Giles, architect, of said San Antonio Loan and Trust Co., being drawing No. 25, a certain west wall of the new building of said San Antonio Loan and Trust Company, now being constructed by said Thos. Lonergan & Co., under contract heretofore made between them and San Antonio Loan and Trust Company, which said building is situated at the corner of Navarro and Commerce streets, situated in the city of San Antonio, Bexar county, Texas. The said wall to be strictly in accordance with the drawings and specifications prepared therefor by the said architect, and to be of skeleton construction with brick filling and to be eight inches thick to the fifth floor, and the fifth floor to be twelve inches thick. The said Thos. Lonergan & Co. agree to perform the whole of said intended work, matters and things, under the direction and to the entire satisfaction of said architect, whose decision is to be final and conclusive on all points. The said San Antonio Loan and Trust Company agree to pay said contractor said sum of money at the times and on the terms and conditions specified and provided by said plans and specifications, and stipulations therein contained. One month additional time is allowed on original contract. Unavoidable delays in procuring beams shall be taken in favor of contractor."

The petition alleged that in pursuance of the said contract and bond, Thos. Lonergan & Co. entered upon the performance of the work of building the said house and prosecuted the same until it ^{was} nearing completion, when the house fell, and that said Thos. Lonergan & Co. failed and refused to replace the said building but abandoned the said work. The plaintiff alleged that it had performed all of its

promises in the said contract and in accordance with the terms thereof had paid to the said Thos. Lonergan & Co., for labor, materials, etc., the sum of twenty-five thousand seven hundred and twenty dollars. It was alleged that both Thos. Lonergan & Co. and the American Surety Company had refused to replace and rebuild the said house, whereby the plaintiff was damaged in the sum paid for materials, labor, etc., under the contract, and in other sums specified in the petition but not necessary to be stated here.

Thos. Lonergan & Company answered by general demurrer, special exceptions, by general denial and by special answer, setting up the following defenses. As a special defense to its obligation to rebuild the structure, Thos. Lonergan & Company alleged, in substance, that the building did not fall by reason of any defect in the material used by it in the construction of said building, nor for want of skill and care in the construction of same, but that the said collapse was caused solely by defects and imperfections in the plans and specifications furnished by the loan and trust company to guide the said defendants in the performance of their work. That the said collapse was caused by want of skill on the part of the architect who represented the loan and trust company, and want of care on his part as well as his directing the performance of things improper to be done and making changes in the original plans and specifications which weakened the building and caused its fall. There was no question made upon the sufficiency of the allegations in the answer to present the issue, and we have not undertaken to set them out with any degree of particularity, but state in general terms the defense presented. Thos. Lonergan & Co. pleaded that the architect, Giles, inspected the work and material and accepted the same at different times, whereby plaintiff was estopped to deny its liability therefor, and pleaded in reconvention against the plaintiff for the value of work done and material furnished and not paid for based upon the facts set up in the answer to the amount of eighteen thousand nine hundred and thirty dollars.

The American Surety Company of New York adopted the answer of Thos. Lonergan & Co., presented general demurrer and special exceptions to plaintiff's petition, general denial to the allegations of the petition, and pleaded specially that the contract between the plaintiff and Thos. Lonergan & Co., supplemented by the contract dated April 26, 1899, with the specifications and plans, which were made

a part thereof, was incapable of execution or performance because of uncertainty therein, pointing out the uncertainty relied upon, which it is not necessary for us to set out at this time. The said surety company further pleaded that the specifications constituting a part of the original contract and the bond guaranteeing a performance of the contract by the said Thos. Lonergan & Co. contained certain provisions, which are set out in the plea, and then alleged that after the execution and delivery of the original contract dated February 21, 1899, and the execution and delivery ^{of} of the supplemental contract and bond, the San Antonio Loan and Trust Company and Thos. Lonergan & Co., without the knowledge or consent of the American Surety Company of New York, by an agreement entered into between themselves, altered in various and sundry ways the terms and conditions of the said original contract and supplemental contract, and altered the amount and character of the materials to be used and the work to be done, and agreed upon a performance by the said Thos. Lonergan & Co. of certain extra additional work not mentioned in nor contemplated by the said original or supplemental contract. That at the time of the making of the said agreement as to the alterations no agreement was made as to the addition to or deduction from the original contract price on account thereof, nor upon the additional items necessary to complete the same, nor was any such agreement reduced to writing and indorsed either upon the original or supplemental contract, nor was there any attempt to make an agreement with reference to either of these subjects, nor was the decision of the architect asked in reference thereto, nor were the changes noted on the contract, whereby the said American Surety Company was discharged from its obligations upon the bond as the surety of Thos. Lonergan & Co. The answer specified sixteen separate and distinct changes, alterations and items of extra work by which it was discharged, but they will not be inserted in this statement, but referred to as may be necessary. The answer also contains a plea of estoppel in this, that the architect was to have full power to dismiss from the works any man or men for incompetency or misconduct, and the contractor should not have any right, without permission of the architect, to reinstate such person; also set up the provision in the specifications that in case of delay by the contractor in providing and delivering the requisite materials, or in the advancement of work, a deficiency of workmen, or for misconduct or in-

ability, the architect should provide, at the expense of the contractor, all such materials and employ such number of workmen at the works as the architect may think proper, and the cost and charges incurred shall be retained out of the contract and paid by a reservation from the estimates from time to time, or amounts thereof, which may be due as liquidated damages. It is claimed that by virtue of these provisions in the specifications the loan and trust company did represent and guarantee to the defendants, as surety of Thos. Lonergan & Co., that Alfred Giles, acting for and on behalf of the San Antonio Loan and Trust Company, would continuously, as the work of construction progressed, superintend the construction of said building in accordance with such contract, plans and specifications, and that he would not permit to be used or would cause to be removed from said building all improper work and materials, and when the same should have been inspected and its fitness decided upon and approved by the said architect, the same should be received and considered by all parties as sufficient; that said architect did continuously inspect the said workmanship and character of materials used in the said building, and did decide that the said materials and work were done in accordance with the contract ⁷⁰ and specifications, etc.; therefore that the loan and trust company was estopped to assert against the American Surety Company the imperfection of any such materials or character of work.

"It was agreed upon the trial by all parties that the firm of Thos. Lonergan & Co. was dissolved by mutual agreement of its members on the twenty-fifth day of September, 1900, and that by the terms of the agreement of dissolution Thos. Lonergan took charge of all the property and assets of the firm and assumed all its liabilities. That since the institution of the suit P. S. Larkin, a member of the firm before its dissolution, died insolvent, leaving his widow and children as his sole heirs; that he had never been served with process in this case, and never appeared nor submitted himself to the jurisdiction of the court; and his wife and children were nonresidents of Texas, and though served with notice to appear and answer, have failed and refused to do so. Wherefore, Thos. Lonergan requested the court that this cause proceed against him individually and against the partnership, and that he be allowed to prosecute the same as such, and the American Surety Company, having also in open court requested that the case proceed without P. S. Larkin or his heirs being made parties, and agreed that it

would make no objection to the cause proceeding without Larkin and his heirs or representatives being made parties, and the plaintiff and intervener having agreed that the cause so proceed, it was ordered by the court that P. S. Larkin individually and his widow and children and heirs be dismissed from the suit, and that the cause proceed with plaintiff as plaintiff and the defendant Thos. Lonergan in his individual capacity and the firm of Thos. Lonergan & Co. and the American Surety Company of New York as defendants, and that Lonergan have the right in his individual capacity for and in behalf of said firm to defend said suit and prosecute the cross-action."

John W. Rapp intervened in this suit, alleging that he had under a contract with Lonergan & Co. furnished labor and material for certain work which was done in the construction of the building, which labor and material amounted to the sum of three thousand four hundred and twenty-six dollars and thirty-seven cents. Rapp set up the fact that the building had been almost completed, and that for reasons alleged in his intervention it fell and was destroyed. He claimed a judgment against Lonergan & Co. for his debt, and also prayed for a foreclosure of the mechanic's lien upon the lot on which the building was being constructed.

"Plaintiff answered intervener's petition by a general demurrer, general denial and plead specially that intervener, being a contractor's laborer and materialman, should not recover, in that Lonergan & Co. abandoned their contract and never completed the building, nor delivered the same, the portion of the work done by Lonergan & Co. having been entirely destroyed and rendered utterly useless and valueless to plaintiff; that at the time of the collapse of said building plaintiff was not indebted to Lonergan & Co., and therefore not indebted to intervener. It also plead the statute of limitations of two and four years. Defendants Lonergan & Co. filed no answer to intervener's petition."

71 The loan and trust company filed special exceptions to different portions of the answer of Thos. Lonergan & Co. and of the American Surety Company. Each exception raised the question of the legal sufficiency of the allegation to constitute a defense to the plaintiff's action. The exceptions were sustained, which action of the court is assigned as error here, and we will state more fully the exceptions when we come to discuss each assignment of error.

The surety company and Thos. Lonergan & Co. make a common defense against this suit upon the contract, which we will first consider and then examine into the defense made by the surety company independently of the other defendant. In order to determine the scope of the contract—that is, what the plaintiffs in error undertook to do—we must look to the contract itself, the specifications which are made a part of it, and to the bond given to secure the performance of it. The effect of these instruments is that Thos. Lonergan & Co. covenanted and agreed with the San Antonio Loan and Trust Company to build upon the lot specified a structure in accordance with the specifications and plans submitted by the trust company and to complete the said structure to the satisfaction of the architect, Alfred Giles. It is not disputed that Lonergan & Co. failed to complete the building in accordance with the specifications and contract, and there is no question made of the proposition that, having so failed, Thos. Lonergan & Co. and their surety are liable to the loan and trust company for the damages sustained by the failure, unless they show some lawful excuse for not fulfilling their contract.

It is alleged by the plaintiffs in error that the destruction of the building was caused by defects in the specifications furnished by the owner, and that the loan and trust company expressly guaranteed the sufficiency of the specifications, and, if not expressed, the terms of that contract are such that the law will imply a guaranty in favor of the builder. In support of this defense the plaintiffs in error cite the following clause of the specifications: "The owner being bound in all cases to recognize the acts of the architect, not only as regards extra work, but also as to the sufficiency of the design, material and workmanship."

The plaintiffs in error have presented their objections to the judgment of the trial court and of the court of civil appeals by many assignments, but by careful grouping and clear propositions of law under each group, the questions to be considered have been reduced to a small compass. The careful preparation of this case by the attorneys of all parties has been of much assistance to this court in making a thorough investigation of the interesting questions presented.

The most important question in this case stands at the threshold of the investigation, and is presented in this concise form in the application for writ of error. "The building which Thos. Lonergan & Co. contracted to erect for the San

Antonio Loan and Trust Company fell, not because of defective material or work, nor because of negligence or other default on the part of the contractors, but solely and exclusively because of fatal defects inherent in the ⁷² 'plans and specifications,' made part of the contract. Therefore, Thos. Lonergan & Co. were not under obligation to rebuild the structure nor to repay to the trust company moneys received for work and material furnished pursuant to the contract."

Plaintiffs in error cite in support of that proposition *Thompson v. Chaffee*, 39 Tex. Civ. App. 567, 89 S. W. 285, decided by the court of civil appeals of the first district. The facts were that Thompson and Chaffee made a contract for the erection of a building by Chaffee, based upon specifications furnished by the owner. The building collapsed before completion and it was claimed to have been caused by defects in the specifications. In the trial court judgment was given against Thompson, and the court of civil appeals in passing upon the case made this statement of Chaffee's defenses: "That he had undertaken the construction of the house, and it was nearing completion, when it fell on account of defective plans, for which he was in no wise responsible and against which he had protested." Announcing its conclusions the court said: "As between the plaintiff and Chaffee, her suit must stand or fall on the plans sued on. It being undisputed, also, that these plans contained the feature to the weakness of which Chaffee ascribes the fall of the building, a finding of the jury sustaining that defense would sustain the judgment as it stands." There is no discussion of the question, and no authority cited in support of the conclusion, and we think that the learned judge who wrote the opinion would not have so summarily disposed of a question of such importance if it had been involved in the decision. Besides, there seems to have been an issue that after the contract was executed a change in the specifications was made over the protest of Chaffee which caused the loss of the building. The decision does not rest upon imperfections of the original specifications and is not in point.

In support of their proposition plaintiffs in error rely upon *Bentley v. State*, 73 Wis. 416, 41 N. W. 338, which counsel for defendant in error has attempted to distinguish from this case, but we are of opinion that it is well in point, and, if sound in doctrine, would require the reversal of this judgment. The facts of that case were that the state of

Wisconsin, desiring to add to her capitol building, enacted a statute by which a commission was created to let the contract for the work and to perform all the acts necessary to secure its construction. The statute authorized the commission to employ an architect who should prepare the plans and specifications for the structure and superintend the work, representing the state in the course of the work. In pursuance of the statute the commission by public notice invited bids to be presented to the commission and directed all bidders to call upon the architect for inspection of the plans and specifications. Bentley and his associates submitted a bid for the work, which was accepted. The specifications were made a part of the contract and provided for the supervision and control by the architect. When the work was well advanced toward completion, a part of the structure fell, from defects in the specifications. Bentley restored that portion of the building at an expense of about twenty thousand dollars and completed the work. The commission ⁷³ refused to pay the cost of restoring that portion of the walls, and Bentley sued the state to recover the cost of material and labor and for money expended in the work of restoration. The supreme court of Wisconsin held in that case that the state was liable for the loss sustained by Bentley on account of the defects in the plans and specifications; in other words, that the state of Wisconsin stood as guarantor for the sufficiency of the specifications furnished by the architect. The conclusion of the court was announced in these words: "According to such facts, the state undertook to furnish suitable plans and specifications, and required the plaintiffs to conform thereto, and assumed control and supervision of the execution thereof, and thereby took the risk of their efficiency. What was thus done, or omitted to be done, by the architect, must be deemed to have been done or omitted by the state. Moreover, we must hold, notwithstanding the English case cited, that the language of the contract is such as to fairly imply an undertaking on the part of the state that such architect had sufficient learning, experience, skill and judgment to properly perform the work thus required of him, and that such plans, drawings, and specifications were suitable and efficient for the purpose designed." From the standpoint of the contractor, the court clearly and forcibly laid down the proposition which is ably presented in this case. Realizing that their decision was in conflict with the case of *Thorn v. Mayor etc.*, L. R. 1 App. Cas. 120, relied upon in that case as in this by the

defendant in error, the supreme court of Wisconsin criticised the English case thus: "The value of such decisions as authority, however, is somewhat impaired by reason of the uncertainty as to the precise grounds upon which they are based. This grows out of the fact, so common among English decisions, especially of the present day, of rendering numerous opinions in the same case. Thus, in that case, there were five different opinions rendered in the exchequer chamber and four in the house of lords. Each of these opinions puts such decision upon grounds differing more or less from some, if not all, of the others." An examination of *Thorn v. Mayor* will show that the four opinions delivered in the house of lords are in perfect agreement upon the main question decided in the case—in fact, there is no conflict. Some reasons are assigned in each case not found in the other opinions, but that adds strength to it instead of weakening the authority of the case. The conclusion reached by the house of lords in that case is entirely consistent with the fundamental principles that underlie the law of contracts, and is in harmony with the decisions of the American courts upon this class of contracts as to the obligation of the contracting parties and their relations to each other. In *Bentley v. State*, 73 Wis. 416, 41 N. W. 338, the supreme court of Wisconsin ignores the fact that this is a matter of contract in which the parties are at arm's-length; the opinion is pregnant with the idea that there was a duty resting on the state to take care of the bidders with whom it was dealing, but there is no reason for charging the builder with such duty to the contractor. In the case under consideration the parties were each competent to ⁷⁴ contract, and there is no circumstance indicating the slightest unfairness in the transaction. The transaction may be fairly summarized thus: The loan and trust company owned a lot upon which it desired to build a house, and employed an architect in whom its officers had confidence to prepare the plans and specifications. The trust company was willing to risk the skill of the architect, and submitted the specifications to bidders for inspection and for their own determination as to whether or not they were willing to bind themselves to build the house in pursuance of, and in accordance with, the specifications as prepared. The owner being satisfied with the specifications, the contractors were called upon to exercise their own judgment, and if they were not competent to judge for themselves, it became their duty to protect their interests by procuring such aid as was

necessary to put them in possession of the facts. There is no more reason why the loan and trust company should be held responsible for the alleged defects in the specifications that it did not discover for want of skill and knowledge of the business of an architect, than there is for holding Thos. Lonergan & Co. to be bound by their acceptance of the defective plans which they understood as well as the trust company did, and in all probability much better. The fact that Lonergan & Co. contracted to construct the building according to the specifications furnished implied that they understood the plans: *Clark v. Pope*, 70 Ill. 133; *Lloyd's Building Contracts*, sec. 4. In *Bentley v. State*, 73 Wis. 416, 41 N. W. 338, the supreme court of Wisconsin say: "The state undertook to furnish suitable plans and specifications," etc., but we find no such undertaking expressed in that contract, and if the state either expressly and by implication so covenanted, then that case is not like this in the facts, and the decision is not applicable here. If that court attached to the contract the obligation "to furnish suitable specifications," as a matter of law it assumes the proposition under discussion, and asserts in different words that the law imports into such a contract a guaranty of the specifications without regard to the intention of the parties. *Bentley v. State*, 73 Wis. 416, 41 N. W. 338, rests upon a fallacy which would be destructive of the basic principles of contracts, while *Thorn v. Mayor*, L. R. 1 App. Cas. 120, is bottomed upon and supported by the well-recognized and long-established rule of law that in the absence of fraud or other improper influence, competent persons may make their own contracts for lawful purposes and will be required to perform them: *Dermott v. Jones*, 2 Wall. 1, 17 L. ed. 762. We are of opinion that the rule announced in the English case is sound in principle, and ought to be applied to such contracts. We therefore hold that the loan and trust company was not bound as guarantor of the sufficiency of the specifications as a legal consequence of submitting them for bids on the work and entering into the contract.

If there be any obligation resting upon the loan and trust company, as guarantor of the sufficiency of the specifications, it must be found expressed in the language of the contract, or there must be found in that contract such language as will justify the court in concluding that the parties intended that the loan and trust company should ⁷⁵ guarantee the sufficiency of the specifications to Thos. Lonergan & Co. This brings us to the consideration of the language of the

contract itself. We believe that no provision in the contract has been invoked as containing any express guaranty except the following clause: "The owner being bound in all cases to recognize the acts of the architect, not only as regards extra work, but also as to the sufficiency of the design, material and workmanship." Disconnected from the context, this language might be construed to apply to the design or specification for the building of the house, but when read in connection with that which goes before and that which follows, we think it cannot be so understood. The sentence quoted is found between two paragraphs, and its meaning is shown by the following extract:

"The owner reserves the right, by conferring with the architect, to alter or modify the design or to add to or diminish from the contract price, the architect being at liberty to make any alterations in the plans, form, construction, detail or execution described by the drawings and specifications without invalidating or rendering void the contract, and in case of any difference of expense, an addition to or abatement from the contract shall be made in the ratio or proportion such work may bear to the whole contract work agreed to be performed, and the same to be determined as before mentioned.

"The owner being bound in all cases to recognize the acts of the architect, not only as regards extra work, but also as to the sufficiency of the design, material and workmanship.

"No alterations or extra work to be done except upon the price and additional time necessary to complete same being agreed upon beforehand, and indorsed upon the contract; and in case no agreement could be effected between the owner and the contractor in regard to the price for alterations or modifications, as above referred to, the decision of the architect is to be final and conclusive."

It is quite evident that the subject here treated of is the changes which might be made by the owner through the action of the architect which might involve some change in the plans for executing the work as well as some changes in the material. This was to be under the supervision and control of the architect, and that clause which is relied upon by the plaintiffs in error and quoted hereinbefore was evidently inserted to protect the builders, Lonergan & Co., against any future claims by the loan and trust company that the work had not been done according to the terms and specifications embraced in the original contract. In other words, the owner, in exercising the right to make these

changes, agreed to be bound by whatever the architect should do to accomplish the changes. The "design" mentioned did not refer to the original plan.

We have not been able to find, from a careful examination of the contract and specifications, any terms used therein from which we think there could by any fair construction arise by implication a guaranty of the sufficiency of the specifications, and no such clause has been pointed out. The plaintiffs in error claim that ⁷⁶ this can be derived from the fact that the architect is to have supervision and control of all the work and other circumstances of that character, but these are provisions simply for the protection of the owner, who was represented in the execution of the work by the architect, while the builder represented himself.

We are of opinion that Thos. Lonergan & Co., having failed to comply with their agreement to construct and complete the building in accordance with the contract and the specifications, must be held responsible for the loss, notwithstanding the fact that the house fell by reason of its weakness arising out of defects in the specifications and without any fault on the part of the builder: *Dermott v. Jones*, 2 Wall. 1, 17 L. ed. 762; *School Dist. v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371; *Superintendent v. Bennett*, 27 N. J. L. 513, 72 Am. Dec. 373; *Clark v. Pope*, 70 Ill. 128.

Counsel for plaintiffs in error have cited many cases in which the courts have said that the builder or contractor does not guarantee the sufficiency of the specifications. It is a correct proposition, because the specifications are, as a matter of law, not guaranteed by either party to the other. In the cases cited, we believe that without exception the contractor had performed his work according to the terms of his agreement and had fulfilled his contract by finishing the structure, terminating his relation as contractor, after which the house was destroyed by some accident or calamity, or had fallen from some defect or weakness in the structure or fault of the soil, and in such cases the courts have held that the contractor does not guarantee the sufficiency of the specifications, but only the skill with which he performs his work and the soundness of the material used therein. He is therefore not liable for the destruction of the building after he has performed his agreement by completing the structure: *Clark v. Pope*, 70 Ill. 128.

It has been just as uniformly held, however, that whenever the building or structure has been destroyed by reason of any defect in the work done, or by any accident or any

means whatever before the contract has been completed, then the contractor must bear the loss, no matter what might be the occasion thereof, unless it be some wrong done by the owner subsequent to the making of the contract which caused the fall. Liability of the builder does not rest upon a guaranty of the specifications, but upon his failure to perform his contract to complete and deliver the structure.

Counsel for defendant in error have not denied that the allegations of the plea of the surety company show such material changes to have been made in the contract without its consent as would ordinarily discharge the surety from liability upon its bond. We shall, therefore, not cite authority, nor adduce argument, to sustain that general proposition, but we will examine the contentions of the defendant in error which are expressed in two propositions, the first of which we copy: "The bond of the American Surety Company in this case is, in its nature, an insurance contract to indemnify the loan and trust company against defaults of Lonergan & Co., and as such must be construed like any other contract of insurance—that is, if it is susceptible of two constructions, ⁷⁷ one favorable and the other unfavorable to the surety company, the latter, if consistent with the object for which the contract was made, must be adopted." The honorable court of civil appeals sustained this proposition, holding that the surety company was in this case not entitled to the same protection of the law that would be accorded to a surety who executed the same bond without compensation, and cite the following cases in support of that conclusion: *Cowles v. United States Fid. etc. Co.*, 32 Wash. 120, 98 Am. St. Rep. 838, 72 Pac. 1032; *Pacific Bridge Co. v. United States Fid. etc. Co.*, 33 Wash. 47, 73 Pac. 772. Both of the cases cited were decided by the supreme court of Washington. In neither case is any reason assigned why there should be a difference in the rights of a compensated and voluntary surety, and we have been unable to discover a plausible ground for such distinction. How it could be that receiving compensation by the surety would affect the relation between the surety on the bond and the owner of the building has not been suggested by counsel and is not apparent to us. The well-established rule that material changes in the contract, made without the consent of the surety, will discharge him from liability is based upon the clear and distinct ground that the surety's obligation is to answer for the contract as it is made, and a material

change destroys that contract and substitutes a new one, for which the surety has not contracted to be responsible. Why should a compensated, any more than a voluntary, surety be held to guarantee a contract to which he has not consented? The proposition antagonizes the fundamental requirement that to make a valid contract the minds of the contracting parties must meet and agree upon its terms. We are of opinion that the holding of the court of civil appeals upon this question was error.

The defendant in error asserts that the provision of the contract, which is claimed to have been violated, was made for its benefit; therefore it had the right to waive that violation. The second proposition is in these words: "Where the contract, as in this case, provides that no alteration or extra work is to be done, except upon the price and additional time necessary to complete the same being agreed upon beforehand, and indorsed upon the contract, the owner may waive compliance with the provision; and the surety on the contractors' bond is not discharged because it has been disregarded. This condition of the contract being for the benefit of the owner, it could waive it, and such waiver does not affect the liability of the surety company." This proposition was also sustained by the court of civil appeals, in support of which it cited the following cases: *Hohn v. Shideler*, 164 Ind. 242, 72 N. E. 575; *Cowles v. United States Fid. etc. Co.*, 32 Wash. 120, 98 Am. St. Rep. 838, 72 Pac. 1032; *Pacific Bridge Co. v. United States Fid. etc. Co.*, 33 Wash. 47, 73 Pac. 772. The general rule upon this subject is that any material change made in the contract upon which the bond is predicated, without the consent of the surety, will release the surety, whether that change be for his benefit or not: *Lane v. Scott*, 57 Tex. 367. In that case the court said: "It is a further well-established principle that when the original contract has been thus varied, a ⁷⁸ court of equity will discharge the surety without further inquiry as to whether he has been prejudiced or benefited by it, for the reason that this question, as a general rule, would not be a practicable one." If we admit, however, that the failure to comply with a stipulation in the contract which was solely for the benefit of the owner would not discharge the surety, still we have the question whether the provision which was claimed to have been disregarded in this instance was not for the benefit of the surety also, and that therefore the rule which has been invoked would not apply to the facts of this case. For the sake of convenience, we here again copy

the two provisions of the contract which are brought in question by this proposition:

"The owner reserves the right, by conferring with the architect, to alter or modify the design or to add to or diminish from the contract price, the architect being at liberty to make any alterations in the plans, form, construction, detail or execution described by the drawings and specifications without invalidating or rendering void the contract, and in case of any difference of expense, an addition to or abatement from the contract shall be made in the ratio or proportion such work may bear to the whole contract work agreed to be performed, and the same to be determined as before mentioned.

"No alterations or extra work to be done except upon the price and additional time necessary to complete same being agreed upon beforehand, and indorsed upon the contract; and in case no agreement could be effected between the owner and the contractor in regard to the price for alterations or modifications, as above referred to, the decision of the architect is to be final and conclusive."

It may be admitted that the first paragraph above quoted was inserted solely for the benefit of the owner of the property, it confers authority to make changes which could be made by no other person, but it is not for a disregard of that clause of the contract that complaint is made; therefore, that clause cannot be considered in determining the rights of the parties under this proposition. It was in the interest of the owner of the property that the changes in the prices to be paid and other matters connected with those changes should be in writing as required by the second clause, so that there could be no controversy as to the extent of the changes to be made nor the compensation to be paid. It was not solely for the owner's benefit, for the contractor and the surety were likewise interested in the observance of the second clause above quoted. The trust company might have waived the performance of an act to be done by Lonergan & Co. which was for the benefit of the trust company only, but how could it waive the performance by itself of a condition upon which its authority to make changes rested? It is distinctly provided that the owner cannot make changes provided for in the first clause, except upon the condition that such changes shall be noted on the contract. This is clearly not in the interest of the owner alone, for it could not be said that in his own interest a limitation would be placed upon his action. The terms in which the limitation

is expressed clearly ⁷⁹ indicate that it is intended principally to protect the contractor and the surety against any claim on the part of the owner not expressed in the written contract. In other words, it was the intention of the parties that the whole contract, including changes made by authority of its terms, should be in writing for the mutual benefit of the owner, the contractor and the surety, and a failure by the owner to comply with such a provision could not be waived by him and the principal as against the surety upon the bond: *Ryan v. Morton*, 65 Tex. 258. In the case cited the contract provided that the owner of the property should retain certain sums of the contract price in his hands. He failed to do so, and the surety set up that this was a failure to perform the contract and was virtually a change of the contract as to him. It was therefore claimed that it was a provision for the protection of the owner and could not be waived. The court said: "This was a part of the contract for the protection of the owner of the property, but it gave a guaranty to the sureties that the work would not be paid for until it was done. This tended to their protection, and if a part of the work was not done by their principal, the owner ought to have retained a fund in his hands, at least equal to the contract price for the work not done, which would have lessened the liability of the sureties to him on failure of their principal to comply with his contract. This he did not do, but, on the contrary, he paid to their principal, in violation of the contract, the full price to which he would have been entitled had he performed the entire work." It was held in that case that the violation of the contract discharged the sureties. That case is in point and is a complete answer to the contention of the defendant in error upon this branch of the case. We conclude that the changes made in the contract, without the consent of the American Surety Company, operated to discharge that company from liability upon the bond.

John W. Rapp intervened in this suit in the district court, claiming (1) that the contract for the construction of the building made Lonergan & Co. the agents for the trust company to contract for the fireproofing, and that his contract was made with the trust company, through its agents, Lonergan & Co., and not with Lonergan & Co. as contractors; (2) that he furnished the material and did the work as specified in his petition of intervention, and that he gave notice of his claim as required by law to the owner, the trust com-

pany, and thereby acquired a lien upon the lots on which the house was being constructed to secure his debt against Lonergan & Co. The builder, Lonergan & Co., undertook in the construction of the house to do the fireproofing, the cost of which was included in the sum to be paid by the owner for the construction and completion of the building. The specifications contained these provisions: "The drawings are made for using expanded metal lathing and concrete for all fireproofing and all partitions and lathing and as otherwise specified, but the entire proofing to be left open to bidders for any good system of fireproofing." Again: "It is particularly to be understood that whatever system of fireproofing ⁸⁰ is adopted, only the very finest work will be allowed to go in, and none other need be figured upon." Manifestly, these clauses did not in any way take from the contractor power to control the fireproofing, except that it required that bids should be received for any kind of good fireproofing and should not be confined to the lathing and concrete expressed in the specifications, and the last quotation shows the purpose was to secure the best fireproofing that was to be had. The language is not susceptible of the construction placed upon it by counsel for Rapp.

The evidence of Giles, the architect, shows that at the time the notice of Rapp's claim was served on him as architect the trust company had in its hands about six thousand four hundred and thirty dollars, being twenty per cent of the estimates previously made upon the work and for which payments had been made. The twenty per cent was by the contract reserved by the company for its own protection and to be paid only when the building was completed and the contract complied with; therefore it was not subject to the claim of the plaintiff, because it was not due to Lonergan & Co. Between the time when the notice was given by Rapp and the collapse of the building there was work done upon the structure which was never estimated, and, as payments were to be made only upon the estimate of the architect, there was not at any time a sum which Lonergan & Co. had a right to demand.

The proceeding prescribed by the statute by which a materialman is permitted to fix a lien for material furnished by him and used in the erection of an improvement does not create a debt against the owner of the property, but operates as a writ of garnishment would, and appropriates so much of the money in the hands of the owner as is then due

and payable, or may become due and payable, to the contractor to the extent necessary to establish that claim: *Fullenwider v. Longmoore*, 73 Tex. 480, 11 S. W. 500. In the case cited the court says of a similar proceeding: "The lien acquired is, however, in all cases subordinate, and never superior, to the terms of the contract. No original indebtedness is created by establishing the lien. The debt of the owner of the property as fixed by the contract cannot be modified, changed or enlarged by the proceedings fixing the lien. These proceedings do no more than establish a lien against the property for such amount as is unpaid and is payable by the terms of the contract when the proceedings are commenced. From the time of the service of the notice upon the owner of the property he can make no further payment to the contractor without incurring liability for the lien debt, if proper steps shall be taken to establish it, to the extent of his indebtedness under the contract when the notice is served. If the owner of the property is indebted to the contractor, the service of the notice, if followed by the acts required to fix the lien, secures the fund as does a writ of garnishment in an ordinary case, except that a pro rata distribution may become necessary by the terms of the statute between different lienholders and the process of collecting the money is different." The owner of the property is liable to the materialman only as he, the owner, would be liable ⁸¹ to the contractor. Under the facts, *Lonergan & Co.* cannot recover against the trust company; therefore, *Rapp* cannot enforce a lien upon the lots, nor recover from the trust company for the value of materials and work done for *Lonergan & Co.*: *Riter v. Houston etc. Oil Co.*, 19 Tex. Civ. App. 516, 48 S. W. 758; *Ricker v. Schadt*, 5 Tex. Civ. App. 460, 23 S. W. 907. We are of opinion that there was no error in the charge of the court, and the judgment of the trial court and of the court of civil appeals as between *Rapp* and the original contractor, and also as between *Rapp* and the trust company, are affirmed.

It is ordered that the judgment of the district court and of the court of civil appeals in favor of the San Antonio Loan and Trust Company against *Thos. Lonergan* be and the same is in all things affirmed. And it is further ordered that the judgment of said courts in favor of the San Antonio Loan and Trust Company against the American Surety Company be and the same is hereby reversed and remanded

for trial, except as to the issues determined by the judgment as between the San Antonio Loan and Trust Company and Thos. Lonergan. It is ordered that the San Antonio Loan and Trust Company recover all costs of all of the courts as against Thomas Lonergan and John Rapp, but that the American Surety Company recover of the said San Antonio Loan and Trust Company its costs in the court of civil appeals and in this court.

ON MOTION OF JOHN W. RAPP FOR A REHEARING.

The judgment in this case will be corrected by interlineation so as to affirm the judgment of the court of civil appeals as between John W. Rapp and Thos. Lonergan & Company and affirm the judgments of the district court and court of civil appeals as between John W. Rapp and the San Antonio Loan and Trust Company. And said judgment will be corrected by interlineation so as to award the costs as between them in favor of John W. Rapp against Thos. Lonergan and Thos. Lonergan & Co., and also to award the costs as between them in favor of the San Antonio Loan and Trust Company against the said John W. Rapp. And the opinion of this court will be corrected by erasing the words, "of the trial court and," so that the opinion will read, "and the judgment of the court of civil appeals as between Rapp and the original contractor, and also between Rapp and the trust company, is affirmed."

The motion for rehearing is overruled.

Affirmed in part and reversed and remanded in part.

The Effect of the Destruction of a Building in course of construction before its completion on the rights and liabilities of the contractor and the owner is considered in the note to Huyett & Smith Co. v. Chicago Edison Co., 59 Am. St. Rep. 285. For other authorities on this question, see Milske v. Steiner Mantel Co., 103 Md. 235, 115 Am. St. Rep. 354; Krause v. Board of School Trustees, 162 Ind. 278, 102 Am. St. Rep. 203; Butterfield v. Byron, 153 Mass. 517, 25 Am. St. Rep. 654.

The Difference Between a Suretyship entered into for a valuable consideration and a similar obligation entered into gratuitously is the subject of a note to Cowles v. United States etc. Co., 98 Am. St. Rep. 844.

BROWN v. CANTERBURY.

[101 Tex. 86, 104 S. W. 1055.]

EXECUTION SALE—Title Acquired by Purchaser.—When the vendor of land under an executory sale obtains judgment against the vendee on a purchase money note and causes the property to be sold, the purchaser acquires not only the title of the vendee, but also the legal title that remained in the vendor as security for the purchase price. (p. 828.)

EXECUTION SALE.—The Purchaser at an Execution Sale may Acquire the Title of the Plaintiff as well as that of the defendant, if essential to accomplish the purpose of the sale. (p. 828.)

VENDOR—Retention of Legal Title as Security.—The vendor of land under an executory contract retains the legal title only to secure the payment of the unpaid purchase money. (p. 828.)

C. L. Bradley and Fisher, Sears & Campbell, for the plaintiffs in error.

Ewing & Ring, G. H. Pendarvis, Cobbs & Hildebrand and Ross & Wood, for the defendants in error.

⁸⁹ BROWN, J. Certified question from the court of civil appeals for the first district, as follows:

“Ann D. Brown and others in the right of the heirs of Horace Baldwin, deceased, brought this action of trespass to try title to recover of C. P. Shearn and others holding in the right of the estate of Charles Shearn, deceased, blocks 323 and 328 of Charles Shearn’s addition to the city of Houston. Other blocks of that addition were originally included in the suit, but were eliminated prior to the trial and are not here involved.

“The G., H. & S. A. Railway Company and the Southern Pacific Company, two of the defendants, disclaimed as to all the land sued for except block 323, and as to that pleaded not guilty and limitation of three, five and ten years. These companies also vouched in those occupying the relation of warrantors, but no question arises as to them on this appeal. The other defendants pleaded not guilty.

“The cause was tried without a jury and resulted in a judgment for defendants.

“The facts are as follows: In December, 1837, the co-owners with J. S. Holman executed and delivered to him a power of attorney to sell one hundred acres of land owned in common by them, of which the land in controversy is a part.

“Pursuant to this, on June 16, 1839, Holman for himself and as attorney in fact for his associates sold and conveyed the same one hundred acres to Portis and Tarply in consid-

eration of thirteen hundred dollars, evidenced by four notes for three hundred and twenty-five dollars each, due respectively in six, twelve, eighteen and twenty-four months from date, the lien being retained in the deed.

“On July 27, 1839, Portis and Tarply sold and conveyed to Manly Sexton a distinct fifty acres out of the one hundred acres above named, and the land in controversy is a part of this fifty acres. This deed recited a cash payment of one thousand dollars. On the same day Manly Sexton sold and conveyed the same fifty acres to Horace Baldwin for a recited cash ⁹⁰ consideration of three thousand five hundred dollars, the deed also reciting that the land was unencumbered.

“The plaintiffs were shown to be the owners of such title as Horace Baldwin had.

“In 1841 J. S. Holman brought suit against Portis and Tarply on a note for three hundred and twenty-five dollars and procured personal judgment thereon. No lien was either foreclosed or asserted. Upon this judgment execution issued, the return showing among other things that on the refusal of the judgment defendants to point out property for levy the writ was levied on the one hundred acres first mentioned herein, the same having been pointed out by Thomas M. Bagby, ‘agent of Holman.’

“Thereafter, on October 4, 1842, the land was duly appraised, advertised and offered for sale by the sheriff. His return further shows that it was sold to Thomas M. Bagby on a bid of two hundred and sixty-six dollars and sixty-six cents, but that Bagby had failed to comply with his bid, so the execution and sheriff’s deed which the sheriff had prepared were returned to the clerk of the court.

“The records of Harris county show the record of a deed of date October 4, 1842, from the sheriff of Harris county to Thomas M. Bagby purporting to convey the land so sold at sheriff’s sale. This deed purports to have been proved for record by a subscribing witness thereto. There is no direct evidence that it was ever delivered by the sheriff or that Bagby ever complied with his bid. We find, however, that it was in fact delivered.

“On November 16, 1844, Thomas M. Bagby sold and conveyed to Charles Shearn (by deed which declared that the land was his own) the one hundred acres mentioned above and the defendants deraign their title regularly under the deed from Bagby. This deed and the deed from the sheriff to Bagby were placed of record January 11, and January

13, 1845, respectively. The deed from Portis and Tarply to Manly Sexton was recorded on the day of its date.

"The deed from Sexton to Horace Baldwin was recorded August 1, 1839, so that both these deeds were of record long prior to the sheriff's sale under the Holman judgment.

"The claim of Shearn and those holding under him has been continuously and openly asserted without question or challenge from any source until shortly prior to the institution of this suit in 1901. They have paid the taxes, and as early as some time between 1860 and 1870 the land was platted into lots and blocks by Shearn as an addition to the city of Houston. Horace Baldwin lived in the city of Houston until about 1850 and died shortly thereafter in Galveston. His heirs, or some of them, have lived in Houston ever since. No taxes appear to have been paid under the Baldwin claim.

"Homes have been built on parts of the land under the Shearn claim, and the railway companies have erected shops and terminals on parts of it claimed by them and have so held for so long that they have title under the statute of limitations of ten years against all the plaintiffs except those under coverture.

"The property was not inventoried as a part of Baldwin's estate ⁹¹ but such force as this has is modified by the further fact that he died in Galveston and that other property apparently belonging to him was also omitted from the inventory. All the parties and witnesses to these transactions are dead.

"The papers in the cause of Holman v. Portis & Tarply have been lost or destroyed and such facts with reference thereto as were shown upon the trial appeared from the judgment and execution dockets and the testimony of a witness who had seen the note and execution with its return. The note forming the basis of that suit is shown only by circumstances to have been one of the series of vendor's lien notes in question, but it recited that it was executed in payment for land. It was shown that another suit was subsequently brought by Holman against Portis & Tarply on a note for like amount and a lien was therein asserted. The papers are lost and it only presumptively appears that that note was one of the series. The judgment rendered on this last was one of foreclosure, and execution and order of sale were returned nulla bona. These purchase money notes have never been paid.

"The appellants contend that as Baldwin, the subvendee of Portis and Tarply, was not made party to the suit of Hol-

man under which the land was sold to Bagby, and as the defendants in that judgment had parted with all their interest in the fifty acres in question, nothing passed by the sheriff's deed except the fifty acres not sold by Portis and Tarply, and that the judgment in no respect bound Baldwin. Further, that as the judgment sought by Holman in his suit on the three hundred and twenty-five dollar note was personal, and as he did not choose to put in issue his vendor's lien, the superior title remained in Holman and his co-owners, and that after this lapse of time the vendor's lien notes which gave life to that title should be conclusively presumed to have been discharged.

"The appellees seek to sustain the judgment upon the ground:

"First. That the sale to Bagby under the Holman judgment passed to the execution purchaser whatever rights Holman had in the land levied on and sold, and therefore Bagby became the owner of the superior title retained by the vendor's lien in the deed to Portis and Tarply.

"Second. That the facts authorized the presumption that Bagby purchased at execution sale as the agent of Holman, the bid being credited on the execution, from which it follows that the position of Holman, the holder of the superior title, was not changed and the right remained in Baldwin, unaffected by the judgment and execution sale, to discharge the lien by timely action and perfect his rights, which he did not do, which the claimants under him do not now offer to do, and which they would not be permitted to do at this late day.

"The trial court held as an inference of fact that Bagby acted as agent of Holman in the purchase at execution sale; that the vendor's lien notes remained undischarged, and rested his judgment upon the theory embodied in appellee's second contention.

"This court held that the evidence did not present the issue of Bagby's agency for Holman in making the purchase at execution ⁹² sale, and that the superior title retained by Holman did not pass to Bagby by that sale.

"Upon this conclusion we reversed the judgment and remanded the cause. The case is now pending before us on motion for rehearing. We respectfully certify for your decision the following questions:

"First. Do the facts stated present the issue of the agency of Bagby to make the purchase at execution sale for and on behalf of Holman, the judgment plaintiff?

"Second. We having found as a fact that Bagby did not act as agent for Holman in making such purchase, did such title as Holman had in the property levied on and sold, nevertheless pass thereby to the purchaser?"

We answer the second question in the affirmative. When Holman sued upon the note for the purchase money of the land, obtained judgment against Portis and Tarply, the original vendees, and caused the land to be sold under that judgment, the purchaser, Bagby, took the title of Portis and Tarply and also the legal title which remained in Holman to secure the debt. Portis and Tarply, having sold the fifty acres which appellants claim, had no title to that, but Bagby took the superior title which Holman reserved in the sale to Portis and Tarply. Authorities: *Vieno v. Gibson*, 85 Tex. 432, 21 S. W. 1028; *Freeman on Executions*, 3d ed., sec. 335, p. 1939; *Vierheller's Appeal*, 24 Pa. 105, 62 Am. Dec. 365; *Horbach v. Riley*, 7 Pa. (7 Barr.) 81; *Love v. Jones*, 4 Watts, 465.

After stating the general rule that a purchaser at execution sale takes only the title of the defendant in execution, Mr. Freeman says: "In some instances, the purchaser acquires the interest of the plaintiff as well as of the defendant. This is so whenever the title of the plaintiff is essential to accomplish the manifest purpose of the sale. Thus, if the sale is made to satisfy a lien held by plaintiff, it transfers such lien; or, in case the plaintiff held the legal title to secure the debt, the sale divests him of that also. Hence, when a sale is made to enforce a vendor's lien, the purchaser acquires the interests both of the vendor and the vendee in the land."

It is the settled law of this state that the original vendor of land under executory contract retains the legal title only to secure the payment of the unpaid purchase money. The legal title being held by Holman to secure the payment of the purchase money notes, this case comes within the exception stated by Mr. Freeman.

In *Vieno v. Gibson*, 85 Tex. 432, 21 S. W. 1028, above cited, the holder of the notes for the purchase money of a tract of land sued on one of the notes foreclosing the lien. The land was sold, Gibson purchasing at the sale. Subsequently the plaintiff in that judgment sued upon the other purchase money notes, and sought to foreclose the vendor's lien on the same land, but the court held that he parted with his right to do so by selling the land under the first judgment. This case can be sustained only upon the ground that the legal title held to secure the notes passed by the first sale.

In *Love v. Jones*, 4 Watts, 465, cited above, the court said: "Where ⁹³ an executory contract has been made for the sale of land, in pursuance of which the vendee has obtained the possession thereof, but not the legal title, and the whole of the purchase money having become payable, a part or the whole whereof remains unpaid, the vendor institutes an action founded upon the contract, and in affirmance thereof obtains a judgment for the recovery of the money, under which he levies upon and sells the land, he must be considered as selling all that estate in the land, whatever it may be, which he agreed to sell and convey to the defendant. The vendor being the plaintiff in such case, and the owner of the legal estate, has the right to agree that such shall be the effect of the sale by the sheriff under his judgment; and in order that complete justice may be done to all concerned, without delay, and with as little expense as possible, it is right and necessary that the agreement of the plaintiff to this effect should be implied from his having caused the land to be levied on and sold under his judgment.

"By giving this effect to the sale, complete justice is more likely to be done, perhaps, to everyone concerned, than could be had in any other course of proceeding that could be adopted."

If this be not the correct rule, then Holman could have taken from Bagby the land he bought if Portis and Tarply failed to pay the other notes. Such a result would not be tolerated by the courts.

The court of civil appeals referred to *Fisher v. Foote*, 25 Tex. Supp. 311, and *Myers v. Paxton* (Tex. Civ. App.), 23 S. W. 284, to support their conclusion. In *Fisher v. Foote* the facts were, in substance, that Fisher sold the land in controversy to one Brown for five hundred dollars cash and a note for five hundred dollars. Brown sold to Taylor for the same price and Fisher took a note from Taylor for five hundred dollars, releasing the note for like amount from Brown, and conveyed the land to Taylor, who gave a note to Brown for five hundred dollars with mortgage on the land to secure that note. There was no reservation of lien to secure the note given by Taylor or to Fisher. Fisher sued upon the note given to him—Brown was not a party—and caused the land to be sold, at which sale Fisher purchased. Brown foreclosed his mortgage and caused the land to be sold under that decree. Foote became the purchaser. Brown's decree foreclosing the mortgage was entered before the sale under Fisher's execution. The supreme court decided the case upon the priority of the mort-

gage lien over the judgment lien. The court said: "The judgment lien arose subsequently to the giving of the mortgage, and of course was subordinate to that, and the purchaser at the sale under the judgment took the title subject to the lien of the mortgage": 25 Tex. Supp. 317. The question now under consideration was not before that court. It is true the court referred to the matter in this language: "The purchaser at the execution sale acquired no right or interest by his purchase, as against the title of the purchaser at the sale under the decree of foreclosure of the mortgage. Even if the vendor's lien might be enforced by execution upon the judgment, still being a secret lien, it could not be set up against a purchaser of the land bona fide, without notice of the lien; and such the plaintiff appears to have been." In using that language the court had in ⁹⁴ mind only the vendor's lien, and did not in the remotest sense refer to the title reserved to secure the lien.

It will be seen that the reason given by the court why Fisher did not acquire the equity of redemption was, that it had been foreclosed under the mortgage. In that case, Fisher parted with the legal title when he deeded the land to Taylor; therefore he had no title to transmit and the question we have could not have arisen.

The question in hand was not involved in *Myers v. Paxton*. Judge Williams said: "The charge should have been given, and the decision of the case should have been made to depend upon the issue whether or not the land was the homestead of Freeland at the date of the levy": 23 S. W. 284.

It is apparent that the issue involved here did not arise in that case. In fact, the plaintiff in the execution did not have the legal title to the land, and therefore it could not have passed by the sale.

Counsel for appellant cite *Summers v. Hancock*, 23 Tex. 150, as conclusively settling the question. In that case W. J. Ryan transferred a note given to him by Hancock for the land in question to M. K. Ryan, who sued W. J. Ryan and Hancock, and obtained judgment under which the lots were sold and bought by Slayton. The Summers were not parties to the suit. W. J. Ryan gave bond for title to Hancock, and when the latter sold to Summers, by agreement, between the parties, W. J. Ryan made a deed to the Summers who gave the note sued upon. Summers pleaded failure of consideration, alleging that the sale under the execution conveyed the superior title to Slayton, who purchased at the sale. It is patent that the issue presented here did not arise, because

the legal title was vested in Summers by the deed from W. J. Ryan, and M. K. Ryan, the assignee of the purchase money notes, the plaintiff in the execution, had no title, legal or equitable.

Since Bagby took the legal title of Holman under the sale, it is unnecessary for us to answer the first question. Whether Bagby bought for Holman or not becomes immaterial.

The Question as to Whether an Execution Sale carries the interest of the plaintiff in the land sold is considered in the note to King v. Cushman, 89 Am. Dec. 370.

KRAUSE v. CITY OF EL PASO.

[101 Tex. 211, 106 S. W. 121.]

MUNICIPAL CORPORATION—Estoppel to Claim Street.—A municipal corporation that has led a person to erect permanent improvements upon a portion of a public street will be estopped after the lapse of many years to claim the property as part of the highway and remove the improvements. (pp. 836, 837.)

Walter Davis, T. A. Falvey and William Aubrey, for the plaintiff in error.

R. F. Burges, city attorney, M. W. Stanton and W. M. Coldwell, city attorney, for the defendant in error.

214 BROWN, J. Annie P. Krause, John P. Pryor and Thos. D. Pryor, heirs and legatees of Mrs. Fannie D. Porter, deceased, instituted this suit in the district court of El Paso county to enjoin the city of El Paso from removing a portion of a brick house on a small piece of land situated at the intersection of San Antonio and Stanton streets, which land is alleged to be the property of plaintiffs. The land in controversy is a triangular piece twenty-four feet on Stanton street and its north line running to an intersection with San Antonio street, about twenty-eight feet. The controversy arose over a conflict of maps of the city, which had been made previously and subsequently to the acquisition of the property. On some of the maps Myrtle avenue, which approached Stanton street from the opposite side to San Antonio street, if its north line be extended, would cut off the southeast corner of lot 63 in block 12, in triangular form as above stated. The city filed a plea in reconvention claiming the right to the street, setting up the fact of its dedication to public use and

the acceptance of it by the city, to which plaintiffs answered by general denial and not guilty.

There is a very elaborate statement of the case made by the honorable court of civil appeals embracing the findings of fact of the trial court, which findings we condense as follows:

In the year 1858, Gillette Brothers, J. F. Crosby and Morton & Kelley owned the land on which the city of El Paso is located, and, in that year, they employed Anson Mills, a surveyor, to lay the land out in lots, blocks, streets and alleys and make a plat of it, which he did, but the said owners were not satisfied with the plat, which we will call the first Mills map. The streets and the lot and block which is here claimed were shown and platted as is claimed by the plaintiffs. In May, or June, 1859, at the instance of the owners of the said land, Mills made a map which was signed by him and accepted and signed by the owners of the land. Copies of this map were kept in the office of the company and were used by them in the sale and transfer of the lots in the city. The map was lithographed and was used by the public generally, and became known as the Mills map of the city of El Paso, and we shall so designate it in this opinion. The last-named map showed lot 63 in block 12, San Antonio street, Stanton street and Myrtle avenue as they are now claimed by the city. This first Mills map was never used by the owners of the property, nor by others in the transfer of property within the city. El Paso seems to have been unincorporated until 1873, when it was chartered under the laws of the ²¹⁵ state, whether by special act or by general law is not stated. In 1874 the city council of the city of El Paso adopted an ordinance by which all obstructions on any street, alley, etc., were declared to be an offense and punishable by fine. In 1881 the city engineer made a map of the city in accordance with the Mills map, which was adopted by the council on May 26, 1881, but it was provided that it should not be binding upon those whose land had not been dedicated to the use of the city. This last map was in use when Mrs. Porter purchased the land. At a subsequent date not given in the statement, one Campbell and others made an addition to the city of El Paso, and made a map of the city as well as of the addition, which showed lot 63 in block 12 and the streets to be laid out as in the first Mills map. In 1885, J. G. Hilzinger, who was assessor of taxes for El Paso, prepared for himself a map according to the first Mills map, and the Hilzinger map was adopted by the city council. Thereafter, at a date not given, Wimberly,

city engineer, prepared a map of the city in conformity to the Mills map, which was adopted by the city and has continued to be the official map since that time.

July 24, 1882, Rector & Campbell, being the owners of lot 63 in block 12, conveyed it to Mrs. Porter, the deed describing the land conveyed as shown by the first Mills map. At that time there was an ordinance of the city of El Paso which required persons who desired to erect improvements upon their property to have their lines designated by the engineer, and Mrs. Porter, being desirous to erect a house upon her property, called upon the city engineer to show her the lines of the streets surrounding her property. The city engineer, in accordance with her request, surveyed the lot and designated the lines and corners according to the first Mills map. Mrs. Porter built upon the property a brick house and went into possession of it, and the possession has been continuous since that time until this suit was brought. At a date not given, the city of El Paso required Mrs. Porter to make a sidewalk along her property at the place where the controversy arose, which recognized her right as she claimed it and the location of the streets as it was shown upon the first Mills map. In subsequent years Mrs. Porter was at different times required to repair this sidewalk and keep it in good condition. There does not appear to have been any claim set up by the city to this piece of ground until the institution of this suit or a short time prior thereto. The brick house upon the property is simply said by the court to be valuable, but its value is not given. To enforce the right of the city would practically destroy this house.

In the charter of the city of El Paso are these provisions:

"Sec. 36. To have the exclusive power and control over the streets, alleys, sidewalks, lanes, avenues, and public grounds and highways of the city, and to abate and remove encroachments or obstructions thereon; to open, alter, widen, straighten, extend, establish, abolish, regulate, grade, regrade, clean, pave, macadamize, or otherwise improve the same."

"Sec. 103. The duties of the engineer and surveyor shall be fixed by the city council, and also his compensation, and the fees he ²¹⁶ shall be allowed for all work done for the city or private individuals as city engineer and surveyor, as well as the amount of bond he shall give for the faithful performance of his duties."

The city adopted an ordinance that was in force in 1882, from which this extract is made: "It shall be the duty of

the city engineer to make all surveys of such streets, blocks, lots or other grounds within or without the city as the city council shall direct; . . . to make all surveys of lots, blocks or other grounds within the city for private individuals when called upon by them to do so, of which surveys, when so completed, he shall give certificates to such individuals as may require them and shall keep in his office a record book wherein a plat of every survey made by him within the city shall be placed and indexed."

The case was tried in the district court before the judge, a jury being waived, and judgment was entered against the plaintiffs, which judgment was by the court of civil appeals affirmed.

The findings of fact made by the court of civil appeals establish that the land in controversy was embraced in Myrtle avenue according to the plat of the city in which the proprietors dedicated the streets to the use of the public, and that the streets so platted were accepted by the city of El Paso.

To justify a reversal of the judgments of the court of civil appeals and district court it must appear that the city was estopped to claim the ground as a part of the public highway, or that the facts show that the city had abandoned the use of that part of the street. The defendants in error submit the proposition that a municipal corporation cannot convey the public streets of a city to private individuals for private use; therefore, the title to the streets cannot pass from the corporation to the citizen by estoppel. In support of this proposition they cite the following cases, with others: *Webb v. Demopolis*, 95 Ala. 116, 13 South. 289, 21 L. R. A. 62; *Snyder v. Pulasky*, 176 Ill. 397, 52 N. E. 62, 44 L. R. A. 407; *Mobile v. Sullivan Timber Co.*, 129 Fed. 298, 63 C. C. A. 412; *Philadelphia Mtg. & Tr. Co. v. Omaha*, 63 Neb. 280, 93 Am. St. Rep. 442, 88 N. W. 523; *Simplot v. Chicago M. & S. Ry. Co.*, 5 McCrary, 158, 16 Fed. 350; *Ralston v. Weston*, 46 W. Va. 544, 76 Am. St. Rep. 834, 33 S. W. 326.

In *Webb v. Demopolis*, 95 Ala. 116, 13 South. 289, the supreme court of Alabama expressed a doubt as to the applicability of the doctrine of estoppel to a municipal corporation in any case, but the facts did not call for a decision of the question. The court said: "If it were necessary to pass on the point in the present case, we should be much inclined to hold that no act or omission to act on the part of the municipality with reference to obstructions in public streets could in any case raise up an estoppel against it to proceed

in the interest of the public to have such obstructions removed, however long they had been allowed to remain in the street.”

In *Snyder v. Pulasky*, 176 Ill. 397, 52 N. E. 62, 44 L. R. A. 407, the supreme court of Illinois used language which is broad enough to embrace this case, but the facts of that case were, that by contract a citizen was permitted to use water from a well in a public street for a given time, and the court held that the city had no authority to bind the public by such a contract and that the doctrine of estoppel would not apply. ²¹⁷ The use of the well was not in opposition to the right of the city, but under and by authority of the city, and the doctrine of estoppel could not arise; it was simply a question of the validity of the contract. The conclusion in that case is sound, but the reasoning of the judge is in conflict with a number of cases decided by the supreme court of that state.

In *City of Mobile v. Sullivan Timber Co.*, 129 Fed. 298. 63 C. C. A. 412, the persons who claimed the estoppel knew that they had no right in the land beneath the navigable waters of that bay. They did not act under any authority of the city, nor under a representation of an officer, but simply used the property by the construction of a wharf, without objection or interference on the part of the city. No act of the city misled them.

In the case of *Philadelphia Mortgage etc. Co. v. City of Omaha*, 63 Neb. 280, 93 Am. St. Rep. 442, 88 N. W. 523, decided by the supreme court of Nebraska, taxes had been levied by the city upon the property in question, and, through a mistake, the tax collector marked on the rolls that the taxes were paid. The trust company loaned money and took a mortgage on the property, and claimed that the city was estopped, by the act of the tax collector, from enforcing its lien for taxes upon the property. There is nothing in the facts of that case to bring it within the rule under which the authorities apply the doctrine to municipal corporations.

Counsel for the city invites special attention to *Ralston v. Weston*, 46 W. Va. 544, 76 Am. St. Rep. 834, 33 S. W. 326. The writer has read the opinion with much interest. That opinion thoroughly sustains the contention of counsel, but we think the opinion is not sound. The court states that his conclusion is sustained by a number of states, Texas being among them. No case in this state holds the doctrine laid down in the case cited.

Kalteyer v. Sullivan, 18 Tex. Civ. App. 488, 46 S. W. 288, was a controversy between two property owners, which involved the power of the city to close an alley. The doctrine

of estoppel could not apply to the facts and was not mentioned in the opinion.

Ordinarily a municipal corporation is not subject to estoppel by reason of the negligent or unauthorized acts of its officers; but it is generally recognized that there are exceptions to that rule. The decided weight of authority places this case within one of the exceptions which is clearly and tersely stated by Judge Campbell, in *Gregory v. Knight*, 50 Mich. 61, 14 N. W. 700, in this language: "It also appears that plaintiff claims to have occupied on his lines for more than twenty years, and it seems quite likely that the fences were put where the authorities and parties supposed the lines to be. Such a practical construction, if long acquiesced in, would necessarily bind the public: *Ellsworth v. Grand Rapids*, 27 Mich. 250. It would be wrong and illegal to put a highway, as against long possession, on any better footing than other property. Highways may be wholly, and there is no reason to hold they may not be partially, discontinued by nonuser. It is the business of the authorities, when roads are laid out, to take some pains to designate the boundaries on the ground, and to have the lines visibly defined. ²¹⁸ If this is not done, the mischief of unsettling what is generally accepted will be very great, and the rights of parties, whether depending on surveys or possession, will be protected by the ordinary courts of justice."

The doctrine here stated is well supported by many well-considered cases, from which we cite the following: *City of Big Rapids v. Comstock*, 65 Mich. 78, 31 N. W. 811; *Peoria v. Johnston*, 56 Ill. 45; *Lee v. Mound Station*, 118 Ill. 304, 8 N. E. 759; *Carlinville v. Castle*, 177 Ill. 105, 69 Am. St. Rep. 212, 52 N. E. 383; *Jordan v. City of Chenoa*, 166 Ill. 530, 47 N. E. 531; *Simplot v. Dubuque*, 49 Iowa, 630; *Paine Lumber Co. v. Oshkosh*, 89 Wis. 449, 61 N. W. 1108.

Why should a municipal corporation, which has led a citizen into error and caused him to expend large sums of money in the erection of permanent improvements upon a portion of the highway, after twenty years' occupancy, be permitted to destroy the improvements without compensation, simply to assert a legal right? A sense of justice common to all civilized people revolts at such a rule of legalized wrong. The facts in this case show without dispute that when Mrs. Porter bought lot 63 in block 12 in the then little town of El Paso there was nothing on the ground to indicate that the north line of Myrtle avenue extended across Stanton street so as to make a wedge shape between San Antonio street and lot 63.

At that time the streets were not much used, and Myrtle avenue at the point opposite to this place was not designated in any way upon the ground. These conditions of uncertainty made it necessary that Mrs. Porter should secure reliable information as to the lines of these streets and their relation to her lot before she erected the brick house which was in contemplation. To whom could she apply for such information? There was an ordinance of the city which required that before she built her house Mrs. Porter should make application to the mayor for a permit to build, giving a description of the lot on which the house was to be erected, and another ordinance made it the duty of the city engineer, upon request by Mrs. Porter, to survey her lot, giving a certificate and keeping a record of the survey. Mrs. Porter's application to the engineer and his survey under the circumstances fully justified her good faith in acting upon the lines thus established as being the boundaries of her right and indicating the public highway to which the city was entitled, and the fact that she erected a permanent building of brick upon the ground shows that she acted in good faith upon the permit to build and the engineer's survey. Her occupancy was not only adverse to all claim of the city to the ground as a public highway, but absolutely excluded the public from any use of it as such for the full period of time named. It is claimed that there is no proof that an application was made; but building without it would have been unlawful and it would have been the duty of the officers to punish her. No prosecution having been inaugurated, nor any objection to the erection or continuance of the house upon the lot for more than twenty years, it will be assumed that she acted lawfully and the making of the application will be presumed. The requirement of the city that Mrs. Porter should construct a sidewalk along the front of her property for the use of the public in passing to and fro, ²¹⁹ and the demand of the city that she keep the sidewalk in repair, were affirmative acts recognizing the rightfulness of her possession. Arguments would not add to the force of such facts, for they embody the logic of common right and fair dealing which compels the conclusion that the city of El Paso, by the acts of its officers, with the absolute possession by Mrs. Porter during the great length of time, is estopped now to claim that the piece of land occupied by the brick house shall be yielded up to public use at great loss to the owner by the destruction of that building. The inconvenience to the public, if indeed there be any, would be so small in comparison with the damage to the owner that nothing but

an inflexible rule of law would justify the enforcement of the city's claim. It would, in fact, be the appropriation of private property to public use without compensation: *Ralston v. Weston*, 46 W. Va. 544, 76 Am. St. Rep. 834, 33 S. W. 326. In that case the court said: "Whenever private property is taken or damaged for public use, it must be done through the public officers, acting as the agents of the people. And for these same officers to mislead, either by acts of omission or commission, a private person into building a costly structure over the line of a public highway, in the belief that he was within the limits of his own property, and then demolish or remove it as a public nuisance, would be taking and damaging private property for public use without just compensation. Hence, to regain the use of the highway lost in this manner, they must do so under the right of eminent domain, in so far as the intrusive structure is concerned."

We have not rested our conclusion upon the constitutional guaranty against taking private property for public use without compensation, but it embodies a sound principle of justice and right that courts may well, and do, consider in determining such cases. Counsel for the city of El Paso insist that in case the judgment in this cause be reversed, the case shall be remanded to the district court for another trial. It appears that the case has been fully developed, there being no fact necessary to the determination of the rights of the parties which needs to be ascertained. It is therefore the duty of this court to enter such judgment as the trial court should have entered, and it is ordered that the judgments of the district court and court of civil appeals be reversed, and, now here proceeding to enter the judgment that the district court should have rendered, it is further ordered that the city of El Paso take nothing by its suit against Annie P. Krause, John P. Pryor and Thos. D. Pryor, and it is further ordered that the temporary injunction granted by the judge of the district court against the city of El Paso be perpetuated and that the said city be enjoined and forever restrained from removing the house or any part of it from the ground in question in this suit.

Reversed and rendered.

The Doctrine of the Principal Case has the support of some decisions: *People v. City of Rock Island*, 215 Ill. 488, 106 Am. St. Rep. 179; *Davenport v. Boyd*, 109 Iowa, 248, 77 Am. St. Rep. 536; but it seems opposed to the weight of authority: See the notes to *Mobile Transp. Co. v. Mobile*, 128 Ala. 335, 86 Am. St. Rep. 143; *Flynn v. Baisley*, 35 Or. 268, 76 Am. St. Rep. 495; and the subsequent cases of *Philadelphia Mortgage etc. Co. v. City of Omaha*, 63 Neb. 280, 93 Am. St. Rep. 442; *State v. Goodwin*, 145 N. C. 461, 122 Am. St. Rep. 467.

HAINES v. WEST.

[101 Tex. 226, 105 S. W. 1118.]

JUDGMENT—Validity as Against Insane Person.—A judgment against an insane person is not void, and binds him in a subsequent action involving the right to the property determined by it. Hence, error by the trial court in finding him sane becomes immaterial in the second suit. (p. 840.)

JUDGMENT—Misnomer in Parties.—One Who Voluntarily Makes Himself a Party to an action under a name not his own is in fact a real party to the suit, and parol evidence is admissible to identify him as such. (p. 840.)

JUDGMENT.—An Unrecorded Judgment for the Recovery of Land is not void under the Texas statute, but simply inadmissible in evidence against an innocent purchaser. (p. 841.)

JUDGMENT—Unrecorded Decree—Innocent Purchaser.—Under a statute providing that judgments for the recovery of land if not recorded shall not be admissible in evidence against an innocent purchaser, a purchaser is not protected against a properly recorded judgment by the fact that through a mistake in the proceedings and judgment the record does not disclose the true name of the person against whom the judgment was rendered. (p. 841.)

Rowe & Rowe, J. S. Wheelless, Wm. L. Thompson and N. A. Rector, for the plaintiffs in error.

O'Brien, John & O'Brien, W. W. Cruse and J. D. Lipscomb, for the defendants in error.

229 BROWN, J. The land in controversy was situated in Jefferson county, Texas, until 1858, when the legislature created Hardin county embracing a portion of Jefferson. The dividing line between the two counties passed through the survey in controversy, which consisted of fifteen hundred acres of land that had been granted to T. D. Yoakum, under whom all the parties claim title. It is unnecessary for us to set out the facts in detail. The following statement will be sufficient for a decision of the questions which we regard as material.

In the year 1870 a suit was pending in the district court of Jefferson county by Ralph West, administrator of Richard West, deceased, against Anna Chesher. Sidney Cole, Evaline Cotton and Caroline Haines, under the name of Caroline Henderson, made themselves parties defendant, alleging that Anna Chesher was their tenant and that the land belonged to them as the children of said Yoakum. In 1870 the court entered judgment in that case against ²³⁰ Anna Chesher and the other defendants, Sidney Cole, Evaline Cotton and Caroline Henderson, married women, whose husbands were not joined, which judgment was duly recorded in Jefferson county in 1877. In 1897 Ollie Rowe bought that part of the land which

lies in Hardin county by deed from the said Sidney Cole, Evaline Cotton and Caroline Haines, joined by their husbands. On the twenty-second day of December, 1904, two suits were pending in the district court of Jefferson county involving the lands in controversy; they were consolidated and an amended petition filed in which the said Sidney Cole, Evaline Cotton and Caroline Haines, joined by their husbands, and Ollie Rowe, were made parties plaintiff against Claude West and others, the claimants of the land under the former judgment. The latter case was tried before the judge without a jury, who filed findings of fact, from which our statement is made, and gave judgment for the defendants, which was affirmed by the court of civil appeals.

We find it unnecessary to discuss the different assignments of error presented by the plaintiffs in error to this court, but shall confine ourselves to those which we regard as necessary to be determined.

It is claimed that the undisputed evidence shows that Mrs. Caroline Haines was insane at the time that the judgment of 1870 was rendered in the district court of Jefferson county, and that the trial court in this case erred in finding that she was at that time sane. The error is immaterial, because if she was insane the judgment was not void and would bind her in this suit: *Freeman on Judgments*, sec. 152; *Ewing v. Wilson*, 63 Tex. 88.

On behalf of Mrs. Haines and Ollie Rowe it is objected that Mrs. Haines was not a party to the suit in which the judgment of 1870 was entered. It is sufficient answer to say that she voluntarily made herself a party to the suit under the name of Caroline Henderson, and was in fact a real party to the suit. Parol evidence was admissible to identify her as a party to the action: *Freeman on Judgments*, sec. 175; *Tarleton v. Johnson*, 25 Ala. 300, 60 Am. Dec. 515; *Shirley v. Fearn*, 33 Miss. 653, 69 Am. Dec. 375.

Ollie Rowe claims to be an innocent purchaser in good faith for valuable consideration from Caroline Haines. This presents the only substantial question in this case. The judgment of 1870 divested Caroline Haines of all title to the land; therefore she had nothing to convey to Ollie Rowe, and if he is entitled to any protection as an innocent purchaser, it must arise under the statutes of our state concerning registration. Article 4649, Revised Statutes, reads as follows: "Every partition of any tract of land or lot, made under any order or decree of any court, and every judgment or decree by which the title of any tract of land or lot is recovered shall

be duly recorded in the clerk's office of the county in which such tract of land or lot or part thereof may lie, and until so recorded, such partition, judgment or decree shall not be received in evidence in support of any right claimed by virtue thereof." The judgment in this case was recorded in Jefferson county before Ollie ²³¹ Rowe became a purchaser. It was held in the case of Thornton v. Murray, 50 Tex. 161, and Russell v. Farquhar, 55 Tex. 355, that this statute was passed for the purpose of protecting purchasers in good faith. It will be observed that this article does not declare all unrecorded judgments to be void as to subsequent purchasers in good faith without notice as in case of unrecorded deeds, but provides that such unrecorded judgments shall not be admissible in evidence against innocent purchasers in good faith. The judgment in this case having been recorded and being admissible in evidence, fully complies with the statutory requirement, and the court cannot interpolate into that statute any conditions which were not therein expressed whereby the innocent purchaser would be protected. It was the policy of the legislature to provide for the protection of the innocent purchaser by permitting him to have the decree excluded upon a trial of the right to the property, which would be as effective as the provisions of the article with regard to deeds, if the instrument was not recorded as required by law. Mrs. Haines having no title to convey to Ollie Rowe, he, not coming within any provision of the statute by which he would receive protection against the judgment, cannot be accorded the protection as an innocent purchaser under article 4640, which applies specifically to unrecorded deeds; therefore the question whether the language of the judgment would give him notice that Mrs. Haines was a party to that judgment is immaterial—he stands or falls on Mrs. Haines' title.

It is ordered that the judgment of the court of civil appeals be affirmed.

JUDGMENTS FOR OR AGAINST INSANE PERSONS.*

- I. Capacity of Insane Persons to Sue or be Sued, 842.
- II. How Jurisdiction is Obtainable Over Insane Persons, 845.
- III. Status of the Judgment with Respect to Its Validity and Effect, 846.
- IV. Effect of Knowledge of the Insanity, 852.

*REFERENCES TO MONOGRAPHIC NOTES.

Due process of law as applied to insane persons: 43 Am. St. Rep. 531.

Vacation of judgments and decrees on motion when not specially authorized by statute: 60 Am. St. Rep. 633.

Relief in equity, other than by appellate proceedings, against judgments, decrees and other judicial determinations: 54 Am. St. Rep. 213.

V. Judgments or Decrees in Divorce or Other Special Proceedings,
853.

VI. Relief from Judgments for or Against Insane Persons.

a. By Appeal, Writ of Error or Writ of Coram Nobis, 854.

b. By Application to the Equitable Jurisdiction of the Court,
856.

I. Capacity of Insane Persons to Sue or be Sued.

An insane person has a legal capacity to sue or be sued the same as a sane person: *Ex parte Worthington*, 37 Ala. 496, 79 Am. Dec. 67; *Justice v. Ott*, 87 Cal. 530, 25 Pac. 691; *Speck v. Pullman etc. Co.*, 121 Ill. 33, 12 N. E. 213; *Stigers v. Brent*, 50 Md. 214, 33 Am. Rep. 317; *Taylor v. Lovering*, 171 Mass. 303, 50 N. E. 612; *Ingersoll v. Harrison*, 48 Mich. 234, 12 N. W. 179; *Van Horn v. Haun*, 39 N. J. L. 207; *Allen v. Ranson*, 44 Mo. 263, 100 Am. Dec. 282; *Prentiss v. Cornell*, 31 Hun, 167; *Andrews v. O'Reilly*, 22 R. I. 362, 48 Atl. 7; *Rankin v. Warner*, 70 Tenn. 302; *Menz v. Beebe*, 95 Wis. 383, 60 Am. St. Rep. 120, 70 N. W. 468; *Ziegler v. Bark*, 121 Wis. 533, 99 N. W. 224. "The common-law right of a lunatic to maintain a suit was declared as long ago as Lord Coke's time, in *Beverley's Case*, 2 Coke's Rep., pt. 4, p. 568. And the distinction in this respect between an incompetent and an infant has always been recognized (1 *Freeman on Judgments*, sec. 152), and is fully preserved in our own statutes, which provide (*Rev. Stats. 1898*, sec. 2613) that an infant must appear by guardian, but omit any such requirement with reference to the insane plaintiff. The rule in *Menz v. Beebe* [95 Wis. 383, 60 Am. St. Rep. 120, 70 N. W. 468] is supported, not only by the authorities there cited, but also by *Allen v. Ranson*, 44 Mo. 263, 100 Am. Dec. 282; *Rankin v. Warner*, 70 Tenn. 302; *Amos v. Taylor*, 2 Brev. (S. C.) 20; *Stigers v. Brent*, 50 Md. 214, 33 Am. Rep. 317; *Looby v. Redmond*, 66 Conn. 444, 34 Atl. 102; *Skinner v. Tibbitts*, 13 Civ. Proc. Rep. (N. Y.) 370.

"Our statutes evince a policy to confer upon courts full power to protect the interests of insane persons who are in court without the protection of their guardians, by authorizing that in any case, when a party shall appear to be insane, the court or judge may appoint a guardian for the action, as the case may require, and by requiring that, in case of a defendant, he shall be protected by a guardian: *Rev. Stats. 1898*, sec. 2615. The proper course for courts to pursue, when it becomes apparent that a plaintiff, by reason of his insanity, cannot safely protect his rights in the litigation, is illustrated by *Weismann v. Daniels*, 114 Wis. 240, 90 N. W. 162, where, upon suggestion of such a situation, this court, instead of dismissing the case and denying all hearing to the unfortunate, appointed a guardian ad litem and directed the case to proceed": *Weismann v. Donald*, 125 Wis. 600, 104 N. W. 916, 2 L. R. A., N. S., 961. And in *McKenna v. Garvey*, 191 Mass. 96, 77 N. E. 782, the court, in speaking to this question, said: "On this point the generally prevailing rule of law is that an insane person may appear and prosecute or defend by attorney (at least when he is not under guardianship) any ordinary

action at common law, if no special reason is shown to the contrary, and that he will be bound by the results: *Cunningham v. Davis*, 175 Mass. 213, 56 N. E. 2; *Hallett v. Oakes*, 1 Cush. 296; *Stigers v. Brent*, 50 Md. 214, 33 Am. Rep. 317; *King v. Robinson*, 33 Me. 114, 54 Am. Dec. 614; *Ingersoll v. Harrison*, 48 Mich. 234, 12 N. W. 179; *Van Horn v. Haun*, 39 N. J. L. 207; *Cameron's Committee v. Pottinger*, 3 Bibb (Ky.), 11. Sometimes, for his protection, it is well for the court to appoint a guardian ad litem to represent him. In some states the subject is governed by statutes, and the decisions in different jurisdictions are not entirely harmonious. In suits in equity the general practice is to appoint a guardian ad litem for insane litigants: *Cunningham v. Davis*, 175 Mass. 213, 56 N. E. 2. One reason for this rule in the early times was that averments and answers in equity were made by the parties under oath: *Westcomb v. Westcomb*, 1 Dick. 233; *Howlett v. Wilbraham*, 5 Madd. 423; *Wilson v. Gray*, 14 Ves. 172; *Sturges v. Longworth*, 1 Ohio St. 544. See *Wartuaby v. Wartuaby*, 1 Jac. 377."

The plaintiff is not bound to ascertain the mental capacity of the defendant before being entitled to commence suit: *Maloney v. Dewey*, 127 Ill. 395, 11 Am. St. Rep. 131, 19 N. E. 848. In *King v. Robinson*, 33 Me. 114, 54 Am. Dec. 614, the court said: "The law does not appear to have imposed it as a duty to be performed by a plaintiff to ascertain the mental capacity of a defendant and to bring it before the court for its consideration, that such a guardian may be appointed. It may be prudent in cases of doubt for him to do so, lest his judgment should be liable to be disturbed by a petition for a review, or possibly by a suit in equity. There being no legal obligation resting upon the court or upon the plaintiff to ascertain the facts and have such a guardian appointed, its omission cannot be assigned as error."

But a knowledge on the part of the plaintiff of defendant's insanity might afford grounds for a court of equity to set the judgment aside in a proper proceeding brought for that purpose: *Gillespie v. Gouly*, 120 Cal. 515, 52 Pac. 816.

On the question whether a party to a suit is sane or insane, the presumption exists that he is sane. Insanity is the exception and must be proved by the one asserting it: *Spurlock v. Noe*, 19 Ky. Law Rep. 1321, 43 S. W. 231, 39 L. R. A. 775. Where a person has been adjudged insane, it merely raises a presumption that he is still insane at a subsequent date: *Logan v. Vanarsdall*, 27 Ky. Law Rep. 822, 86 S. W. 981. One who commences a suit against a person who has been insane, treating him during such suit as if in the possession of his reasoning faculties, concedes his restoration to sanity: *Clay v. Hammond*, 199 Ill. 370, 93 Am. St. Rep. 146, 65 N. E. 352.

An insane person is regarded as a ward of the court and entitled to protection in respect to his person and property. He is particularly under the care of courts of equity: *Austin v. Bean*, 101 Ala. 133, 16 South. 41; *Barron v. Lexington*, 32 Ky. Law Rep. 92, 105 S. W. 395; *Wurster v. Armfield*, 175 N. Y. 256, 67 N. E. 584.

For the better protection of insane litigants, and for the purpose of having a party who may become responsible for the costs and respond under penalty of contempt to the orders of the court, it is generally the practice to require the insane person to be represented by a next friend or his general guardian or committee, if he have one, or by a guardian ad litem appointed by the court. Generally, however, the insane party is required to be joined with such guardian or other representative. Much learning is displayed by the courts in their discussion of this subject, and the decisions are by no means harmonious as to whether an insane defendant should be represented by his general guardian or committee or by a guardian ad litem. The question is in many of the states regulated by statute. The failure to comply with the rules of procedure in this respect does not, however, render the judgment entered in the case void, as will be seen by the following cases which discuss the question: *Jetton v. Smead*, 29 Ark. 372; *Hare v. Shaw*, 84 Ark. 32, 120 Am. St. Rep. 17, 104 S. W. 931; *Dixon v. Cardozo*, 106 Cal. 506, 39 Pac. 857; *Dent v. Merriam*, 113 Ga. 33, 38 South. 334; *Covington v. Neftzger*, 140 Ill. 608, 33 Am. St. Rep. 261, 30 N. E. 764; *Isle v. Cranby*, 199 Ill. 39, 64 N. E. 1065, 64 L. R. A. 513; *Giffany v. Worthington*, 96 Iowa, 560, 65 N. W. 817; *Gustafson v. Ericksdotter*, 37 Kan. 670, 16 Pac. 91; *Plympton v. Hall*, 55 Minn. 22, 56 N. W. 351, 21 L. R. A. 675; *Bensieck v. Cook*, 110 Mo. 173, 33 Am. St. Rep. 422, 19 S. W. 642; *Wager v. Wagoner*, 53 Neb. 511, 73 N. W. 937; *Search v. Search*, 26 N. J. Eq. 110; *Ortley v. Messere*, 7 Johns. Ch. 139; *Smith v. Smith*, 106 N. C. 498, 11 S. E. 188; *Row v. Row*, 53 Ohio St. 249, 41 N. E. 239; *Holzheiser v. Gulf etc. R. Co.*, 11 Tex. Civ. 677, 33 S. W. 887; *Bird's Committee v. Bird*, 21 Gratt. 712; *Howard v. Landsberg's Committee*, 108 Va. 161, 60 S. E. 769; *Holden v. Scanlan*, 30 Vt. 177; *Hicks v. Hicks*, 79 Wis. 465, 48 N. W. 495.

In New York, leave of court must be obtained before commencing a suit against a person who has been adjudged to be a lunatic: *Crippen v. Culver*, 13 Barb. 424; *Matter of Hopper*, 5 Paige, 489; *Smith v. Keteltas*, 27 App. Div. 279, 50 N. Y. Supp. 471.

In *Van Horn v. Haun*, 39 N. J. L. 207, the court said: "The right to sue the lunatic himself, at law, is, in all the cases at common law, alluded to as a settled practice, and as not presenting a matter for discussion: *Ibbotson v. Lord Galway*, 6 T. R. 133; *Steel v. Alan*, 2 Bos. & P. 362; *Cock v. Bell*, 13 East, 355. This was, then, the method of procedure at common law. Nor is there any marked departure from that method discoverable in this country. The schemes for the care of the person and property of the lunatic vary somewhat in the different states, but very generally the character of the committee or guardian here is assimilated to that of the committee under the English system. In New York, there is a departure by force of the construction given to their statute. Chancellor Kent decided that in that state the estate in the hands of the committee was, by their statute, placed in the possession of the court, not only for the main-

tenance of the lunatic, but for the payment of creditors: *Brashear v. Cortland*, 2 Johns. Ch. 401.

"So courts of equity will there restrain actions at law: *Matter of Hiller*, 3 Paige, 199; *Soverhill v. Dickson*, 5 How. Pr. 109. The courts of law there, however, take no notice of this, but leave the equity side to deal with the party. In an action at law, the status of the defendant, as a lunatic, cannot be urged against the proceeding: *Robertson v. Lain*, 19 Wend. 650. Generally, in this country, the character of the committee or guardian as a mere curator without title in the property of the lunatic, his immunity from liability to an action, and the liability of the lunatic himself to such an action is recognized by the courts: *Ex parte Leighton*, 14 Mass. 207; *Tomlinson's Lessee v. Devore*, 1 Gill (Md.), 345; *Warden v. Eichbaum*, 3 Grant's Cas. 42; *Bolling v. Turner*, 6 Rand. 584; *Allison v. Taylor*, 6 Dana, 87, 32 Am. Dec. 68; *Aldrich v. Williams*, 12 Vt. 413; *Walker v. Clay*, 21 Ala. 797; *Cameron's Committee v. Pottinger*, 3 Bibb (Ky.), 11. Nor does it matter whether the person appointed as curator of the person and property of the lunatic is styled committee or guardian: *Symmes v. Major*, 21 Ind. 443. In this state there is nothing in the policy of our law or in our statutes which renders a different rule obligatory or desirable."

In a suit against an insane person, if judgment is rendered against him, it is properly entered against him and not against his guardian or guardian ad litem: *Walker v. Clay*, 21 Ala. 797; *Stigers v. Brent*, 50 Md. 214, 33 Am. Rep. 317.

II. How Jurisdiction is Obtainable Over Insane Persons.

Jurisdiction may be ordinarily obtained over an insane person by the like process as if he were sane: *Noel v. Modern Woodmen of America*, 61 Ill. App. 597; *McKenna v. Garvey*, 191 Mass. 96, 77 N. E. 782; *Johnson v. Pomeroy*, 31 Ohio St. 247. In *Stigers v. Brent*, 50 Md. 214, 33 Am. Rep. 317, it was contended that the summons was not properly served upon the insane defendant. He, however, appeared by attorney, and the court observed: "This, under the circumstances, shows a sufficient service of the summons. The appearance of the defendant in obedience to its command, by attorney, gives the court full jurisdiction over the case."

Of course where the statute prescribes a particular manner of serving the summons upon a person who is sued as an insane person, the service must conform to the mode prescribed by the statute: *Justice v. Ott*, 87 Cal. 530, 25 Pac. 691; *Marquis v. Wiren*, 74 Kan. 775, 87 Pac. 1135. In *Wilson v. Wilson*, 95 Minn. 464, 104 N. W. 300, it was stated that jurisdiction may be obtained by service of the summons and complaint upon the insane party personally, but the court suggested that the trial court ought, under such circumstances, to require the appointment of a guardian ad litem to protect the interests of the defendant at the trial and during the subsequent proceedings. In *Sacramento Sav. Bank v. Spencer*, 53 Cal. 737, a de-

crce of foreclosure of mortgage was entered in a suit brought against the mortgagor, who was insane, and two other persons who were designated by fictitious names. The mortgagor was personally served with a copy of the summons, while a copy of the summons and complaint was served upon one of his codefendants. The code provided that where there are several defendants, a copy of the complaint need be served on only one defendant. The insane defendant made no appearance. In ejectment to test the rights of a person claiming title under the sheriff's deed, the judgment was sustained on the ground that the court had obtained jurisdiction by service of the summons and complaint on the insane party's codefendant, but the court stated that where an insane party has no guardian, all that is required is that he be served personally. In *Stuard v. Porter*, 79 Ohio, 1, 85 N. E. 1062, a copy of the summons was served on the insane defendant at the insane hospital and also on the superintendent of the hospital. The defendant's guardian waived issuance and service of summons and appeared. The court refused to quash the service of summons on defendant and dismiss the suit for want of jurisdiction, stating that jurisdiction was obtained over both the ward and his guardian.

III. Status of the Judgment with Respect to Its Validity and Effect.

"There is a difference between a want of jurisdiction and a defect in obtaining jurisdiction. At common law the defendant was brought within the power of the court by service of the *brevia*, or original writ. In this country the same object is accomplished by service of summons, either actual or constructive, or of some other process issued in the suit; or by the voluntary appearance of the defendant in person or by his attorney. From the moment of the service of process, the court has such control over the litigants that all its subsequent proceedings, however erroneous, are not void. If there is any irregularity in the process, or in the manner of its service, the defendant must take advantage of such irregularity by some motion or proceeding in the court where the action is pending. The fact that defendant is not given all the time allowed him by law to plead, or that he was served by some person incompetent to make a valid service, or any other fact connected with the service of process, on account of which a judgment by default would be reversed upon appeal, will not ordinarily make the judgment vulnerable to collateral attack. In case of an attempted service of process, the presumption exists that the court considered and determined the question whether the acts done were sufficient or insufficient. If so, the conclusion reached by the court, being derived from hearing and deliberating upon a matter, which, by law, it was authorized to hear and decide, though erroneous, cannot be void": *Freeman on Judgments*, sec. 126.

Although the statements made by the courts in rendering decisions on the validity of judgments against insane persons would indicate

that a want of harmony exists as to the correct rule in respect thereto, still a thorough consideration of the circumstances under which the statements are made will show that the rule is substantially uniform that such judgments are merely voidable under circumstances which would render any other judgment voidable. In the cases where judgments against insane persons have been set aside by courts of equity, it will always be found that they were so set aside on principles of equity which are not alone applicable because of the fact that the party was insane. The ground usually assigned is that the judgment was rendered against the insane person through excusable neglect or inadvertence on his part. It is quite true that the fact of insanity in connection with the possession of a meritorious defense to the action will generally be sufficient to vacate a judgment if the rights of innocent third persons have not intervened.

It does not appear to be disputed that a judgment against an insane person will be sustained when collaterally assailed: *Dunn v. Dunn*, 114 Cal. 210, 46 Pac. 5; *Foster v. Jones*, 23 Ga. 168; *Noel v. Modern Woodmen of America*, 61 Ill. App. 597; *Maloney v. Dewey*, 127 Ill. 395, 11 Am. St. Rep. 131, 19 N. E. 848; *Dickerson v. Davis*, 111 Ind. 433, 12 N. E. 145; *Boyer v. Berryman*, 123 Ind. 451, 24 N. E. 249; *Allison v. Taylor*, 6 Dana, 87, 32 Am. Dec. 68; *Lamprey v. Nudd*, 29 N. H. 299; *Brittain v. Mull*, 99 N. C. 483, 6 S. E. 382; *Thomas v. Hunsucker*, 108 N. C. 720, 13 S. E. 221; *Johnson v. Pomeroy*, 31 Ohio St. 247; *Harper v. Harding*, 3 Or. 361; *Ewing v. Wilson*, 63 Tex. 88; *Haines v. West*, 101 Tex. 226, ante, p. 839, 105 S. W. 1118; *Withrow v. Smithson*, 37 W. Va. 757, 17 S. E. 316, 19 L. R. A. 762.

Hence, it follows that a judgment against an insane person is not void: *White v. Farley*, 81 Ala. 563, 8 South. 215; *Allison v. Taylor*, 6 Dana, 87, 32 Am. Dec. 68; *Kent v. West*, 16 App. Div. 496, 44 N. Y. Supp. 901, affirmed in 154 N. Y. 749, 49 N. E. 1099; *Pollock v. Horn*, 13 Wash. 626, 52 Am. St. Rep. 66, 43 Pac. 885; *White v. Hinton*, 3 Wyo. 753, 30 Pac. 953, 17 L. R. A. 66. In South Carolina, however, the court has declared that no jurisdiction of the person is obtained in a suit where the person sued is insane and not represented by a committee or guardian ad litem: *Ex parte Roundtree*, 51 S. C. 405, 29 S. E. 66; *Ex parte Kibler*, 53 S. C. 461, 31 S. E. 274. And in Kansas, under special statutory provisions relative to suits against insane persons, the court held that where the service of process upon a person who had been adjudged insane was not in accordance with the statute, no jurisdiction was acquired and the judgment was void: *Marquis v. Wiren*, 74 Kan. 775, 87 Pac. 1135.

The statement is frequently made by the courts that a judgment against an insane person is neither void nor voidable merely because of the defendant's insanity: *Leonard v. The Chicago Times*, 51 Ill. App. 427; *Speck v. Pullman Palace Car Co.*, 121 Ill. 33, 12 N. E.

213; *Maloney v. Dewey*, 127 Ill. 395, 11 Am. St. Rep. 131, 19 N. E. 848; *Crow v. Meyersieck*, 88 Mo. 411; *Pollock v. Horn*, 13 Wash. 626, 52 Am. St. Rep. 66, 43 Pac. 885. In the case last cited, in declaring that the judgment was not void, the court said: "Whatever may be said of the justice or injustice of this rule, the rule itself is so well established by the authorities that it cannot be gainsaid. In *Freeman on Judgments*, fourth edition, section 152, the author says: 'While an occasional difference of opinion manifests itself in regard to the propriety and possibility of binding *femes covert* and infants by judicial proceedings in which they were not represented by some competent authority, no such difference has been made apparent in relation to a more unfortunate and more defenseless class of persons; but by a concurrence of judicial authority, lunatics are held to be within the jurisdiction of the courts. Judgments against them, it is said, are neither void nor voidable. . . . The proper remedy in favor of a lunatic being to apply to chancery to restrain proceedings, and to compel plaintiff to go there for justice. In a suit against a lunatic, the judgment is properly entered against him, and not against his guardian. A lunatic has capacity to appear in court by attorney. The legal title to his estate remains in him, and does not pass to his guardian': Citing a great many cases to sustain the text. See, also, *Freeman on Executions*, sec. 22; *Withrow v. Smithson*, 37 W. Va. 757, 17 S. E. 316, 19 L. R. A. 762. In the last-mentioned case it was decided that a judgment against a person, insane at its rendition, is not for that cause void, and is a lien on land. The judgment, therefore, not being void, and no appeal having been taken from it, mere questions of irregularity in the proceedings in that case cannot be raised in this collateral attack: *Belles v. Miller*, 10 Wash. 259, 38 Pac. 1050."

In *McAllister v. Lancaster Co. Bank*, 15 Neb. 295, 18 N. W. 57, the record showed that the insanity of the insane defendant was known to the plaintiff when he commenced the action. The court refused to set the judgment aside, declaring: "The court, by its process, acquired jurisdiction of the plaintiff, and, although the want of an answer by a guardian for the suit may have rendered the judgment erroneous, it is neither void nor voidable." In *Dickerson v. Davis*, 111 Ind. 433, 12 N. E. 145, judgment by default was rendered against an insane defendant in favor of a bona fide holder of a note, which had been obtained by fraud from the defendant by the original holder. The defendant had not been judicially declared insane and the plaintiff did not know of his insanity. Although the court held the judgment was assailable collaterally, it declared it to be erroneous.

Some courts, though holding such judgments not to be void, declare them to be irregular: *Carrol Imp. Co. v. Engleman* (Iowa), 99 N. W. 574. Such a judgment was declared irregular in *Dunn v. Dunn*, 114 Cal. 210, 46 Pac. 5. In that case a decree of foreclosure was rendered upon the default of the defendant, who was of unsound mind. The

defendant had no guardian. Suit was brought by the heirs of the defendant to annul the mortgage and decree of foreclosure. But the court said: "This cannot now be done. The defendant, Catherine Dunn, is a purchaser in good faith and for a valuable consideration. Insane persons may be sued and jurisdiction over them acquired as of other persons. True, guardians should be appointed to represent them. It was, no doubt, the duty of the plaintiff to cause it to be done. But the judgment entered without the appointment of a guardian, though irregular, is not void. Undoubtedly it may be vacated in a direct proceeding if no innocent purchaser has acquired rights under it. But public policy forbids that as to such persons the validity of the judgment shall be questioned. The judgment was regular on its face. The court had jurisdiction of the subject matter and of the person of the defendant. The judgment itself was an adjudication that the court had jurisdiction, and on collateral attack was conclusive, except as to infirmities shown in the judgment-roll. There may be exceptions to this rule, but this is not one. It is a hardship upon plaintiffs, and it is possible that the mortgage and judgment were obtained by unfair means. But of these defendant had no knowledge and the wrong cannot be righted at her expense." And in Illinois the rights of an innocent third person purchasing under an execution sale were sustained, although the judgment had been confessed by an insane defendant and was said to be subject to be set aside in a direct proceeding for that purpose: *Crawford v. Thomson*, 161 Ill. 161, 43 N. W. 617. But in another case it was held that an execution sale should be set aside where it was shown that the grantee under the sheriff's deed had knowledge that the judgment debtor was mentally unsound and incapable of acting for herself, and was not represented by a guardian during the litigation: *Gillespie v. Gouly*, 120 Cal. 515, 52 Pac. 816. So, also, in *Allison v. Taylor*, 6 Dana, 87, 32 Am. Dec. 68, it was declared that a judgment by default against a lunatic on process served upon him alone, and not on his committee, though erroneous, is not void.

Some courts make the general statement that judgments against insane persons, although not void, are voidable: *West v. McDonald* (Ky.), 113 S. W. 872; *Heard v. Sack*, 81 Mo. 610; *Lamprey v. Nudd*, 29 N. H. 299; *Thomas v. Hunsucker*, 108 N. C. 720, 13 S. E. 221; *Atwood v. Lester*, 20 R. I. 660, 40 Atl. 866; *Denni v. Elliott*, 60 Tex. 337. In *Lamprey v. Nudd*, 29 N. H. 299, one of the leading cases on this subject, the court said: "The fact that a person against whom a suit is commenced is, at the service of the process upon him, a person of insane mind, and that he so continued until judgment rendered, and that he appeared in person or by attorney, or not at all, is good cause to reverse the judgment upon a writ of error; though for reasons which we think inapplicable and without force here, and, perhaps, little creditable to the jurisprudence of an enlightened country, it seems not to have been so held in England. But, in such

case, the defect in the proceedings renders them only voidable, and not void: *Allison v. Taylor*, 6 Dana, 87; *Robertson v. Lain*, 19 Wend. 649.

"Indeed, there are few defects in the proceedings of a court of justice which render the proceedings void, in the strict sense of that word, where the court has jurisdiction of the subject matter of the suit: *State v. Richmond*, 6 Fost. Rep. 232. . . . It can make no difference, in this case, that the judgment in the action upon the mortgage may be liable to be reversed on error, and that the further proceedings upon the foreclosure are voidable, since they all remain valid and effectual, until they are duly avoided by the proper proceedings for that purpose: *Smith v. Smith*, before cited [15 N. H. 55]. The value of the property was a matter entirely immaterial, since none of the rights of the parties, legal or equitable, depended upon that question. The evidence on that subject was, of course, properly rejected.

"If the plaintiff, by reason of his insanity at the date of the mortgage, and of the proceedings adopted to foreclose it, has rights not yet barred by the lapse of time, he may probably obtain redress by proper proceedings on the equity side of this court, which has ample powers in cases relating to the redemption and foreclosure of mortgages."

So, also, in *Atwood v. Lester*, 20 R. I. 660, 40 Atl. 866, it was observed: "That an insane person may be sued, and jurisdiction over him acquired, by the like process as if he were sane, is abundantly established by the authorities: 1 Freeman on Judgments, sec. 152; 1 Black on Judgments, sec. 205; *Johnson v. Pomeroy*, 31 Ohio St. 247; *Stigers v. Brent*, 50 Md. 214, 33 Am. Rep. 317; *King v. Robinson*, 33 Me. 114, 54 Am. Dec. 614. And, this being so, a judgment obtained against him is not void; but, according to the prevailing doctrine, it is doubtless voidable: *Lamprey v. Nudd*, 29 N. H. 299; Black on Judgments, sec. 205. The verdict in this case, then, being only voidable, should it be set aside simply on the ground of the defendant's mental unsoundness at the time it was rendered? For it is not contended that defendant was mentally incompetent or of unsound mind at the time he gave the note and received the money. We think not. It is admitted by his counsel that he has no defense to the action on its merits. The defendant received the amount represented by the note, and had the use and benefit thereof, and he is therefore justly indebted to the plaintiff therefor. If a guardian ad litem had been appointed, he could have interposed no defense to the suit, and the verdict would have been the same as that rendered. While, therefore, we think that in all cases where the mental unsoundness or insanity of a defendant is set up, although not formally adjudicated, it would be better practice for the court to appoint a guardian ad litem, yet, as the defendant in the case at bar has not been prejudiced in any degree by the failure of the court to appoint one, we do not think the verdict should be set aside on that ground."

In *Denni v. Elliott*, 60 Tex. 337, a decree made and entered upon the agreement of the parties to the suit was attacked in a collateral proceeding on the ground that one of the parties was insane at the time. But the court held that the agreement was merged in the judgment, and that the rules of law applicable to judgments rather than those applicable to contracts should be applied, and hence that the judgment should be considered voidable and not void.

But the fact that the defendant, when the judgment was rendered against him, was of unsound mind is not of itself sufficient to vacate the judgment: *Woods v. Brown*, 93 Ind. 164, 47 Am. Rep. 369. A judgment against an insane person is binding upon him and those in privity with him so long as it stands unreversed or is not set aside in some direct proceeding instituted for that purpose: *Ewing v. Wilson*, 63 Tex. 88. But in a direct proceeding for that purpose, a decree entered by agreement of the parties may be vacated upon a showing that at the time of the agreement and entry of the decree the plaintiff was insane: *Brown v. Rentfro*, 57 Tex. 327.

In *King v. Robinson*, 33 Me. 114, 54 Am. Dec. 614, one of the early cases on this subject and which is cited frequently, the court, after an exhaustive review of the cases relative to the manner in which an insane person should be represented in a suit against him, said:

"The mere fact that a party defendant is non compos mentis during any of the preliminary proceedings, or when judgment is rendered, constitutes no ground of defense, for both at law and in equity a contract or liability assumed by him while of sound mind may be enforced against him, when he is of unsound mind: *Yates v. Boen*, *Strange*, 1104; *Kernot v. Nooman*, 2 Term Rep. 390; *Nutt v. Verney*, 4 Term Rep. 121; *Ibbotson v. Galway*, 6 Term Rep. 133; *Steel v. Allan*, 2 Bos. & P. 362, 437; *Pillop v. Sexton*, 3 Bos. & P. 550; *Baxter v. Portsmouth*, 2 Car. & P. 178; *Hathaway v. Clark*, 5 Pick. 490; *Robertson v. Lain*, 19 Wend. 649; *Clarke v. Dunham*, 4 Denio, 262; *Owen v. Davis*, 1 Ves. 82; *Niell v. Morley*, 9 Ves. 478; *Anonymous*, 13 Ves. 590.

"Cases have been cited to show, and they do show, that a judgment rendered against an infant will be erroneous, if the record shows that he appeared by attorney and not by guardian. The inference thence appears to have been drawn that the rule is the same respecting the appearance of one of full age and of unsound mind. The inference is unauthorized. The rule respecting the appearance of an infant, whether of sound or unsound mind, is, that he must appear by guardian: 2 Saund. 96, note 2; *Comyn's Digest*, Pleader, 2, c. 2; *Beverley's Case*, 4 Coke, 123. And one of unsound mind of full age must appear by attorney.

"Nor does it appear to be essential that the law should be otherwise for the protection and preservation of the rights of persons non compos mentis. The defense must be that he was in that condition when the contract was made or liability incurred, and the only cause of complaint must be, that he was not in a condition to have a fair trial. If it should be made to appear that he did not on that

account have a fair trial, and that injustice had been done, the court, upon petition, might grant a review."

And in *Sternbergh v. Schoolcraft*, 2 Barb. 153, the court, in speaking of the effect of such judgments, said: "The judgment was not void. The authorities are decisive on this point. The judgment was not even erroneous. It could not have been reversed on error for the cause assigned. The justice had full jurisdiction of the person of Sternbergh, subject only to the interference of the court of chancery."

There is no inhibition of legal proceedings against incompetent persons, but courts will properly protect the rights of those who are incompetent to care for themselves: *Sanford v. Sanford*, 62 N. Y. 553; *Prentiss v. Cornell*, 31 Hun, 167. Hence, where, upon the suggestion that one of the defendants was an incompetent person, who had not been adjudged so, the court made an order directing that she be represented by an attorney who was thereafter duly appointed, served an answer and represented her rights and interests at the trial, the court acquires jurisdiction of her person, and the judgment rendered in the proceeding will sustain a sale made thereunder: *Livingston v. Livingston*, 56 App. Div. 484, 67 N. Y. Supp. 789, affirmed in 166 N. Y. 601, 59 N. E. 1125.

In a West Virginia case it was said: "A lunatic is within the jurisdiction of the court and may be sued as others. The court may appoint a guardian ad litem to defend him, if his lunacy is discovered; but if the case goes on without such guardian, the judgment is not void, or reversible. As the authorities clearly show a lunatic to be subject to actions, it is reasonable to say that the same forum would not reverse the judgment because of lunacy": *Withrow v. Smithson*, 37 W. Va. 757, 17 S. E. 316, 19 L. R. A. 762.

Where a case has been tried, submitted and verdict rendered, it is no objection to the signing of the findings and judgment that one of the parties has become insane: *San Luis Obispo Co. v. Simas*, 1 Cal. App. 175, 81 Pac. 972.

IV. Effect of Knowledge of the Insanity.

The fact that one who sues an insane person has knowledge of his insanity at the time of commencing his suit does not affect the jurisdiction of the court, but only the regularity of the proceedings: *McAllister v. Lancaster Co. Bank*, 15 Neb. 295, 18 N. W. 57; *Johnson v. Pomeroy*, 31 Ohio St. 247; *Stuard v. Porter*, 79 Ohio, 1, 85 N. E. 1062. But the fact of such knowledge is a circumstance which will appeal strongly to the equity jurisdiction of the court in a proceeding to vacate or set the judgment aside. Thus in *Ammon v. Wiebold*, 61 N. J. Eq. 350, 48 Atl. 950, a decree pro confesso was vacated under such circumstances as an inequitable and unjust use of the process of the court and the taking of advantage of the disability of the defendant. The facts in *Godde v. Marvin*, 142 Mich. 518, 105 N. W. 1112, were also such as to warrant the judgment

being set aside. The summons had been served on the insane person at the asylum where he was confined, but no service was had on the guardian of his person and estate. No guardian ad litem was appointed. The plaintiff knew of defendant's insanity and that he had a guardian. In fact, he had talked with the guardian relative to the subject matter of the suit. The court set the judgment aside, for the reason that the statute of limitations would have been a good defense to the suit.

V. Judgments or Decrees in Divorce or Other Special Proceedings.

The nature of the suit in which the judgment is rendered does not ordinarily affect the validity of a judgment for or against an insane person.

But inasmuch as the right to sue for a divorce is strictly personal to the party aggrieved, the rule obtains that an insane spouse cannot maintain by either guardian or next friend an action for divorce: *Worthy v. Worthy*, 36 Ga. 45, 91 Am. Dec. 758; *Bradford v. Abend*, 89 Ill. 78, 31 Am. Rep. 67; *Mohler v. Shank's Estate*, 93 Iowa, 273, 57 Am. St. Rep. 274, 61 N. W. 981, 34 L. R. A. 161; *Birdzell v. Birdzell*, 33 Kan. 433, 52 Am. Rep. 539, 6 Pac. 561. In Massachusetts, however, under statutory provisions a suit for divorce is allowed to be filed and prosecuted in behalf of an insane person, either by the guardian of the party or by a next friend appointed by the court for the purpose: *Garnett v. Garnett*, 114 Mass. 379, 19 Am. Rep. 369; *Cowan v. Cowan*, 139 Mass. 377, 1 N. E. 152. And in Alabama a suit for alimony alone on the part of an insane wife has been allowed to be maintained: *Mims v. Mims*, 33 Ala. 98.

The rule is, however, different where the divorce suit is against an insane defendant. A suit for divorce may be maintained against an insane person for causes arising while the party was sane, provided that the insanity appears to be permanent and incurable. But the courts caution against undue haste under such circumstances: *Harrigan v. Harrigan*, 135 Cal. 397, 87 Am. St. Rep. 118, 67 Pac. 506; *Iago v. Iago*, 168 Ill. 339, 61 Am. St. Rep. 120, 48 N. E. 30, 39 L. R. A. 115; *State v. Murphy*, 29 Nev. 149, 85 Pac. 1004; *Rathbun v. Rathbun*, 40 How. Pr. 328; *Stratford v. Stratford*, 92 N. C. 297.

A judgment in a bastardy proceeding may be set aside by the court on its own motion where it ascertains that the prosecutrix was mentally incompetent at the time of bringing the proceeding. "Since," said the court, "she alone can originate, control and terminate the proceedings, is it possible that one without intelligence or understanding of its purpose and effect can do so? The statute, it is true, provides that 'any unmarried woman,' etc., may institute an action, and such terms, without qualifications, are broad enough to include idiots and lunatics. There is language, however, employed in the same connection, which clearly implies that only rational beings were within the contemplation of the legislature. As already indicated, she only can begin the prosecution, and that she

is to do by making a written complaint on oath. Only those who understand the binding force of an oath and are capable of giving testimony are within the spirit and intent of the act. If complaint was made by anyone other than the mother, the justice would certainly acquire no jurisdiction, and shall the oath of one bereft of reason be made the basis of a warrant and an arrest? The statute designates her as the prosecuting witness, and provides that her testimony shall be reduced to writing, read carefully to her, and by her be signed, after which it is to be transmitted to the district court, with the other papers in the case, as a basis for the proceeding in that court. These provisions contemplate that the complainant shall be a competent witness, and the code provides that persons who are of unsound mind are incompetent to testify: Civ. Code, sec. 323. Again, the statutory provision that she may dismiss the proceedings when she shall enter an admission on the record that provision for the maintenance of the child has been made to her satisfaction so clearly requires an exercise of intelligence and judgment that there can be no doubt as to the legislative intent. Having no mind or understanding, there was, in fact, no complainant. The arrest and prosecution of a person on the initiative of one mentally irresponsible is beyond reason; and since the incapacity of the complainant is conceded, and no one but the mother can institute the proceeding, no jurisdiction was acquired, and hence the proceeding was null and void. It may seem to be a hardship that the statutory remedy does not reach exceptional cases like this one, but it is not the only remedy available for such an injury; and, even if it were, the court would not be justified in extending the remedy beyond the terms and spirit of the statute conferring it. The incapacity of the complainant was not discovered until the trial, and while the judgment had been rendered, it was competent for the court to set it aside and dismiss the proceeding. It was done during the term and on the day that judgment was rendered; and, having ascertained that there was an absence of jurisdiction, it was not only the right, but the duty, of the court to set aside the judgment and discharge the defendant": *State v. Jehlik*, 66 Kan. 301, 71 Pac. 572, 61 L. R. A. 265.

A judgment for unpaid taxes was the subject of attack in *Heard v. Sack*, 81 Mo. 610. The owner of the property was mentally incompetent. The court observed: "Judgments rendered pursuant to the statute for the collection of taxes stand on the same footing as any other judgment of the circuit court, and are not assailable collaterally for mere irregularities or errors curable on appeal or writ of error."

VI. Relief from Judgments for or Against Insane Persons.

a. **By Appeal, Writ of Error or Writ of Coram Nobis.**—Under most circumstances the proper remedy for relief from a judgment rendered against an insane person is by an application to the chancery side of the court. Nevertheless, in those states where the rules of procedure

require the appointment of a guardian, committee, next friend or guardian ad litem in order to prosecute or defend a suit on behalf of or against an insane person, relief will often be available by appeal, writ of error or writ of error coram nobis according to the condition of the record.

Thus in *Allison v. Taylor*, 6 Dana, 87, 32 Am. Dec. 68, it was said: "Had the fact of lunacy appeared in the record of the judgment, a writ of error to this court would have insured the proper relief. But though the fact did not so appear, and is judicially known only from an admission in the record of this suit—brought to enforce (by eviction) a purchase of the lunatic's land, under an execution in the judgment against him—yet, upon a writ of error coram nobis, the judgment might have been set aside."

In *King v. Robinson*, 33 Me. 114, 54 Am. Dec. 614, a writ of error coram nobis was used, but the court observed that: "When a judgment wholly unjust has been obtained against one non compos mentis, he may, in certain cases, obtain relief in equity by a perpetual injunction against the enforcement of that judgment."

In *Heard v. Sack*, 81 Mo. 610, the suit was brought by the guardian of the insane to set aside a deed made pursuant to a sale under tax proceedings. The court, in the course of the opinion, said: "The error in rendering a judgment against an insane man would not, ordinarily, appear of record, any more than in the case of a judgment against a minor. It is an error of misapprehension of a fact, existing in pais, not called to the attention of the court. Such judgment may be reviewed, and the error rectified in the court where committed on writ of coram nobis: 2 Tidd's Practice, 1136; *Ex parte Toney*, 11 Mo. 662. To such a motion, or writ of error, there does not seem to be any limitation as to the time in which it may be invoked: *Powell v. Gott*, 13 Mo. 458, 53 Am. Dec. 153; *Groner v. Smith*, 49 Mo. 324. But this action is in equity, and is *res inter alios acta*, to set aside the deed made pursuant to a sale under such judgment to a stranger to the record. No doctrine of the law is better settled than that while the title of the judgment plaintiff will be forfeited by a subsequent reversal or vacation of the judgment, yet the title of a stranger who in good faith purchased before the reversal of the judgment, will not be affected by such reversal: *Gott v. Powell*, 41 Mo. 420; *Vogler v. Montgomery*, 54 Mo. 577. Such purchasers are protected from secret vices in judgments. Where it is sought to vacate a judgment on account of matters extrinsic to the judgment, where the purchaser thereunder was not a party to the judgment, it must be averred and proved that the purchaser had notice of such infirmity; without this he is not affected thereby: *Reeve v. Kennedy*, 43 Cal. 643; *Freeman v. Thompson*, 53 Mo. 185; *Hardin v. Lee*, 51 Mo. 241."

In *Withrow v. Smithson*, 37 W. Va. 757, 17 S. E. 316, 19 L. R. A. 762, the court took the view that the insanity of the defendant was not a cause for reversal of the judgment, and hence that the only

redress of such a party who was so insane as to be incapable of making defense and who possessed a good defense, was in the equity jurisdiction of the court. The court reviewed the subject of remedy in such cases quite exhaustively, and in the course of the opinion observed: "The point is made that the application to equity is mistaken, and that it should have been to the court of law which pronounced the judgment, by either writ of error coram nobis at common law, or by motion under section 1, chapter 134 of the code. There was in no manner a suggestion of Smithson's insanity in the record of the judgment. A writ of error, in appellate courts, corrects errors of law apparent in the record; but if, at the date of the judgment, there exist a fact which, had it been introduced into the record, ought to have prevented the judgment, but it was not introduced, it is a case of error in fact, to be corrected by writ of error coram nobis, or by such motion. Thus, if the defendant be dead, and his death be pleaded in the action, but the court disregard it, and render judgment, that is error of law, because the court, having the fact before it in the record has rendered a judgment contrary to law, as the record showed the defendant to be dead, and a writ of error in an appellate court would correct it; but where the death is not presented, and judgment is rendered, that is error in fact, to be corrected by writ of error coram nobis or motion: *Jacques v. Cesar*, 2 Saund. (Williams' Notes) 101a; 2 Tidd's Practice, 1191; 2 Tuckers Commentaries, 328; 4 Minor's Institutes, 947; note to *Holford v. Alexander*, 46 Am. Dec. 257. Death, infancy, and coverture are conceded grounds of error in fact, as a basis for writ of error coram nobis; and I would consider insanity of like nature, and ground for that writ, and not for equity jurisdiction, were it a cause at law for reversal of a judgment. But I do not think that insanity of the defendant at the date of the judgment is a reason for the reversal of the judgment by proceedings at law."

In *Iago v. Iago*, 168 Ill. 339, 61 Am. St. Rep. 120, 48 N. E. 30, 39 L. R. A. 115, it was declared that an insane person may, by his friend, maintain a writ of error for the purpose of questioning the regularity and legality of a decree of divorce entered against him in a proceeding instituted after he became insane. The insanity in that case appeared of record inasmuch as a guardian ad litem had been appointed for the defendant in the original action. The court refused to dismiss the writ.

The issuance of writs of error and writs of error coram nobis is considered in the notes to *Wheeler v. Winn*, 91 Am. Dec. 193, and *Collins v. State*, 97 Am. St. Rep. 362.

b. By Application to the Equitable Jurisdiction of the Court.—The same rules apply to the vacation of judgments against insane persons as apply to judgments against sane persons where a showing of excusable neglect or gross unfairness is made by the judgment debtor. Thus it has been said: "Where a judgment wholly unjust has been obtained against a non compos mentis, he may, in certain cases,

obtain relief in equity by a perpetual injunction against the enforcement of that judgment": *King v. Robinson*, 33 Me. 114, 54 Am. Dec. 614. The unfairness of a judgment obtained against a lunatic may be attacked by an equitable action instituted by his committee. The judgment may be modified or annulled in such an action: *Demilt v. Leonard*, 11 Abb. Pr. 252. The court in the leading case of *Lamprey v. Nudd*, 29 N. H. 299, in discussing the effect of such judgments, said: "If plaintiff, by reason of his insanity at the date of the mortgage and of the proceedings adopted to foreclose it, has rights not yet barred by the lapse of time, he may probably obtain redress by proper proceedings on the equity side of this court, which has ample powers in cases relating to the redemption and foreclosure of mortgages."

The remedy of a lunatic where the judgment against him has been fraudulently or wrongfully obtained is by a suit in equity to set it aside: *Pollock v. Horn*, 13 Wash. 626, 52 Am. St. Rep. 66, 43 Pac. 885. Although equity has jurisdiction of a suit to vacate a judgment rendered against an insane person, still before a court of equity will do so, it must clearly appear that an injustice has been done. The fact that by reason of defendant's insanity he failed to set up the only defense which he had, namely, the statute of limitations, has been deemed sufficient to warrant a court of equity in setting the judgment aside: *Godde v. Marvin*, 142 Mich. 518, 105 N. W. 1112. So, also, where a judgment or decree has been entered against an insane defendant through perjury or fraud on the part of the prevailing party, such defendant may proceed by an original suit in equity to impeach such judgment or decree and have leave to answer and defend the same. And such defendant may do so through his legally appointed guardian: *Wirth v. Weigand* (Neb.), 122 N. W. 714. Where a defendant was insane at the time that a default judgment was rendered against him, he is entitled, generally under statutory provisions, to have the judgment set aside as having been rendered against him through his mistake, surprise or excusable neglect: *Dickerson v. Davis*, 111 Ind. 433, 12 N. E. 145; *Henderson v. Mitchell*, 1 Bail. Eq. 113, 21 Am. Dec. 526; *Ex parte Rountree*, 51 S. C. 405, 29 S. E. 66; *Bond v. Neuschwander*, 86 Wis. 391, 57 N. W. 54. But in obtaining relief in equity from such judgments, it is necessary to show that the judgment, through some fraud or unfairness, is not such a one as in equity and good conscience should be allowed to stand: *Johnson v. Pomeroy*, 31 Ohio St. 247.

"It is true," said the court in *Lee v. Henman*, 10 Tex. Civ. App. 666, 32 S. W. 93, "that suits may be brought and judgments rendered against insane persons, and such judgments are valid until set aside in some proper proceeding. They are subject, however, like other judgments, to be reviewed and set aside by a court of equity, upon proper showing. After the term at which they are rendered has closed, they become final, like other judgments, and are subject to be reviewed only by appellate proceedings, or by the court rendering

them, upon the principles which govern courts of equity in proceedings in the nature of a review. Under such principles a party against whom a judgment has been rendered upon a claim against which he had a good defense will be allowed to reopen the judgment, and set up his defense, provided he proceeds with proper diligence, and can show a good reason why he did not present his defense before the judgment was rendered."

Where application is made to a court of equity to set aside such a judgment against an insane person, it is necessary that the insane person or his representatives show the possession of a meritorious defense: *Woods v. Brown*, 93 Ind. 164, 47 Am. Rep. 369; *Dickerson v. Davis*, 111 Ind. 433, 12 N. E. 145; *Kent v. West*, 22 Misc. Rep. 403, 50 N. Y. Supp. 339; *Kneedler's Appeal*, 92 Pa. 428; *Atwood v. Lester*, 20 R. I. 660, 40 Atl. 866; *White v. Hinton*, 3 Wyo. 753, 30 Pac. 953, 17 L. R. A. 66.

Where a decree has been rendered against an insane person in a court of chancery, such as the circuit court of the United States, the requisite equitable jurisdiction to relieve the party from the decree is in the same court, and a proceeding for that purpose should be instituted in that court: *Maloney v. Dewey*, 127 Ill. 395, 11 Am. St. Rep. 131, 19 N. E. 848.

In Iowa it is held, under statutory provisions, that a suit for the vacation of a judgment, a proceeding somewhat similar to a bill of review in equity, must be brought by the legal representatives of an insane party within one year after his death, since the disability of an insane person terminates with his death: *Wood v. Wood*, 136 Iowa, 128, 125 Am. St. Rep. 223, 113 N. W. 492, 12 L. R. A., N. S., 891.

GULF, WEST TEXAS AND PACIFIC RAILWAY COMPANY v. WITTNEBERT.

[101 Tex. 368, 108 S. W. 150.]

CARRIERS—Duty to Inspect Car.—It is not the Duty of a Railroad Company receiving a loaded car from a connecting line to inspect the manner of loading to ascertain whether the freight is so arranged as to be safe to persons who may be called upon to remove it from the cars. (p. 860.)

CARRIER.—When the Consignor Loads Freight on a Car or Packs Articles for shipment, the carrier that receives the car as loaded or the package as prepared is not liable for damages arising from defects in the loading or packing. (p. 861.)

CARRIER—Inspection of Oil-car.—It is the Duty of a Railway Company, upon receiving a tank-car loaded with oil from another line, to make a reasonable inspection of its condition with reference to its fitness for transportation, but this does not require it to unscrew the cap on the dome of the car to discover whether a check valve has been properly set in loading the car so as to protect persons who may unload it. (p. 863.)

Proctors, Vandenberg & Crain, for the plaintiff in error.

Lackey & Lewright, for the defendant in error.

372 BROWN, J. For many years prior to June, 1903, H. Runge & Co. were engaged in running a cotton-gin at Cuero, Texas, and, at the time of the injury to Wittnebert they used Beaumont crude oil for fuel. About June, 1903, Runge & Co. ordered a tank of Beaumont oil from McManus, Houck & Co., of Beaumont, which was loaded into a tank-car that belonged to the Texas and New Orleans Railroad Company and was by the latter company and an intermediate carrier transported to Victoria, and there delivered to the Gulf, West Texas and Pacific Railway Company, by which it was hauled to Cuero, Texas, its destination; and on the twelfth day of June, 1903, for the purpose of being unloaded, the car was placed upon a sidetrack opposite to a pipe which connected with the oil reservoir of H. Runge & Co. Wittnebert had charge of the gin of Runge & Co., and with an assistant undertook to unload the oil tank. The method of unloading the tank was to connect a piece of hose with the pipe that was connected with the reservoir, then to fasten the hose upon the end of an escape pipe which extended beneath the bottom of the tank by which the oil would pass through the hose into the pipe leading to the reservoir. It was necessary before connecting the hose with the pipe to remove the tap from the end of the escape pipe through which the oil should pass. Wittnebert and his assistant went under the car and Wittnebert removed the tap, whereupon the oil flowed down from the tank upon him inflicting the injury for which this suit was brought. In the construction of the tank there was a valve which, when properly set, closed the upper end of the escape pipe and would prevent the oil from flowing through the escape pipe. A round iron rod connected with the valve and the other end extended into the dome, and the proper method of unloading was, after removing the tap and attaching the hose, to go upon top of the tank and raise the valve by means of a monkey-wrench. When this car was placed upon the track the valve was not set, and when the tap was removed the oil flowed out upon Wittnebert. If the valve had been set as it should have been, this would not have happened. Upon top of the tank was a dome which, when delivered to plaintiff in error, was covered by a cap screwed down upon it. The valve could be raised by a rod which passed up through the tank and into the dome. No one could tell whether the valve was set or not

without going upon the car, removing the cap of the dome and ascertaining the fact from the position of the rod.

When the car was delivered to the plaintiff in error at Victoria, it was inspected by the inspector of the plaintiff in error at that place, who, however, did not go upon the top of the tank, nor remove the cap to ascertain whether or not the valve was set. The inspector could have ascertained the fact by removing the cap and examining the rod. Wittnebert had unloaded six or seven oil-tank cars at the same place before this, all of which had the valves set when they were placed upon the sidetrack at the point for unloading, and ³⁷³ he had never opened the valve before removing the tap. Wittnebert knew that if the valve was not set and the tap should be removed the oil would flow out upon him, and if he had known that the valve was not set he would not have removed the tap. He could have ascertained the condition of the valve by looking into the dome. The injury inflicted upon the defendant in error was sufficient to justify the amount of damages recovered in the trial court.

The only question presented to this court is, Was it the duty of the Gulf, West Texas and Pacific Railway Company to see that the valve was set and the tank in a safe condition to be unloaded when delivered to the consignee?

The judgment in this case has no support except upon the failure of the railway company to examine into the manner in which the car was loaded to ascertain whether the safety valve had been set so as to make it safe for any person who might unload the car when delivered to the consignee. It was the duty of the railway company upon receiving the tank-car to make a reasonable inspection of its condition with reference to its fitness for transportation. But we have been unable to find any authority which goes to the extent of holding that it was the duty of the railway company, under such facts, to inspect the manner of loading the car so as to ascertain whether the freight was so arranged as to be safe to persons who might be called upon to remove it from the car. The honorable court of civil appeals cites *Sykes v. St. Louis & S. F. Ry. Co.*, 178 Mo. 693, 77 S. W. 723, and adopts its reasoning as applicable to the facts of this case. In that case a car had been loaded at Kansas City with odd car wheels consigned to the St. Louis Car Wheel Company at St. Louis. The car was carried by the Kansas City, Fort Scott and Memphis Railway Company to its connection with the St. Louis and San Francisco Railroad Company, and the latter received and hauled the car to a local station in the city of St. Louis,

where it was delivered to the Missouri Pacific Railway Company, by which the car was carried to the premises of and delivered to the consignee. Sykes, an employé of the car wheel company, entered the car for the purpose of removing the old car wheels, when his foot and leg passed through a hole in the floor, whereby he received his injury. There were a number of holes in the floor of that car, with hay and other things thrown over them. Sykes sued the St. Louis and San Francisco Railroad Company, the intermediate carrier. The supreme court of Missouri held that the intermediate carrier was not liable, but in delivering the opinion said that the Missouri Pacific Railroad Company, which delivered the car to the consignee, would be liable under such circumstances. This was pure dicta; the question was not before the court; the Missouri Pacific Railroad Company was not a party to the suit. However, that case is distinguishable from this case in this, that the injury in that case occurred through a defect in the car itself, while in this there was no defect in the car, but in the loading of it. The duty of the two carriers depended upon entirely different facts; therefore, if the reasoning of that court be sound, it is not applicable to the question now presented to this court.

³⁷⁴ We have found no dissent from the general rule that when the consignor loads freight upon a car or packs articles for shipment the carrier which receives the car as loaded, or the package as prepared, is not liable for damages which arise from the defect in the loading or the packing: *Hutchinson on Carriers*, sec. 333; *Texas & P. Ry. Co. v. Klepper* (Tex. Civ. App.), 24 S. W. 567; *Mexican Cent. Ry. Co. v. Shean* (Tex.), 18 S. W. 151; *Ross v. Troy & Boston Ry. Co.*, 49 Vt. 364, 24 Am. Rep. 144; *Milwaukee v. Chicago & N. W. Ry. Co.*, 37 Wis. 190; *Western Ry. Co. v. Harwell*, 97 Ala. 341, 11 South. 781; *Klauber v. American Express Co.*, 21 Wis. 21, 91 Am. Dec. 452; *McCarthy v. Louisville & N. Ry. Co.*, 102 Ala. 193, 48 Am. St. Rep. 29, 14 South. 370; *Cohn v. Platt*, 95 N. Y. Supp. 535; *Texas Cent. Ry. Co. v. O'Loughlin* (Tex. Civ. App.), 84 S. W. 1104.

In *Railway Co. v. Klepper*, the court of civil appeals for the second district held that where horses were placed in a car by the owner for shipment over a railroad the railroad company was not liable for damages which occurred to the horses by their being overcrowded in the car, and this conclusion was placed upon the ground that the railroad company was not responsible for the act of the shipper in im-

properly loading his own freight, but might haul the car as loaded.

In the case of *Mexican Central Ry. Co. v. Shean* (Tex.), 18 S. W. 144, the commission of appeals, by Judge Garret, rendered an opinion which was approved by the supreme court in which it was held, although expressed in a very few words, that where a loaded car was by one railroad delivered to another, it did not devolve upon the railroad receiving the loaded car to cause the loading to be inspected, adjusted or corrected. It is said that the duty to furnish safe appliances and machinery, including cars, does not extend so far.

A lot of mules were shipped upon a railroad which delivered the car loaded to the Western Railroad Company, which delivered the stock to the consignee. Upon delivery it was found that some of them had been injured by spikes or long nails driven on the inside of the car. It was held that the last company was not liable for the damages, and the court said: "Such transfers and the inspection to be made during their occurrence must need be made according to some order and system adopted by the railroad company, and by persons appointed for that duty. Attention must be given to all cars coming into their custody, and all other duties reasonably imposed upon the inspector must be performed. There was nothing to indicate to the inspector the existence of the nails or spikes inside the car. In view of these facts the simple question is, Was it the duty of the inspector to remove the mules and examine the car on the inside for dangerous projections? We are clearly of the opinion that it was not": *Western Ry. Co. v. Harwell*, 97 Ala. 341, 11 South. 781. That case is strongly in point; the defect in the loading of the tank—that is, the failure to set the valve—could not be seen from the outside but the dome must have been opened and looked into in order to ascertain that fact.

In *Miltimore v. Chicago & N. W. Ry. Co.*, 37 Wis. 190, the shipper selected an open car for the shipment of a wagon and loaded it upon a car without in any way confining it. While the train was in motion a high ³⁷⁵ wind blew the wagon from the car and it was damaged. The shipper sought to hold the railroad company liable for the injury to the wagon, but the supreme court of Wisconsin held that the shipper having chosen his car and having himself loaded the wagon upon the car, could not recover for damages re-

sulting from the defective manner in which the wagon was secured.

In the case of *Texas Central Ry. Co. v. O'Loughlin* (Tex. Civ. App.), 84 S. W. 1104, decided by the court of civil appeals for the second district, the railroad company received beef cattle for shipment to St. Louis, limiting its liability to its own line, and the shipment upon that line terminated at Cisco, where the car was delivered to the Texas and Pacific Railroad Company, which delivered it to the Missouri, Kansas and Texas Railroad Company at Fort Worth. The Texas Central Railroad Company bedded the car, but failed to make the bedding sufficient to protect the cattle from injury. The Texas Central delivered the car at Cisco within a few hours after receiving it and the cattle were not seriously damaged up to that time, but the shipment was continued in the same car to Muskogee, Indian Territory, without removing the cattle from the car or renewing the bedding. The principal damage done to the cattle in the shipment occurred after the car left the Central Railroad, and that company, being sued for damages, defended upon the ground that its liability was limited to its own road, but the court held that as it had made the bedding and improperly loaded the cattle in a car which was to continue as loaded after it was delivered to the succeeding carrier, its liability continued, and the next carrier which received it did not become liable for the damages arising from the improper bedding furnished by the first carrier, because it transported the cattle as loaded when delivered to it. This court refused an application for writ of error in that case.

The authorities cited and from which we have made the quotations above establish the proposition that it is not the duty of a railroad company, which receives from the owner or from another railroad company a loaded car, to make an inspection of the manner of the loading when the defect cannot be discovered by an external examination. If, in this case, the oil had been lost by the failure to set the valve, and Runge & Co. had sued the plaintiff in error for the value of the oil, no recovery could have been had, because no duty of inspection existed; therefore, no negligence would be shown by the facts.

The railroad company in the capacity of common carrier not being liable for property lost under like circumstances, how can it be that a railroad company with regard to the same freight would be under obligation to make an inspec-

tion in order to protect persons in the employ of the consignee when unloading the car? The only connection that the railroad company had with the unloading of the car was to place it in a proper position to be unloaded, and in doing so it would have been liable for any injury which might have occurred through negligence on its part in performing that duty. But it was in no sense bound to see that the contents of the tank were in proper condition for unloading. In order to make the ³⁷⁶ inspection claimed, the inspector at Victoria would have been required to go upon the top of the oil tank, unscrew the cap from the dome and test the valve to ascertain whether it was properly set. As we have seen, no such duty of inspection rested upon the railroad company with regard to loaded cars, received from another road, either to secure the freight or to protect its own servants while operating the train. We have found no precedent for holding that the railroad company owed such duty to the consignee, nor do we know of any rule of law that would support such a conclusion.

If the man who assisted Wittnebert had received the injury and had sued Runge & Co., it would present a more serious question whether Wittnebert's failure to inspect and adjust the valve would not be such negligence as would make Runge & Co. liable. There are sounder reasons for holding that Runge & Co. were charged with that duty to their employés than for placing it on the plaintiff in error.

We are of the opinion that Wittnebert had no cause of action against the railroad company in this case upon the facts as detailed, and, as his own testimony shows that he could make no better case upon another trial, it is useless to remand the case to the district court. It is therefore ordered that the judgments of the court of civil appeals and the district court be reversed and that judgment be here rendered that the defendant in error take nothing by his suit and pay all costs of all of the courts.

If Goods are Transported in Closed Cars, so that when received from one carrier by another the latter cannot, without opening the doors, see the condition of their contents, it is under no duty to open the doors, and is not answerable for a loss or injury to the goods resulting solely from their condition and not from any fault of the carrier: *McCarthy v. Louisville etc. R. R. Co.*, 102 Ala. 193, 48 Am. St. Rep. 29. And it has been held that if a consignor selects for the transportation of goods sold a car which, by reason of defects discernible upon inspection, is unsuitable for that particular class of goods, the carrier is not liable for a loss of the goods due to the unsuitableness and defective condition of the car: *Frohlich v. Pennsylvania Co.*, 138 Mich. 116, 110 Am. St. Rep. 310.

O'BEAR-NESTER GLASS COMPANY v. ANTIEXPLO COMPANY.

[101 Tex. 431, 108 S. W. 967.]

UNPATENTED FORMULA.—There is No Substantial Property in an unpatented recipe or formula, but only a qualified property right. (p. 867.)

CORPORATIONS—Stock Subscriptions—Payment in Property. An Unpatented Formula is not property within the constitutional provision that corporations shall issue stock only for property actually received. (p. 867.)

STOCK SUBSCRIPTIONS—Responsibility to Creditors.—Persons receiving stock issued in violation of the constitutional provision that corporations shall issue stock only for property actually received are responsible to creditors of the corporation for the face value of the shares received by them. (p. 868.)

John W. Davis and George M. Shelton, for the plaintiff in error.

Prendergast & Williamson and Sanford & Denton, for the defendants in error.

⁴³³ BROWN, J. John Skimming, A. S. Dennison and Sam H. Hamilton owned a secret formula of "a compound to be mixed with gasoline, kerosene and other oils, to prevent explosion," and on the second day of January, 1904, the said Skimming, Dennison and Hamilton organized a corporation, the Antiexplo Company, under the laws of the state of Texas, for the purpose of manufacturing and selling the said compound. The capital stock was stated in the charter to be \$100,000, and the incorporators sold to the said corporation the formula for making the said compound at the price of \$100,000, taking stock therefor as follows: Hamilton, \$35,000, Skimming, \$35,000; Dennison, \$12,500, and \$17,500 was left for sale, the proceeds to go into the treasury of the company. The \$17,500 in stock was sold to the other defendants herein, but, for the purposes of this opinion, it is unnecessary for us to state in detail the transactions or the amount of stock owned by each. The said Hamilton, Skimming and Dennison believed that the formula which they owned and transferred to the company was worth the sum of \$100,000, and all of the parties who bought stock, as well as the incorporators, acted in good faith in the transaction. The corporation was organized and entered upon its business in the city of Waco and was doing a prosperous business when "the fire insurance ⁴³⁴ companies

issued circular letters to all of their policy-holders and to all persons who were then handling the product of the said formula warning them against buying or selling any of the said compound in their business, and threatening that if they did so the companies would cancel the insurance held by said policies, and would not insure them, whereby the business of the said corporation was wrecked and largely ruined."

O'Bear-Nester Glass Company, a creditor of the Antiexplo Company, brought this suit against the company to recover its debt and against the other defendants to recover the difference between the face value of the stock held by them and the value of the payments actually made by them to the company for the stock. A trial was had before the court without a jury, and judgment was rendered in favor of the O'Bear-Nester Glass Company against the Antiexplo Company for \$1,604.50, and judgment was rendered in favor of all the other defendants against the said O'Bear-Nester Glass Company.

Section 6 of article 12 of our state constitution is in this language: "No corporation shall issue stock or bonds except for money paid, labor done, or property actually received." The purpose of the convention in enacting that provision of the constitution was to secure creditors as well as stockholders of corporations against the practice which was too common of corporations issuing fictitious stock and stock upon an insufficient consideration, whereby the actual capital was much less than the amount represented by the shares issued and sold by the corporation. The terms in which this section of the constitution is expressed indicates the purpose that the assets of the corporation should be something substantial and of such character that they could be subjected to the payment of claims against the corporation as well as to secure the shareholders in their rights in the capital stock. The question presented for our consideration is, Was the secret formula for preparing "a compound to be mixed with gasoline, kerosene and other oils to prevent explosions" property, within the meaning of our constitution?

It is true that the inventor or discoverer of a secret such as the Antiexplo has a qualified right in it to the extent that he is entitled to maintain the secrecy of his invention, and to prevent its disclosure or use by one who obtained knowledge of it through fraud or breach of contract with him. *Chadwick v. Covell*, 151 Mass. 190, 21 Am. St. Rep. 442, 23 N. E. 1068, 6 L. R. A. 839. But it is held in the case just

cited that one who acquires information of such secret formula by lawful means may use it, and that neither the original discoverer nor any transferee of his can prevent it. In that case the discoverer of the formula, Dr. Spencer, after using it for a number of years, died, and left a request that it should be given to Mrs. Chadwick, and the administrator of his estate delivered to her the written recipe and she began the manufacture and sale of the medicine under the name of the original discoverer. Subsequently the administrator de bonis non of the estate transferred the secret formula to Covell, who began the ⁴³⁵ manufacture and sale of the same medicine under the name of the original discoverer. Mrs. Chadwick brought the action to restrain Covell from using the formula, but the court held that the defendant having lawfully gotten possession of the secret was entitled to use it notwithstanding the prior right of the plaintiff.

The qualified property right of the discoverer of an unpatented recipe or formula is of such a character that it constitutes no substantial property, and could not under any circumstances be subjected to the payment of the debts of the corporation, nor could the shareholders have it sold and the proceeds distributed by process of court. Such unsubstantial and shadowy right when delivered in payment of stock constitutes no payment within the terms of the above-quoted section of our constitution: *Van Cleve v. Berkey*, 143 Mo. 109, 44 S. W. 743, 42 L. R. A. 593; *Camden v. Stuart*, 144 U. S. 104, 12 Sup. Ct. Rep. 585, 36 L. ed. 363. In the case last cited the supreme court of the United States said: "The experience and goodwill of the partners, which it is claimed were transferred to the corporation, are of too unsubstantial and shadowy a nature to be capable of pecuniary estimation in this connection. It is not denied that the goodwill of a business may be the subject of barter and sale as between the parties to it, but in a case of this kind there is no proper basis for ascertaining its value, and the claim is evidently an afterthought." The *Antiexplo* was more unsubstantial and shadowy than the goodwill of the partnership. Its value was entirely speculative.

If the court should dissolve the corporation it would have no assets to distribute, except such property as it may have acquired in the course of its business, and its assets, the secret formula, would be of such absolutely unsubstantial and shadowy a nature that there could be no application of it to the payment of the debts, or by distribution to the

stockholders. If the court should be able to acquire a knowledge of the formula and cause it to be sold, each of the incorporators who possessed a knowledge of the formula could organize a corporation upon the same basis and carry on the business.

The emphatic terms in which the section of our constitution above quoted is expressed, that the payment for the stock shall be issued only for money paid, for labor done, or property actually received, clearly indicate that the intention was that the assets of corporations created in Texas should consist of property capable of being applied to the payment of debts and of distribution among the stockholders. The word "property," as used in that section, is so qualified by the words "actually received" as to clearly show that it was the intention that the property should be of such a character as could be delivered to the corporation, and not of a character that could only be communicated to some one of its officers or employés. Skimming parted with nothing substantial, for he had the same legal right to use the formula and impart it to others, after the transfer to the corporation, as he had before the sale. The formula was not "property actually received" by the corporation, for it could not actually receive what Skimming retained. That in which no right is acquired which the law will ⁴³⁶ protect cannot be "property actually received." We think there can be no doubt that the secret formula was not property within the terms of the constitution; therefore, the stock, which was issued upon the consideration of its transfer to the corporation, was issued contrary to the constitution, and those persons who received the stock must be held responsible to the creditors of that corporation for the face value of the shares received by them from the corporation.

It is ordered that the judgments of the district court and court of civil appeals be reversed and the cause remanded.

ON MOTION FOR REHEARING.

Defendant in error asks that this court pass upon the liability of Sanger, Edwards & McClintock and affirm the judgment as to them. We have examined the facts and find the case has not been so developed that we can determine the question of liability of said parties. The motion is overruled and the case remanded as to all of the parties.

The Nature of Property in an Unpatented Formula is discussed in *Chadwick v. Covell*, 151 Mass. 190, 21 Am. St. Rep. 442; and the

nature of property in uncopyrighted literary productions is discussed in *Tabor v. Hoffman*, 118 N. Y. 30, 16 Am. St. Rep. 740; *Dodge Co. v. Construction Information Co.*, 183 Mass. 62, 97 Am. St. Rep. 412; *Frohman v. Ferris*, 238 Ill. 430, 128 Am. St. Rep. 135.

If a *Liability for a Stock Subscription* is to be discharged in property, it must measure up to the money value. In other words, the value of the property must be equivalent to the amount of the subscription: *Macbeth v. Banfield*, 45 Or. 553, 106 Am. St. Rep. 670, and see authorities cited in the cross-reference note thereto. According to *Lea v. Iron Belt Mercantile Co.*, 147 Ala. 421, 119 Am. St. Rep. 93, though property has been received at an overvaluation in payment of a subscription to the stock of a corporation, its creditors who take such stock with knowledge of the overvaluation and payment thereby cannot assail the transaction. That stockholders cannot escape their liability to pay the full amount unpaid upon stock held by them so long as any creditor of the corporation remains unpaid, see *Moore v. United States Barrel Co.*, 238 Ill. 544, 128 Am. St. Rep. 153.

CREAMER v. BRISCOE.

[101 Tex. 490, 109 S. W. 911.]

COMMUNITY PROPERTY.—The Character of the Title to Property, as separate or community, depends upon the existence or non-existence of the marriage at the time of the incipency of the right in virtue of which the title is finally extended, and the title when extended relates to that time. (p. 870.)

COMMUNITY PROPERTY—Homestead in Public Land.—Where a man and wife enter a homestead donation, and she dies and he remarries before the expiration of the requisite time for perfecting title, the land is the community property of the first marriage upon his subsequent performance of the legal requirements for acquiring title. (p. 874.)

Snodgrass & Dibrell and George E. Smith, for the plaintiffs in error.

Goodson & Goodson, for the defendants in error.

491 WILLIAMS, J. This action was brought by defendants in error as heirs of Mrs. Sarah Creamer, the second wife of Josiah Creamer, to establish their title to interests in the land in controversy alleged by them to have been the community property of Josiah Creamer and their ancestress. The plaintiffs in error, the defendants below, claim the whole of the property as belonging to the community estate of Josiah Creamer and his first wife. Creamer and his first wife settled upon the land, in 1871, in order to acquire it as a homestead donation under the laws then in force, and did everything necessary to that end except to complete the

three years' occupancy. After they had occupied the land for more than a year Mrs. Creamer died, and Josiah Creamer, thereafter and during the three years, married his second wife, and with her completed the occupancy and obtained a patent.

We are of the opinion that the case of *Mills v. Brown*, 69 Tex. 244, 6 S. W. 612, sustains the contention of plaintiffs in error that the facts stated show the land to belong to the community estate of the first marriage. In that case a widow, who was the head of a family, made application for a survey of a piece of public land for a homestead and paid the surveyor's fees. Without having done anything more she married, and she and her husband settled and resided together upon the land for less than three years, when she died. Thereafter the husband completed the necessary occupancy and a patent issued to her heirs. The question was whether the land was community property of the two or the separate property of the wife. The court held both that it was not her separate property and that it was community property, and the land was divided equally between the claimants under the two.

If the contention of the defendants in error were sound, the land involved in that case would have been the separate property of the husband, such contention being that homesteads of this character are only acquired, in the sense of the statute defining ⁴⁹² separate and community property, after the occupancy has been completed. *Mills v. Brown*, 69 Tex. 244, 6 S. W. 612, fully recognizes as applicable to such cases the principle, more fully discussed afterward in the case of *Welder v. Lambert*, 91 Tex. 510, 44 S. W. 281, that the character of title to property, as separate or community, depends upon the existence or nonexistence of the marriage at the time of the incipency of the right in virtue of which the title is finally extended, and that the title, when extended, relates back to that time. And *Mills v. Brown*, 69 Tex. 244, 6 S. W. 612, expressly holds that the right to such homestead donations has its incipency in the actual settlement upon the land.

It is true that the claimant under the husband in *Mills v. Brown* claimed only half of the land on the ground that the whole was the common property of the husband and wife, and did not assert that it became the separate property.

•

of the husband by his completion of the occupancy after his wife's death. He was merely resisting the contention that the land belonged to the wife, in her separate right, because of the steps taken by her before the marriage and settlement. Both parties were contending for the principle above stated, and differing upon the question as to what step or steps constituted the inception of the right which merged in and gave character to the title, and it was this question which the court decided, holding in no uncertain language, and upon reasoning with which we are entirely satisfied, that the initial step in which the right originated was the settlement.

The decisions by which the court of civil appeals felt constrained to hold in this case that the land in question belonged to the community estate of the second marriage are *Buford v. Bostick*, 58 Tex. 63; *Roberts v. Trout*, 13 Tex. Civ. App. 70, 35 S. W. 323; *Votaw v. Pettigrew*, 15 Tex. Civ. App. 87, 38 S. W. 215; *Richard v. Moore*, 110 La. 435, 34 South. 593.

In *Buford v. Bostick*, 58 Tex. 63, the question was one of three years' limitation, depending upon the further question whether or not the claim to a homestead of land, which was not vacant but was owned by the plaintiff in that action, constituted color of title before the settlers had held for three years. The decision was based mainly upon the language of the statute regulating the action of trespass to try title and the limitations applicable to it, but in the course of the opinion this language is used: "A pre-emption claim, until perfected, is not a title defeasible upon the non-performance of conditions subsequent, but is a mere inchoate right which may ripen into a perfect title upon the performance of certain conditions precedent. Neither is it an already existing and certain demand for land, issued by the government upon an executed consideration, as a certificate of headright, land warrant or land scrip, but is a mere privilege or right of possession, sufficient under the statute, as against all but those holding under a superior right or title, to maintain trespass to try title, but not sufficient to defeat this superior right or title by limitations."

This characterization of the right of a homestead or pre-emption claimant as against the state may be correct enough, and the question whether or not such a claim to land is title or color of ⁴⁹³ title under the statute of limitations may

depend upon its legal standing as between the claimant and the state. But when the question is one between the husband and wife as to their respective rights, other considerations should control, and are made to control by the reasoning in *Mills v. Brown*, 69 Tex. 244, 6 S. W. 612.

It is not correct to say that a husband and wife who have settled upon public lands under the law giving them the right to occupy and improve it, and eventually to obtain title by such occupancy and improvement, acquire no right prior to the running of the prescribed time. It is true that they do not acquire a complete title, legal or equitable, until they have possessed for such time, but it does not follow that they do not acquire a right in the land which afterward merges in and determines the character of the title. From the time of the initial steps, the settlement, they have the right to hold and use the land as owners against anyone but the state, and against the state at least so long as they comply with the law and it remains unchanged. They are authorized to sell their claim, and the purchaser becomes entitled to take possession, to complete the occupancy and to acquire the title. It would hardly be contended that the price of such a sale would not be community property, And perhaps we hazard nothing in saying that, if it should become necessary for the court, upon separation of the husband and wife, to partition their property between them before the expiration of the three years, the land held by them under such a settlement would have to be taken into account as their joint property, and their rights with respect to it adjusted in some appropriate way. It is evident, therefore, that they do acquire rights of property in or with respect to land so held even before they have entitled themselves to a patent from the state.

It would seem that, as between themselves and as against all persons but the state, they are to be treated as having title to the property subject to be lost by noncompliance with the condition of continued occupancy. Certainly they have rights of property in the land, and this is enough to make applicable the principle laid down in *Welder v. Lambert*, 91 Tex. 510, 44 S. W. 281, that the status of title, as belonging to one estate or the other, is determined by the status of the original right subsequently matured into full title. The authorities which hold otherwise reach their con-

clusions by considering merely the relation of the settler to the state under an incomplete occupancy (*Richard v. Moore*, 110 La. 435, 34 South. 593), while the opinion in *Mills v. Brown*, 69 Tex. 244, 6 S. W. 612, regards as decisive the rights which exist as between the parties themselves, and this, we think, is the true test. The original property right, having been "acquired" during the marriage, is community, and the title which completes that right relates back to its origin and takes character from it.

Of the other decisions in this state relied on by defendants in error, that of *Votaw v. Pettigrew*, 15 Tex. Civ. App. 87, 38 S. W. 215, alone sustains them. The very question was involved in that case and was decided by the court of civil appeals. Another point, equally decisive, was there involved, and upon it the refusal of a writ of error by this court may be sustained. The claim of title of the heir of the ⁴⁹⁴ deceased wife was an equitable one, and the purchasers under the husband were not shown to have had any character of notice of it.

In *Roberts v. Trout*, 13 Tex. Civ. App. 70, 35 S. W. 323, the husband conveyed the land, and he and his wife actually left it without having occupied it for three years. The purchaser completed the occupancy and received the patent. We do not find that this court passed on that case. The point decided was that the husband could not make such a sale without the assent of the wife, which is a very different question from that before us. The same conclusion was reached in *Mitchell v. Nix*, 1 Posey's Unreported Cases, 126, and while the question is not in this case, we are not to be understood as intimating a different opinion.

In *Bishop v. Lusk*, 8 Tex. Civ. App. 30, 27 S. W. 306, it was held by the court of civil appeals that when a husband and wife entered upon land of another and held adverse possession for a time less than that required to give title by limitation, when the wife died, and thereafter the husband married again and completed the adverse holding for the term required to bar the true owner, the property did not belong to the community estate of the husband and the first wife. That case was never brought to this court, and is easily distinguishable from this. It holds that a trespasser upon the land of another acquires no right whatever until title is given by the statute of limitations after the lapse of

the prescribed time. We have endeavored to show that this cannot justly be said of a settler upon public land complying with the laws giving him the right to do so.

It follows from what we have said that the character of the property in controversy had been fixed, as belonging to the community estate of the first marriage, when Creamer last married, and that such character could not be affected by that marriage. The last wife merely came into the family and resided on the homestead in use, the title to which was no more changed thereby than if it had been Creamer's separate property.

Plaintiffs having no title upon which to recover, the judgments below will be reversed and judgment will be rendered that they take nothing, etc. Reversed and rendered.

The Principal Case is cited in the recent note to Nilson v. Sarment, 126 Am. St. Rep. 117, on what is community property.

CASES

IN THE

COURT OF CRIMINAL APPEALS

OF

TEXAS.

HUDDLESTON v. STATE.

[54 Tex. Cr. 93, 112 S. W. 64.]

JURIES—Summoning and Impaneling—Constitutional Law.—

The act of the thirtieth legislature of Texas in regard to the manner of summoning and impaneling grand and petit juries in a county including a city or cities of twenty thousand inhabitants is constitutional. (p. 876.)

HOMICIDE—Self-defense in Case of Assault with Gun.—

Where the evidence in a homicide trial shows that the deceased was in the act of assaulting the defendant with a gun at the time of the fatal shot, having previously made numerous threats and also an assault with an ax handle, from the effects of which the defendant was still suffering, it is error to limit the right of self-defense by an instruction that the defendant should use no more force to defend himself than the circumstances reasonably indicated to be necessary. (p. 877.)

MANSLAUGHTER—Prior Threats and Difficulties—Adequate

Cause.—Where the evidence in a homicide trial shows that the deceased made threats against the defendant which had been communicated to him, that a few days previously he had made an assault upon the defendant, and that less than two hours before he had made a vigorous assault on the defendant with an ax handle, from the effect of which the defendant was still suffering, and that the deceased was in the act of making an assault upon the defendant with a gun at the time of the fatal shot, the court should not select one particular fact as a basis for "adequate cause" and charge that the provocation must arise at the time of the killing. (p. 879.)

MANSLAUGHTER — Proof of Prior Assault — Reasonable

Doubt.—Where the defendant in a homicide case introduces evidence, in mitigation of the offense, that a short time before the homicide the deceased assaulted him with an ax handle, he is not required to establish this fact beyond a reasonable doubt, and an instruction requiring him to do so is erroneous. The reasonable doubt is resolved in his favor. (p. 880.)

HOMICIDE—Uncommunicated Threats.—Where the Question of Self-defense is raised in a homicide case, the court in its instruction should not limit the effect of communicated threats to disclosing the condition of the mind of the deceased at the time of the homicide;

they are important in solving the question who began the difficulty. (p. 882.)

HOMICIDE.—If the Accused had been Informed that Threats had been Made by the Deceased, and believed this to be true, he would be equally justifiable in acting thereon though the deceased had not in fact made them. (p. 883.)

Taylor & Gallagher, for the appellant.

F. J. McCord, assistant attorney general, for the state.

94 DAVIDSON, P. J. Appellant was convicted of murder in the second degree, his punishment being assessed at five years confinement in the penitentiary.

The first question suggested for revision is the alleged unconstitutionality of the act of the thirtieth legislature in regard to the manner of summoning and impaneling grand and petit juries in a county including a city or cities of twenty thousand inhabitants. This question was decided adversely to appellant in the case of *Bob Smith v. State*, decided at the present term.

The facts show that there had been trouble between appellant and deceased Thompson a few days prior to the homicide, and that on the day of and about one and a half hours prior to the killing, deceased had attacked appellant with an ax handle and inflicted painful chastisement. This was on the west side of the river in Waco. At the time of the homicide appellant was east of the river some distance from where the former trouble had occurred. That deceased came over in that part of town in a buggy, and was approaching in the direction of appellant, and as he (deceased) came near him, appellant's contention, under his testimony, was that deceased was in the act of procuring his gun and getting it in position to shoot appellant. That before getting it into actual shooting position appellant fired, the wound resulting fatally. Appellant testified that after going to East Waco he met his nephew, Jake Thompson, who told him (appellant) that Bartlett had informed him that deceased and his crowd were armed with a gun on the opposite side of the river, and were coming across, and stated to appellant that he had better go home. Appellant further testified that he started to the wagon-yard to go home, and that when he had walked about three steps on Elm street his attention was called to deceased Thompson, and looking ⁹⁵ around he "saw Thompson throw the lines to his wife and start for his gun." That deceased Thompson got hold of his gun and got it with the muzzle up nearly to the top of the dashboard,

and that he believed from all the preceding circumstances, which are unnecessary here to repeat, that deceased was getting his gun for the purpose of shooting, and that he shot deceased to avoid being himself shot.

Upon this state of case the court charged the jury as follows: "Every person is permitted by law to defend himself against any unlawful attack reasonably threatening injury to his person, and is justified in using all the necessary and reasonable force to defend himself, but no more than the circumstances reasonably indicate to be necessary." Error is assigned in that the charge was an illegal limitation on the right of self-defense, and had a tendency to impress the jury with the belief that the court thought appellant had used more force than was necessary, and that he should have resorted to other means of defense before shooting. If deceased was in the act of making an assault with a deadly weapon following the numerous threats, testified to, by the defendant, the law would presume that it was the intention of deceased to kill appellant, and the court so charged the jury in another portion of the charge. This being the case, appellant had the right to use the most effective means at hand to prevent death, or what he believed might end in death, at the hands of the deceased by the use of the gun. We are of opinion this was a limitation on the right of self-defense not warranted by the facts: See *Scott v. State*, 46 Tex. Cr. 536, 108 Am. St. Rep. 1032, 81 S. W. 294; *Crenshaw v. State*, 48 Tex. Cr. 77, 85 S. W. 1147; *Kelly v. State*, 43 Tex. Cr. 40, 62 S. W. 915. In *Scott v. State*, 46 Tex. Cr. 536, 108 Am. St. Rep. 1032, 81 S. W. 294, the opinion uses this language: "Both parties used guns, which were evidently deadly weapons, from the very beginning, and the question of excessive force is not in the case. We are not prepared to say, this issue not being in the case, that a charge thereon might not have injuriously affected appellant. The jury may have considered that in the opinion of the court there was testimony somewhere from some of the witnesses, showing that appellant used more force than was really necessary, although he might have been authorized to use some force for his protection. If, indeed, he was authorized to use any force, in our opinion he was authorized to use all the force which the evidence shows he did use." The cases of *Crenshaw* and *Kelly* are to the same effect, and not only so, but hold that where the assault or attempted assault is with a deadly weapon, the assaulted party is en-

titled not only to shoot, but to continue to shoot until all danger is past.

This portion of the court's charge on manslaughter is criticised: "The following is deemed adequate cause in law: An assault and battery by deceased causing pain and bloodshed." This is given in the case with the statutory definition of manslaughter in regard to adequate cause and sudden passion and provocation, etc. It is contended ⁹⁶ this charge is erroneous, because it requires the assault and battery shall produce both pain and bloodshed. The statute limits assault and battery by deceased to one causing pain or bloodshed. And it is further contended that the charge is erroneous in selecting out this single example of adequate cause and giving it to the jury to the exclusion of other facts and circumstances in evidence which singly or collectively may have been sufficient to constitute adequate cause. As before stated, about an hour and a half prior to the killing deceased, Thompson made rather a vigorous assault on appellant with an ax handle. The deceased had also assaulted appellant with his fist on Saturday preceding the killing, which occurred on Monday. On Sunday preceding the killing appellant had been informed of threats made by deceased against him. He had, a few moments before the homicide, been informed that the deceased and his crowd, as the witness called them, had a gun with them on the other side of the river, and were coming across, and advised appellant that he had better go home. Appellant was still suffering from the wound inflicted by the ax handle; that he (appellant) started to go home, and when his attention was called to the deceased he looked around and saw deceased throw the lines to his wife and start for his gun; that deceased got hold of his gun and got it with the muzzle nearly up to the top of the dashboard. That the wife of deceased was with him in the buggy, and threw herself in front of deceased, and when she got out of the way appellant raised his gun suddenly and fired. Deceased held on to his gun until appellant fired the second shot, which immediately followed the first. Appellant's contention is that he was excited when he saw deceased, and that all the circumstances preceding his last meeting impressed him that when deceased reached for his gun he was going to shoot, and that he shot to prevent deceased from shooting him. This character of charge has been held vicious by the decisions since *Foster v. State*, 8 Tex. Cr. App. 248. See, also, *Tickle v. State*, 6 Tex. Cr. App. 623; *Hill v. State*, 8 Tex.

Cr. App. 142; Childress v. State, 33 Tex. Cr. 509, 27 S. W. 133; Williams v. State, 15 Tex. Cr. App. 617; High v. State, 26 Tex. Cr. App. 545, 8 Am. St. Rep. 488, 10 S. W. 228; Spivey v. State, 30 Tex. Cr. App. 343, 17 S. W. 546; Bagley v. State (Tex. Cr. App.), 103 S. W. 875; Hardy v. State, 36 Tex. Cr. 400, 37 S. W. 434; Cochran v. State, 28 Tex. Cr. App. 422, 13 S. W. 651; Bracken v. State, 29 Tex. Cr. App. 362, 16 S. W. 192; Keith v. State, 50 Tex. Cr. 63, 94 S. W. 1044; Lundy v. State, 48 Tex. Cr. 217, 87 S. W. 352. In order to make adequate cause from the assault with the ax handle, it having occurred one and a half hours before the homicide, either other circumstance should have occurred so as to bring prominently in the mind of appellant said assault, or the charge upon cooling time should have been given. The court selected one particular fact as a basis for manslaughter, and yet charged the jury that the provocation must arise at the time of the killing. This occurred an hour and a half before ⁹⁷ the homicide. To say the least of it, this charge was very confusing. An assault causing pain or bloodshed an hour and a half before the killing could not have arisen at the time of the killing, and the court charged the jury that the provocation must arise at the time of the killing, and failed to charge the law of cooling time. There were circumstances, viewed in the light of past transactions, at the time of the shooting, calculated to arouse sudden passion, such as anger, rage, sudden resentment, or terror rendering the mind for the time incapable of cool reflection; at least the facts were there, and testified by the witnesses. However, the court charged in a general way that although the law provides that provocation causing sudden passion must arise at the time of the killing, and it is the duty in determining the adequacy of the provocation to consider in connection therewith all the facts and circumstances in evidence in the case, and if by reason thereof the defendant's mind at the time of the homicide was incapable of cool reflection, and that said facts and circumstances were sufficient to produce such state of mind in a person of ordinary temper, then the proof as to the sufficiency of the provocation satisfies the requirements of the law, and so they would consider the facts and circumstances in evidence in determining the condition of appellant's mind at the time of the killing, and the adequacy of the cause producing such condition. In view of the previous charge given, and the further fact that the court instructed the jury that the provocation must arise at the time of the com-

mission of the offense, and that the passion is not the result of former provocation, this latter charge was rather confusing than otherwise. Upon another trial a charge should be so framed as not to confine the attack by deceased upon appellant with an ax handle an hour and a half before the killing as a provocation occurring at the time, and cutting off their consideration of one of the producing causes, which was one of former provocation.

The court gave the following charge: "If you believe from the evidence in this case beyond a reasonable doubt that a short time prior to the alleged killing of the deceased by the defendant the deceased had assaulted the defendant, and you further find the deceased abandoned said assault and had quitted the combat, as far as he could, and you find that the defendant then under the immediate influence of sudden passion, which passion was produced by the assault of the deceased upon the defendant a short time prior to the shooting, the defendant fired upon and killed the deceased, and you find beyond a reasonable doubt that the defendant was not acting in self-defense as herein charged, then and in that event the defendant would be guilty only of manslaughter, and if you so find you will so say." We believe this charge is subject to the criticism that it required the jury to find affirmatively beyond a reasonable doubt that a short time prior to the killing deceased had assaulted the defendant, shifting the burden of proof as well as the reasonable doubt. Appellant did not ⁹⁸ have to prove beyond a reasonable doubt that the deceased had attacked him with an ax handle. The reasonable doubt is resolved in appellant's favor; and they were further required by this charge, in order to mitigate the homicide to manslaughter, to affirmatively find beyond a reasonable doubt that appellant killed deceased under the immediate influence of sudden passion produced by previous assaults. This charge, it occurs to us, placed the burden of proof on appellant and turned the reasonable doubt against him. The accused is entitled to the reasonable doubt of the existence of criminality in regard to facts when his life or his liberty is sought at the hands of a jury. We believe also that it was error to charge with reference to abandonment of the difficulty by the deceased. It would make no difference under the facts of this case, in regard to abandonment of the difficulty, as to whether deceased had abandoned the difficulty or not. There had been a difficulty, and it seems to have been brought on and carried to its final result by the deceased.

Painful wounds had been inflicted by deceased, and there was testimony tending to show that deceased had not abandoned it or quit his purpose of inflicting serious bodily injury on appellant. He had armed himself with a gun and went in the direction appellant had gone, and the testimony raises the issue that he was following appellant at the time they met. What the previous difficulty had to do with the case on the question of abandonment we do not exactly comprehend. The question of adequate cause and passion turned upon the facts, part of which hinged upon the previous difficulty, and the infliction of the punishment by deceased upon appellant. Whether he abandoned the difficulty or not, the adequate cause would be the same. This was a limitation on manslaughter theory, and in our judgment not warranted by the law. On these different propositions, see *Melton v. State*, 47 Tex. Cr. 451, 83 S. W. 822; *Green v. State*, 49 Tex. Cr. 645, 98 S. W. 1059; *Casey v. State*, 49 Tex. Cr. 174, 90 S. W. 1018; *Halsford v. State*, 53 Tex. Cr. 42, 108 S. W. 381, decided Dallas Term, 1908; *Bracken v. State*, 29 Tex. Cr. App. 362, 16 S. W. 192; *Bonner v. State*, 29 Tex. Cr. App. 223, 15 S. W. 821; *Hawthorne v. State*, 28 Tex. Cr. App. 212, 12 S. W. 603; *Bagley v. State* (Tex. Cr. App.), 103 S. W. 875; *Spivey v. State*, 30 Tex. Cr. App. 343, 17 S. W. 546, 45 Tex. Cr. 490, 77 S. W. 444.

In regard to threats, the court charged as follows: "Threats made by a deceased person against the life of a person accused of the murder of such deceased person while not communicated to defendant may be considered by the jury in ascertaining the condition of the mind of the deceased at the time of the homicide." This is a charge upon uncommunicated threats. In this connection the witness May testified that deceased came to him just before the killing and tried to get a gun. The witness Barron testified that after the ax handle assault, deceased said he was going to Ambolds and get a gun, and would run those negroes off the face of the earth; that he was getting too old to fight with his fists. Bartlett testified that shortly before the killing ⁹⁹ he saw a gun in deceased's buggy. Deceased said that they had had a scrap that day, and that he heard that they were ganging up for him on the other side of the river, and that if they showed fight he was going to drop them. That when he advised deceased to wait until the cool of the evening and his passion had subsided and avoid trouble, deceased said he was going over there. Holt testified that de-

ceased shortly before the killing tried to rent a gun from him, and that the witness refused to rent him the gun at first because deceased wanted the gun to shoot squirrels and wanted buckshot to shoot them. That deceased afterward got the gun and later actually got the buckshot shells. Costly testified that after the assault, before the killing, deceased in a conversation with him was very angry; that he referred to the ax handle trouble, and also a fight before that with appellant, and deceased said he was going to get a shotgun and fix Huddleston, appellant. The constable, Lee Jenkins, testified that a short while before the killing the deceased Thompson came by his office in the courthouse and said as he passed by, "Mr. Lee, I'm going out and you may have to come and get me." There are other witnesses, to wit, Ganor, Riddle and Thompson, who testified to facts showing that deceased Thompson had not seen appellant until at the time of the homicide, when the deceased had his gun drawn in a shooting position. This latter testimony was from the state's witnesses mentioned, the theory of the state being that appellant, therefore, began the difficulty at the time of the killing. Other witnesses testified for appellant, as did appellant himself, substantially, that deceased on sight of appellant threw his lines to his wife, grabbed his gun and attempted to get it into a shooting position, and succeeded in getting the muzzle as high as the dashboard, at which time appellant shot him. The charge quoted is the only one given in regard to uncommunicated threats. We think this was error: *Trotter v. State*, 37 Tex. Cr. 468, 36 S. W. 278; *Pitts v. State*, 29 Tex. Cr. App. 374, 16 S. W. 189; *Levy v. State*, 28 Tex. Cr. App. 203, 19 Am. St. Rep. 826, 12 S. W. 596. In Pitt's case it was held that uncommunicated threats are mainly admissible in evidence in cases of doubt as to who commenced the difficulty. In the Levy case it was held that uncommunicated threats were admissible and proper evidence for the purpose of showing that in all probability the deceased made the attack, and his purpose in so doing. In the Trotter case the court charged the jury that uncommunicated threats were to be considered as a circumstance tending to explain the acts of the deceased at the time of the killing, and as further circumstances tending to show whether or not deceased began the difficulty at the time of the killing; and it was further held that the omission of this part of the charge would have been error. It will be observed that the court in the charge given limited the effect of uncommunicated threats to an ascertain-

ment of the condition of the mind of the deceased at the time of the homicide. Appellant was on trial, not the deceased. The question of self-defense was in the case and uncommunicated threats were of decided importance in solving the question as to who began this difficulty. While uncommunicated threats ¹⁰⁰ would not justify because the appellant was not aware of such threats, yet it is a potent circumstance to be considered by the jury as to whether or not deceased began the attack that ended in the homicide. It was a very serious issue in the case as to who began the difficulty resulting in the homicide. This charge should not have been thus limited.

Upon another trial the court should also inform the jury as to the law in regard to communicated threats to the effect that if they were communicated, although not true, if appellant believed them true, and that deceased made them, he would be equally justifiable as if deceased had in fact made the threats. This issue is raised by the testimony, and the jury should have been properly instructed in regard to it, for in passing upon the issues of the case, where there is a contradiction of the testimony, some of which will show that threats were not in fact made, yet if appellant was so informed and believed the threats had been made, he was entitled to act the same as if they had been in fact made. The court failed to instruct the jury in regard to this phase of the law.

There are some other assigned errors in the case which we think are hardly of sufficient importance to require discussion.

For those indicated, however, the judgment is reversed and the cause is remanded.

The Law of Self-defense is discussed at length in the notes to State v. Gordon, 109 Am. St. Rep. 804; State v. Sumner, 74 Am. St. Rep. 717.

The Admissibility of Evidence of Threats in prosecutions for homicide is the subject of a note to State v. Nelson, 89 Am. St. Rep. 691.

EX PARTE KEELING.

[54 Tex. Cr. 118, 121 S. W. 605.]

HABEAS CORPUS—Inquiry into Corporate Existence.—A person in custody for violating a city ordinance cannot, on habeas corpus, inquire into the legality of the corporate existence of the city and the election and incumbency of its officers. Such attack can be made only by proceedings in the nature of quo warranto. (p. 886.)

MUNICIPAL ORDINANCE—Sufficiency of Enacting Clause.—An enacting clause to a municipal ordinance which follows the statute is sufficient. (p. 886.)

MUNICIPAL CORPORATION—Acquisition of Corporate Name.—A city may, by custom, usage and prescription, acquire a corporate name in fact, as where for more than thirty years it uses the name of "City of Calvert" in all official acts and proclamations; the addition of the word "Texas" occasionally or even continuously is immaterial. (p. 887.)

J. E. Bishop and Hudson & Wilson, for the relator.

F. J. McCord, assistant attorney general, for the state.

Lane & Woods and R. W. Purdom, for the respondent.

119 RAMSEY, J. The relator was arrested by C. R. Lovett, city marshal of the city of Calvert, on the thirteenth day of July, 1907, by virtue of a capias which purported to be issued by the corporation court of the city of Calvert. Relator sued out a writ of habeas corpus before the county judge of Robertson county, which was granted, and the hearing thereof set for the twenty-third day of July, 1907. On a hearing, relator was remanded to the custody of the city marshal.

1. The relator's assignment of error, and the only one, is as follows: "The court erred in remanding the defendant, H. A. Keeling, to the custody of C. R. Lovett, city marshal of the pretended city of Calvert, in this, because the complaint upon which the capias in this case is founded, and by virtue of which the defendant is held in custody, is illegal, null and void, and of no force or effect in law, because said complaint charges the defendant, H. A. Keeling, with the offense of violating a stock law ordinance of the pretended city of Calvert, Texas, which purports to have been passed and approved by the pretended mayor and city council of the pretended city of Calvert, Texas, on the 3d of July, 1907, when there does not exist in the law of the state of Texas any such municipal corporation known by the name of the city of Calvert, Texas, because said ordinance does not have prefixed thereto a proper or legal enacting clause,

and was not passed by any body of persons or officials, or any city council, or municipal corporation having power or authority to make complaints and issue warrants of arrest, or to pass ordinances governing any municipal corporation known to the law of the state of Texas, because said complaint purports to have been made by the city marshal of the city of Calvert, and said ordinance purports to have been passed and approved by the mayor and city council of the city of Calvert, Texas, when there is not now and never was a municipal corporation known to the law of the state of Texas by the name of the city of Calvert, Texas." It appears from the evidence that in 1871 the city of Calvert was incorporated by the legislature of the state of Texas. The act of incorporation purports to be an act to incorporate the city of Calvert, in Robertson county, and by its terms ordains that the inhabitants of the city of Calvert, in Robertson county, shall be and they are declared a body politic and corporate under the name and style of the "Mayor, aldermen and inhabitants ¹²⁰ of the city of Calvert," and provides that they shall be known in law by this name and shall have the usual powers of corporations. On the eighth day of May, 1896, the city council of Calvert passed an ordinance accepting the provisions of the Revised Statutes of Texas relating to cities, in which, in substance, it was decided to surrender the special charter of the city and to operate under the general laws of the state. By this ordinance, however, it was provided that they were to retain the corporate name the "Mayor, aldermen and inhabitants of the city of Calvert." The particular ordinance under which relator was arrested contained an enacting clause as follows: "Be it ordained by the city council of the city of Calvert, etc.," and was approved on the third day of July, 1907. The testimony showed, without dispute, that Calvert had been called and known by the name "City of Calvert," and all ordinances and resolutions passed and adopted had been in the name of the "City of Calvert," and that for many years all elections had been held, all the officers elected, all taxes levied and collected, all bonds issued, all trials had and fines imposed and collected, all ordinances promulgated by authority of the mayor and city council of the city of Calvert, and all mail addressed to Calvert, Texas; that all freight and express shipped to persons in said municipal corporation is shipped to Calvert, Texas; and the depot is known as Calvert, Texas, and the postoffice is known as Calvert, Texas. Its existence

and status as a municipality is shown to have been recognized without dispute for quite thirty years. The ordinance is claimed to be invalid, in the first place, because it is urged that its principal officers were not elected, and its laws have not been enacted under the name of the "Mayor, aldermen and the inhabitants of the city of Calvert," and for the reason that the addition of the word "Texas" after the name "City of Calvert" is, in addition thereto, unknown to its creation, and in fact forms no part or parcel of its real name. We think that relator was properly remanded, and that in such proceeding as this the legality of the corporate existence of the city of Calvert, and the election and incumbency of its officers cannot be inquired into in any such proceeding, but the only way that such an attack could be made would be in the nature of quo warranto proceedings: Rev. Stats. (Civil), art. 4343; *Brennan v. Bradshaw*, 53 Tex. 330, 37 Am. Rep. 758; *White v. Quanah* (Tex. Civ. App.), 27 S. W. 839; *McCrary v. Comanche* (Tex. Civ. App.), 34 S. W. 679; *Higgins v. Bordages* (Tex. Civ. App.), 28 S. W. 350; *Eustis v. Henrietta* (Tex. Civ. App.), 37 S. W. 632; *Troutman v. McClesky*, 7 Tex. Civ. App. 561, 27 S. W. 173; *State v. Birch*, 186 Mo. 205, 85 S. W. 361; *State v. Huff*, 105 Mo. App. 354, 79 S. W. 1010; *Town of Decorah v. Gillis*, 10 Iowa, 234; *Town of Frederickton v. Fox*, 84 Mo. 59; *Judson v. Platsburg*, Fed. Cas. No. 7570, 3 Dill. 181; *Harris v. Nesbit*, 24 Ala. 398; *Hamilton v. City of Carthage*, 24 Ill. 22; *Tisdale v. Town of Minonk*, 46 Ill. 9; *Louisville etc. Ry. Co. v. Shires*, 108 Ill. 617; *City of Billings v. Dunnaway*, 54 Mo. App. 1; *City of Clarence v. Patrick*, 54 Mo. App. 462; *State v. Whitney*, 41 Neb. 613, 59 N. W. 884. We think there is no valid objection to the enacting clause, and hold that same is ¹²¹ not subject to attack. Article 559, Revised Statutes, provides that the style of all ordinances shall be, "Be it ordained by the city council of the city of ——" (inserting the name of the city). The enacting clause in this case follows the statute literally. According to relator's contention, to have made the enacting clause valid it should have read, "Be it ordained by the city council of the city of the 'Mayor, aldermen and inhabitants of the city of Calvert.'" We think, in any event, such mere literalism is not to be seriously treated. Again, we think the due arrest and detention of relator might be upheld on the proposition that the city of Calvert has for more than thirty years continuously used the name of the "City of Calvert" in all the official acts and proclamations, and has by custom, usage and prescription

acquired said corporate name in fact: 7 Am. & Eng. Ency. of Law, 2d ed., 685, b (2), and p. 685 (3); Brennan v. Bradshaw, 53 Tex. 330, 37 Am. Rep. 758; Town of Henderson v. Davis, 106 N. C. 88, 11 S. E. 573; West v. City of Columbus, 20 Kan. 633; State ex rel. Chandler v. Huff, 105 Mo. App. 354, 79 S. W. 1010; 20 Am. & Eng. Ency. of Law, 2d ed., Municipal Corporations, 11, p. 1143, and notes. Nor do we think that the addition of the word "Texas" occasionally, or even continuously, would make any difference. This word would be merely descriptive of the locus of said corporation, and would not alter its corporate name or affect its legality, and that the use of the name "City of Calvert" continuously for all these years in all its official acts and proclamations substantially estops said corporation and all of its members from questioning the legality of said corporate name. From what has been said, it follows that we think the arrest and detention of relator was under color of authority, in any event, and that he is without remedy by writ of habeas corpus, and he is therefore remanded to the custody of the city marshal.

The Question When a Prisoner may be Released on Habeas Corpus after judgment and sentence is considered in the note to Koepke v. Hill, 87 Am. St. Rep. 177. His right to attack the legal existence of the court which sentenced him is considered on page 177 of this note, and in the case of State v. Bailey, 106 Minn. 138, ante, p. 592.

HUNTER v. STATE.

[54 Tex. Cr. 224, 114 S. W. 124.]

HOMICIDE—Res Gestae—Competency of Witness.—Where the daughter of the deceased was near the scene of the homicide, heard the shots, ran to the place, and found her brother (who was ten years of age and has since died from his wounds) standing there, his reply to her question as to who did the shooting is admissible as part of the *res gestae*, and his competency as a witness if he had lived is immaterial. (p. 888.)

HOMICIDE—Evidence of Threats and Abuse.—In a homicide case the declaration of one of the defendants, who co-operated in the crime, made five or six days before the homicide, in which he threatened and abused the deceased, is admissible as showing inferential malice. (p. 889.)

HOMICIDE—Opinion as to Report of Gun.—A witness who testifies that he has heard guns fired and can tell the difference between the report of a Winchester and a shotgun may give his opinion

as to what kind of a gun was used in firing shots which he heard at the time of a homicide. (p. 890.)

HOMICIDE—Opinion as to General Character of Deceased.—While it is permissible to prove the general character of the deceased in a prosecution for homicide in which the right of self-defense is interposed, a witness may not state whether the deceased was a man likely to resent with violence an insulting message sent him by the accused. (p. 890.)

HOMICIDE.—To Make a Dying Declaration Admissible, it is not necessary that the deceased should indicate that he is going to die in an hour or in a few hours; but he must be conscious of impending death. (p. 892.)

HOMICIDE.—The Dying Declarations of a Boy Ten Years of Age are admissible. (p. 892.)

INSTRUCTIONS.—The Court may Decline to Give a Requested Instruction on impeaching testimony when its general charge on the question sufficiently covers the case. (p. 893.)

C. K. Walter and J. W. Rainbolt, for the appellant.

F. J. McCord, assistant attorney general, for the state.

225 BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at five years' confinement in the penitentiary.

Ollie Van Dorn, the deceased, and his father were in a wagon. **226** Appellant and his father, Tom Hunter, met the Van Dorns in the road, and a difficulty arose in which the Hunters killed deceased and his father.

Bill of exceptions No. 1 shows that Lorena Van Dorn was permitted to testify that she was picking cotton in her father's field on the evening of the difficulty and heard the shots. That she was about one hundred yards from the scene of the difficulty, and that when she heard the shots she immediately ran to the scene and saw Tom Hunter and defendant with guns in their hands running toward the house. That her father was lying in the wagon unconscious, and that her brother, Ollie Van Dorn, was standing in the wagon, and that she did not know at this time that he had been shot, and that she asked Ollie who did that and he replied, "Tom and Boone Hunter did it; they rose up from behind the gate as we were coming down the road and killed papa." That at that time her brother was ten years of age, had never been in court; had never been to school, but had been going to Sunday-school since he was three years of age, and that he was a boy of average intelligence for that age, and that he was now dead. This testimony was, in the first place, *res gestae*, and the question as to the competency of the witness is immaterial, as held by this court in the case of *Croomes v. State*, 40 Tex. Cr. 672, 51 S. W. 924, 53 S. W. 882.

Bill of exceptions No. 2 shows that George Mills, over objection of appellant, stated that about five or six days before the fatal difficulty in which D. M. Van Dorn and Ollie Van Dorn lost their lives, that he was at the home of Tom Hunter, codefendant of this defendant, and that Tom Hunter asked him where Van Dorn carried his cotton to gin, and that he told him to Greer's gin; and that Tom Hunter then told him to tell "'Old Cud' and 'Kinky' that the dogs had fucked their mammies, and that they would do the same thing if they had the chance, and that anyone who was a friend to them was a son-of-a-bitch, and for him to tell 'Old Cud' Van Dorn that he said that." Appellant objected to the testimony on the ground that same was not a threat, and was immaterial and irrelevant, and was highly prejudicial to the defendant, and was not admissible upon any theory of the case. This testimony showed animus on the part of appellant's codefendant; appellant having subsequently co-operated with him in the wanton killing, the same was admissible to show inferential malice on the part of appellant toward deceased. The testimony shows clearly it alluded to, and had reference to, the deceased.

Bill of exceptions No. 3 shows that George Mills testified that he resided about one mile from the home of the defendant and from the place where the difficulty had occurred which resulted in the death of the deceased, and that he was at home on the day on which it occurred, and that he heard a number of shots in the direction ²²⁷ of the place where the difficulty occurred, and that from the sound of firing there were three different characters of reports, some being louder than the other, and that the first two shots were not as loud as the loudest, but sounded louder than the report of the third gun. That he had heard guns fire and could tell the difference between the report of a Winchester and a shotgun. The witness was then asked by the prosecution what in his opinion, judging from the sound of the different reports, was the kind of gun that fired the first two shots, and what kind of a gun was used in firing of the other shots. Appellant objected on the ground that witness had not qualified as an expert in the sounds of different characters of firearms, and that the answer sought to be elicited would be but an opinion and conclusion of the witness, and that this question was one for the jury to determine from all the circumstances and testimony in the case. Thereupon the court overruled the objection, and the witness testified: "The first two shots sounded like the report of a shotgun and the other shot following sounded like rifle

shots made from a large rifle, and a smaller one mixed with shotgun report." The witness had testified that he had heard guns fire and could tell the difference between the report of a Winchester and a shotgun. This testimony was admissible.

Bill of exceptions No. 4 shows appellant placed A. A. Talley upon the stand and propounded to him the following question: "From your knowledge of the reputation of the deceased, D. M. Van Dorn, was he a man who would likely resent in a violent manner upon the person of the sender of a message purporting to have been sent to him by Tom Hunter to the effect that the dogs had fucked his mammy; that he would do the same thing if he had a chance, and that anybody who was a friend to him was a son-of-a-bitch, if such message had been actually delivered to him by a third party as coming from the said Tom Hunter." The object and purpose of said question being to corroborate the witnesses for the defendant that deceased, D. M. Van Dorn, fired the first shots which precipitated the difficulty, and ended in the death of said D. M. Van Dorn and his son, Ollie Van Dorn, the defendant being charged with the murder of the latter, and the latter's death being by the defendant claimed to be accidental and received while the defendant and the father were defending themselves against an attack upon them by D. M. Van Dorn. The prosecution objected to the question on the ground that same was immaterial and irrelevant, and not the statutory mode of showing the character of the deceased, and it was not permissible to show it in any other manner. The court sustained the objection. The witness would have testified, if permitted, that he was a man who would likely resent in a violent manner upon the person of the sender of such a message the first time he saw him. Appellant offered to prove the same fact by other witnesses. This testimony²²⁸ was not admissible. It is always permissible to prove the general character of the deceased, but to put hypothetical cases like the one above propounded is not authorized by the rules of this court.

Bill of exceptions No. 5 relates to the testimony of Earl Van Dorn, which proves the dying declarations of his brother, Ollie Van Dorn, but we notice the bill is not approved by the judge, and, therefore, cannot be considered.

Bill of exceptions No. 6, however, relates to the same matter mentioned in Bill No. 5. Earl Van Dorn having testified to the dying declarations, appellant moved the court to exclude and strike from the record the testimony of the witness, Earl Van Dorn, which testimony was as follows: That

he was a brother of the deceased, and that he saw deceased at the house of his father about four hours after the difficulty and between 8 and 9 o'clock of the same evening; that the mind of the deceased was clear; that he was about ten years of age, had never been to school, but had been to Sunday-school; that the deceased had never known of a death previous to this; that he never expressed any hope that he would get well, but all along stated that he thought he would never get well, but that he did not say when he thought he was going to die; that he, witness, told him all along that he thought he would get well; that the doctors did not tell him he was going to die; that about thirty-six hours after the statement was made, the doctors operated on him, by amputating his leg at the thigh; that he never fully recovered from the operation and died about five hours after the completion of the operation; that he informed deceased that the doctors desired to operate on him, and that he, witness, told deceased he thought he would get well if he was operated upon, and that deceased consented to the operation; that he, witness, did not think he was going to die at the time the statement was made; that he was in the room alone with deceased when the statement was made and no one else was present, although there were a number of people and two doctors at the house at the time and in and out of the room at intervals, and that Ollie Van Dorn then stated to him without having been asked any questions that he desired to make a statement to him about the difficulty, that he knew that he was going to die, and that then he made the following statement: "Papa and I were coming down the road on our way home from the gin, and I saw Tom Hunter and Boone Hunter and said, 'Papa, there are Tom and Boone Hunter, and they are going to kill you,' and papa said, 'No, they are not,' and we drove on, and when we got closer to the gate, Tom Hunter said to papa 'Stick up your damn head; I want to shoot it off,' and the Hunters began firing on us; then papa shot, then they shot; then papa shot, then they shot; then the Hunters shot again; papa fell back in the wagon, and then Tom Hunter said to Boone Hunter, 'Don't let the little ²²⁹ son-of-a-bitch get away, shoot him.' and that then Boone Hunter came out in the road and shot at me twice and missed me, and then came to the back of the wagon, stuck his gun through the back and between the end boards and shot me." Appellant asked that this testimony be excluded for the following reasons: That it was not shown that the deceased would have been a competent witness if alive at that time; and that it was not shown at the time such

statement was made that deceased was in danger of approaching or immediate death, or that he was conscious of such approaching death as is contemplated by the statutes when such statements may be made—that is, first, that the death of the declarant was imminent; second, that he was so fully aware of this as to be without any hope of life; and third, that he was not sufficiently clear in his mind. The other testimony in the record by the witness for the state, Dr. Dawe, being as follows: “I attended the deceased a few hours after the difficulty; arrived there about 6 or 7 o’clock and did not leave till 10 or 11 o’clock; his mind was clear. Dr. Davie and I placed the injured limb in a plaster and decided to wait till next day to make thorough examination. He was suffering from a wound in the right thigh and slight wound in the left thigh, but could not tell the extent of the injury at that time. We examined him next day and concluded his thigh bone was fractured and that an amputation was necessary. We amputated his right leg at the thigh and he died about five hours after the operation. I did not tell the boy he was going to die, but told him I thought he would get well, and he consented to the operation.” We think this testimony was admissible. Under the authorities of this court, it is not necessary, in order to make a dying declaration admissible, that deceased should indicate he is going to die in an hour or a few hours, but the authorities hold that he must be conscious of impending death. The circumstances in this case show clearly that the boy was conscious of impending death. The character of his wounds and all the surroundings indicate that he had just basis for believing this, since the doctor testified that only about fifty per cent of those who have the leg taken off at the hip ever get well. There is nothing in the above-recited bill to show a lack of intelligence, but it shows a clear, logical and succinct statement for a boy of ten years of age. The fact that the boy was only ten years of age would not preclude the testimony. Where the facts, as they do here, show clearly that degree of intelligence that this bill manifests, the testimony of a child is admissible. We accordingly hold that the court did not err in refusing to exclude the testimony.

Bill of exceptions No. 7 shows while state’s counsel was addressing the jury the following statement was made: “Every witness in the case that has been put upon the stand by the defendant has helped ²³⁰ the state’s case; the proof of Mrs. Hunter, witness for the defendant in this case, being that her children were not picking cotton at the time of the difficulty,

and that none but the participants saw the beginning of the difficulty." Thereupon the defendant requested the court to give in charge to the jury the following charge: "You are charged that you will not consider any testimony in this case tending to show that Mrs. Hunter had told others that none but the participants saw the beginning of the difficulty, as proof of such fact, as such testimony was admitted only for the purpose of impeachment." This charge the court declined to give; but the court did give the following charge in reference to impeaching testimony: "Witnesses may be impeached by showing that they have made other and different statements out of court from those made before you on the trial. You may consider such impeaching evidence, as it may tend to affect the weight to be given the testimony of the witnesses so impeached, and their credibility; but such impeaching evidence is not to be considered by you as tending to establish the alleged guilt of the defendant or any fact in the case." This general charge on impeaching testimony sufficiently covered appellant's complaint.

Bills of exceptions Nos. 8 and 9 relate to similar impeaching matter, which impeaching testimony, as stated, was covered by the main charge.

The charge of the court is a very proper and accurate presentation of all the law applicable to the facts of this case, and the evidence amply supports the verdict, and the judgment is in all things affirmed.

The Competency of Children as Witnesses is the subject of a note to State v. Meyer, 124 Am. St. Rep. 295.

Admissibility of Evidence of the Character or Reputation of the deceased in homicide cases is the subject of a note to State v. Thompson, 124 Am. St. Rep. 1018.

The Admissibility in Evidence of Dying Declarations is the subject of a note to State v. Meyer, 86 Am. St. Rep. 637. To render such declarations admissible it is necessary only that they be made after the infliction of a mortal wound, after hope of recovery has been abandoned by the declarant, and after he has realized that death is impending: Sims v. State, 139 Ala. 74, 101 Am. St. Rep. 17; Craven v. State, 49 Tex. Cr. 78, 122 Am. St. Rep. 799; Jones v. State, 52 Tex. Cr. 303, 124 Am. St. Rep. 1097. If the deceased is suffering from a mortal wound at the time of making a statement as to the circumstances surrounding the affray, and his physician advises him that his case is hopeless and that he will probably die under an anesthetic about to be administered before an operation is to be performed, and he dies a few moments later, such statement is admissible in evidence as a dying declaration: State v. Thompson, 49 Or. 46, 124 Am. St. Rep. 1015.

The Question of Res Gestae is discussed in the note to People v. Vernon, 95 Am. Dec. 51. Res gestae are those circumstances which are the automatic and undisguised incidents of a particular litigated fact, and which, in contemplation of law, are a part of the act itself.

To render circumstances and declarations a part of the *res gestae*, they generally must be substantially contemporaneous with the occurrence, but they need not be concurrent therewith: *State v. Miller*, 73 S. C. 277, 114 Am. St. Rep. 82, and cases cited in the cross-reference note thereto; *Taylor v. State*, 47 Tex. Cr. 122, 122 Am. St. Rep. 678; *Craven v. State*, 48 Tex. Cr. 78, 122 Am. St. Rep. 799. In fact, time is not necessarily a controlling consideration: *State v. Foley*, 113 La. 52, 104 Am. St. Rep. 493, and cases cited in the cross-reference note thereto.

HUDSPETH v. STATE.

[54 Tex. Cr. 371, 112 S. W. 1069.]

LARCENY.—Where a Man has Sold His Wife's Personal Property without her consent, acquiescence or knowledge, no title passes to the purchaser, and there can be no theft of the property from him. (p. 895.)

Wm. McDonald, for the appellant.

F. J. McCord, assistant attorney general, for the state.

371 **BROOKS, J.** Appellant was convicted of theft of cattle, and his punishment assessed at two years' confinement in the penitentiary.

The only question we deem necessary to pass upon is the sufficiency of the evidence. The state's evidence shows that appellant sold a cow and calf for some household furniture to the prosecuting witness. The cow and calf, at the time of the sale, were in a field at the home place of appellant; various head of cattle were also in the field. The state's evidence further shows that appellant subsequently, with the consent of his wife, sold the cow and calf in question to a third party. Upon this state of facts the state rests its conviction for theft, on the part of appellant, of the cattle. The defense testimony shows that the cattle in question belonged to the wife; that she never had given her consent for the cattle to be sold to the prosecuting witness Howard. Appellant also swears that he did not sell the animals in question to the prosecuting witness. Appellant admits he bought some furniture from prosecuting witness, for which he still owed him. The wife admits the furniture was brought to her house. So the above is, in substance, the evidence in this record.

372 We therefore have a case, from the state's standpoint, of a sale by the husband of the wife's personal property without her consent, acquiescence or knowledge. There must be

in law an affirmative or at least a clear ratification of an unauthorized sale by the husband on the part of the wife of her property before there could be any valid sale, or there must be an express authority given the husband by the wife to sell the property. The above detailed facts do not show either express authority or ratification. In the case of *Magee v. White*, 23 Tex. 180, in passing upon a similar question, the supreme court of this state used the following language: "The husband may be her agent to make a contract that will bind her separate estate, but it is not to be presumed that he is her agent because he is her husband. The agency must be an agency in fact and not a thing to be presumed because of the relation of husband and wife." This decision has been followed by a long line of decisions of the supreme court; among others, *Gossard v. Lea*, 3 Tex. Civ. App. 6, 21 S. W. 703. See, also, *Owen v. New York & Texas Land Co.*, 11 Tex. Civ. App. 284, 32 S. W. 189, *Hamilton v. Brooks*, 51 Tex. 142, and *Kempner v. Comer*, 73 Tex. 196, 11 S. W. 194.

The evidence showing, as above suggested, that the husband had no legal right to sell the wife's cattle, then no title passed to the prosecuting witness by such supposed sale, even conceding that said sale took place. There being no legal sale to the prosecuting witness of the cattle, in the nature of things appellant could not steal the cattle from the prosecuting witness. It follows, therefore, that the evidence is wholly insufficient to support this conviction.

The judgment is therefore reversed and the cause is remanded.

The Crime of Larceny is discussed at length in the notes to *People v. Miller*, 88 Am. St. Rep. 559; *State v. Homes*, 57 Am. Dec. 286. Under a constitutional provision to the effect that all property of any feme covert in this state acquired before or after marriage, whether by gift, grant, inheritance, devise, or otherwise, shall, so long as she may choose, be and remain her separate estate and property, a husband may be guilty of larceny of his wife's personal property: *Hunt v. State*, 72 Ark. 241, 105 Am. St. Rep. 34.

COLEMAN v. STATE.

[54 Tex. Cr. 401, 112 S. W. 1049.]

LIQUORS—Illegal Sale by Mistake.—In a Prosecution for a violation of the local option law, it is proper to charge the jury that if the defendant intended to deliver ino, but through mistake and with no want of proper care delivered beer to the purchaser, he should be acquitted. (p. 896.)

Woodward & Baker, for the appellant.

F. J. McCord, assistant attorney general, for the state.

402 BROOKS, J. Appellant was convicted for violating the local option law, and his punishment assessed at a fine of fifty dollars and fifty days imprisonment in the county jail.

Appellant was indicted for selling whisky to W. E. Edgerton. The witness Edgerton testified that he, in company with a man named Dickinson, about sundown, drove up to the clubhouse of appellant, and found him sitting in front of the door and the house was locked. Dickinson asked appellant if he had anything to drink. Appellant replied, "Yes, if you have got the money." The witness and Dickinson were in a buggy at the time. Dickinson said he did not have any money but that Edgerton had a check-book, and asked if that would do. Appellant replied, "Yes," and the witness and defendant went into the house and defendant delivered to him six bottles of Budweiser beer, for which the witness gave him a check on the First National Bank of Coleman, Texas, for ninety cents. Appellant's defense was that he had ino and beer in the same ice-box and that he kept the beer on one side and the ino on the other; that the beer was intoxicating and ino was not, and that by mistake he delivered the witness beer for ino, but that he intended to deliver him ino, and that he did not intend to sell him the beer. The court in substance charged the jury that if appellant intended to deliver ino and through mistake delivered him beer, and that the same grew out of no want of proper care on his part, that they should acquit the appellant. Appellant asked a special charge to the effect that if the liquor delivered by appellant was Budweiser, but appellant thought or through a mistake delivered to said Edgerton the same under the belief that he was delivering ino, they would acquit. The statute provides that in order for a man to avail himself of a mistake of fact, the same must arise from no want of proper care. We think the charge was correct, and there was no error in refusing appellant's special charge.

⁴⁰³ Appellant insists there is a variance in the proof, and that the sale was made to Dickinson and not to Edgerton, but we do not see proper to set this matter out in detail, but suffice it to say the evidence clearly shows that the sale was made to Edgerton. He received the goods and paid the check for same.

Various other matters are urged, but we do not deem it necessary to discuss them further in this opinion. For a further discussion of them see *Coleman v. State*, 54 Tex. Cr. 234, 112 S. W. 769, decided at last Austin term.

Finding no error in the record, the judgment is affirmed.

On a Prosecution for the Violation of a Local Option Law, testimony is admissible, according to *Reed v. State*, 53 Tex. Cr. 4, 126 Am. St. Rep. 764, that the defendant believes the beverage sold was not intoxicating. But according to *Haynes v. State*, 118 Tenn. 709, 121 Am. St. Rep. 1055, ignorance that liquors are intoxicating constitutes no defense or excuse for their unlawful sale. The seller must know at his peril whether or not they are intoxicating, and his belief that they are not, however honest, and resulting from a guaranty under which he bought them, is no excuse.

GRANT v. STATE.

[54 Tex. Cr. 403, 112 S. W. 1068.]

LOTTERY—Suit Club.—A Tailor Carries on a Lottery where he conducts a suit club, whose members each pay a dollar a week and participate in a drawing every Saturday, at which the one getting a certain number receives a suit of clothes, the members being entitled to credit on merchandise for the amounts paid in, and the lucky ones having the privilege of withdrawing. (p. 900.)

No brief for the appellant.

F. J. McCord, assistant attorney general, J. A. Thomas and C. E. Debois, for the state.

⁴⁰³ **BROOKS, J.** Appellants were tried together before the court without the intervention of a jury, and the punishment of each defendant assessed at a fine of one hundred dollars for carrying on a lottery.

⁴⁰⁴ The evidence in the case is as follows: Sid Grant, one of the defendants, after being duly sworn, testified: "I have lived in San Angelo, Texas, about two months. My partner and I, Sid Terry, have been engaged in the business of cus-

tom tailors at San Angelo for about two months. I am one of the defendants in this case. The other defendant is my partner, Sid Terry. We have established a suit club in our tailoring business, which club numbers fifty-two. It is necessary for each member of the club to pay one dollar a week for twenty-six weeks to become a member of the club. The club has a drawing every seven days, on each Saturday night. In the drawings all of the fifty-two members are interested. The club runs for twenty-six weeks and one suit is disposed of at each drawing. All of the members pay one dollar per week. The member drawing a suit of clothes may remain in and pay his dollar or he may withdraw from the club, in which event we seek to get another member in his place, and the retiring member is no longer considered a member of the club. If we could not get a new member, the drawings continue with the remaining numbers. We value the suit of clothes which is drawn at twenty-six dollars, and the suit is worth that amount of money. The right to participate in the drawing costs one dollar, which amount is the week dues of each member. We have had drawings every Saturday night for the past two months, at each of which drawings one of the members drew a suit of clothes. We had a drawing on Saturday, March 7, 1908, at which Jno. Holcomb, one of the members of the club, drew a suit of clothes. He has not yet received the suit of clothes because there was some delay at the factory. We took his measure, and after sample being selected by him, sent the order to Meyer & Co., at Chicago, to be made up. The suit of clothes was not present at the time of the drawing. This is the manner in which all suits are made and delivered to the successful party at each drawing. These drawings come off at our place of business. We are also custom tailors and sell suits to any customer who wants them, by selecting sample, taking measure, and sending them off to be made at some tailoring establishment. We have a room, which is our place of business, in the city of San Angelo, where we take the orders for suits of clothes. The manner and mode of our drawing is as follows:

“We have checks numbered from 1 to 52, which are put into a bag and are shaken by some interested party—that is, a member of the club—and one check is drawn from this bag by a disinterested party; that is, a person who is not a member of the club. Each check is identified by the number on it, and when the check is drawn, the member having the corresponding number is the successful party. We take the member's application for membership, and at the same time the

member pays his dollar and enters the club we give him a number. We furnish the checks for the drawings and keep possession of the same from one drawing to another. 405 When the night of the drawing arrives, the members come to our place of business, or at least six or seven of them, when one of the members present either goes and gets the bag containing the checks, or we deliver to him the bag when called upon, and the same is shaken and the drawing takes place as I have stated before.

"If a member has remained in the club and paid his dollar for one week or more, he is entitled to credit for the amount he has paid in. Any member may withdraw at any time he desires, and at the time he withdraws he is entitled to a credit of the amount he has paid in, to be paid to him by us in merchandise. That is, he may buy a suit of clothes, an overcoat, or a pair of pants, for the regular purchase price and receive a credit for the amount that he has paid in. The suit of clothes that was drawn and disposed of to John Holcomb on Saturday, March 7, 1908, was so disposed of in pursuance to the scheme that I have just told the court. It is not optional with us to discontinue a member at any time without his consent if he makes his payments.

"In starting our club, we solicited the members. We had a piece of foolscap paper with numbers on it from 1 to 52, and when the person would become a member, we would write his name on the paper and give him a number; each person joining the club paying one dollar. On Saturday night we check up to see whether the members have paid, and when we get that fixed up and get our books fixed, we take out the membership and look over that and see whether the club is filled. We then wait for the members to come in, and wait generally until six or seven come, to see that everything is fair. We put the checks into a bag, but we have nothing to do with the drawing of the number, nor has anyone in our employ anything to do with the drawing. The drawing then takes place, as I have before stated. When the number is drawn out, it is shown to us, or one of us. We then refer to the corresponding number and the party holding the same is entitled to a suit of clothes, to be selected from our samples. We then take his measure after the party has selected the kind of cloth and style, and mail to our tailors to be made up. If upon any Saturday night all of the fifty-two numbers are not taken, we then take from the bag as many checks as the club is short, and the numbers are taken out to correspond with the numbers not taken, and the drawing then takes place

by us putting all the numbers which are taken by the members into a bag and one of them is drawn by a disinterested party. The party drawing has no means of ascertaining what number he is to draw. We have no way of controlling which number the successful party draws, nor have either of us any interest in which one of the members is successful. We give a suit of clothes at each drawing. If the successful party drawing the suit of clothes is not present, we then notify him that he has drawn a suit so that he may come in and have his measure taken. He has the right to ⁴⁰⁶ select from about four hundred samples which we have in our place of business. Mr. Holcomb has selected his suit of clothes, and we have taken his measure and sent his order off to be made up. My partner and myself, nor anyone connected with us, have anything to do with the drawings, do not take any number, nor participate in any manner in same, except as above testified to. There are no blanks in the drawings. No drawings are determined by means of dice or a wheel. When the twenty-six drawings have taken place, there have been twenty-six members drawn a suit of clothes, and when a member has paid in as much as twenty-six dollars, he is entitled to a suit of clothes, if he has not been successful at a drawing. If new members have been taken into the club before the twenty-six drawings are completed and paid in different amounts, they become members of a new club. We keep fifty-two members in a club. The club is a continuous proposition."

Under this evidence we are thoroughly convinced, and so hold, that the appellants are both guilty of conducting a lottery within the contemplation of the law of this state, and have clearly violated both the letter and the spirit of the lottery statute. In the case of *Randle v. State*, 42 Tex. 580, the supreme court of this state approved the following charge of the trial court: "If the jury believe defendant did, as charged in the indictment, dispose of money or property by lottery, in prizes distributed by chance, according to a specified scheme or plan, then the jury would be authorized to find a verdict of guilty, and assess the punishment by fine not less than one hundred, nor more than one thousand, dollars. That each and every drawing, where money or property is offered as prizes to be distributed by chance, according to a specified scheme or plan, and a ticket or tickets sold, which entitle the holder to money or property, and which is dependent upon chance, is an offense. That it made no difference whether every ticket entitled the holder to a certain sum or not, if there is an additional sum dependent upon the dis-

tribution by chance over the certain sum, and that it makes no difference by what name it is called, but it is the distribution or offer to distribute the prizes in money by chance, to induce persons to buy tickets therein, and the sale of tickets, and drawing of the numbers, which constitute a lottery, and an offense against the law." This definition clearly covers appellants' offense, and places their acts within the statute which defines a lottery: See Pen. Code, art. 373; 25 Cyclo-pedia of Law, p. 1639, subd. 8; *People v. McPhee*, 139 Mich. 687, 103 N. W. 174, 69 L. R. A. 505; *State v. Randle*, 41 Tex. 292, and *Barry v. State*, 39 Tex. Cr. 240, 45 S. W. 571.

We accordingly hold that the judgment of the lower court is correct, and it is therefore in all things affirmed.

Lottery.—*A Suit Club Whose Members Pay to a Tailor One Dollar Per Week*, and who hold weekly drawings for thirty weeks, the member drawing a certain number receiving a suit of clothes and then ceasing to be a member, and the last member who pays for thirty weeks being entitled to a thirty dollar suit of clothes, regardless of the drawings, is a lottery: *De Florin v. State*, 121 Ga. 593, 104 Am. St. Rep. 177.

SOMERS v. STATE.

[54 Tex. Cr. 475, 113 S. W. 533.]

CRIMINAL TRIAL—Testimony of Absent Witnesses.—On a trial for theft from the person the testimony of witnesses residing without the state, taken on the examining trial, is admissible if a sufficient predicate has been laid. The constitutional guaranty that the accused shall be confronted with the witnesses against him is not thereby violated. (p. 902.)

CRIMINAL TRIAL—Testimony of Absent Witnesses.—Upon a trial for theft from the person the testimony of witnesses residing out of the state, taken in an examining trial before a magistrate on a charge of a different offense, is not admissible. (p. 903.)

A. Winslow, W. S. Anderson and Samuel Belden, for the appellant.

F. H. McCord, assistant attorney general, for the state.

476 **RAMSEY, J.** Appellant was indicted in the district court of Webb county on a charge that he did on the twenty-first day of March, 1908, fraudulently and privately take from the possession of one Fritz Boehler one pocketbook of the value of twenty dollars. On trial he was convicted, and his

punishment assessed at confinement in the state penitentiary for a term of two years.

A number of reasons are assigned why the judgment of conviction should be set aside and the cause reversed. Some of these questions relate to matters which are not likely to arise on another trial of the case, and in view of the fact that it is to be reversed, we shall discuss only the matters hereinafter referred to.

Counsel for appellant urge that the court erred in admitting in evidence the testimony of Christine Schneider and John Schneider, who were alleged to be nonresidents of the state. This testimony was objected to for many reasons. Among others, that the absence of these witnesses and their residence beyond the state were not sufficiently proven. We think in view of the fact that it was shown that these witnesses at the time of the alleged theft were passing through Laredo, that their residence was Cleveland, Ohio, and that they were bound on a pleasure trip to Monterey, Mexico, in connection with the testimony of the district attorney that he had written a letter to John Schneider, to the address given him by said witness, at Cleveland, Ohio, and that he received a reply from him in substance and to the effect that he would be unable to attend the trial, furnish a sufficient predicate for the admission of the testimony taken on the examining trial, if the same had otherwise been admissible. The general objection is made that the court erred in admitting said testimony, for the reason that same is in contravention of section 10 of the Bill of Rights in this state, which guarantees that every person shall be confronted with the witnesses against him. On full consideration this question was decided adversely to the contention of appellant in the case of *Earl Hobbs v. State*, 53 Tex. Cr. 71, 112 S. W. 308. This further additional objection was made, however, which we think must be sustained: Because the admission of said written testimony of these witnesses by the ⁴⁷⁷ court was error, because said testimony was given by them before a justice of the peace of Webb county holding an examining trial for an offense where appellant was charged by affidavit with the theft of property, to wit: One diamond stud from the possession of John Schneider, which said charge and case is a different and distinct transaction from the one in which this defendant was on trial and of which he was convicted, to wit: The theft of one pocketbook and twenty dollars from the person of Fritz Boehler. We think the rule ought not to be extended beyond that laid down in the case of *Hobbs v. State*, 53 Tex.

Cr. 71, 112 S. W. 308, and where, as in this case, testimony is taken, in an examining trial before a magistrate, on a charge of another and different offense than the one being tried, that such testimony in reference to the distinct offense should not be admitted. We are not aware that this precise question has ever been passed on in this state, but in reason there seems to be no safe ground upon which the admission of such testimony can be sustained.

For the error pointed out, the judgment of the court below is reversed and the cause is remanded.

The Constitutional Right of an Accused to be Confronted with the witnesses against him is the subject of a note to Wray v. State, 129 Am. St. Rep. 18.

Admissibility of Evidence Given on a Former Trial in civil cases is the subject of a note to Atchison etc. R. R. Co. v. Osborn, 91 Am. St. Rep. 192; and the admissibility of evidence of absent witnesses in criminal trials is the subject of a note to Cline v. State, 61 Am. St. Rep. 886.

KNAPP v. STATE.

[54 Tex. Cr. 633, 114 S. W. 836.]

MARRIAGE—Effect of Second Marriage Between Same Parties.—Persons once married do not add to the legality of their marriage by a repetition of the marriage ceremony. The second marriage amounts to nothing. (p. 904.)

BIGAMY—Evidence.—In a Prosecution for Bigamy a Conversation between a witness and the first wife of the defendant, not held in his presence or hearing, is inadmissible, for it is hearsay, and also the testimony of a wife against her husband. (p. 904.)

BIGAMY—First Wife as Witness.—In a Prosecution of a Man for bigamy, his first wife cannot be used as a witness against him. (p. 905.)

Baskett & Evans, for the appellant.

F. J. McCord, assistant attorney general, for the state.

634 DAVIDSON, P. J. The charging part of the indictment is as follows: "Henry R. Knapp, on the twenty-first day of December, in the year of our Lord eighteen hundred and ninety-seven (1897), did lawfully marry in the state of New Jersey, and have for his wife one Margret D. Cooney, and while the said Margret D. Cooney was living, did in the county of Dallas and state of Texas, on the twenty-sixth day of March, A. D. 1906, marry and have for his wife one Charlie D. Clair, and afterward on the twenty-sixth day of March,

A. D. 1906, did unlawfully and feloniously have both the said Margret D. Cooney and the said Charlie D. Clair for his two wives at one and the same time, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state." This indictment has the merit of originality in its allegations in charging the offense of bigamy, whatever else may be said about it.

Several questions are suggested for revision. Margret D. Cooney, appellant's alleged first wife, was used as a witness on the trial to prove up her marriage with appellant and to identify him as the party who had previously married her. By her testimony the state showed two facts: First, that she, Margret D. Cooney, was first married to appellant in Canada; second, that she was again married to him in the state of New Jersey, in the United States. She accounts for this by reason of the fact, and so states, that she understood ⁶³⁵ there was no registry made in Canada for the first marriage. We will not enter into a discussion of appellant's contention that the second marriage—that is, that in New Jersey—was not a marriage at all by reason of the first marriage in Canada, but will state in passing that if the first marriage, that in Canada, was legal and proper, the second marriage would amount to nothing. Married people, when once married, do not add to the legality of their marriage by a repetition of the marriage ceremony.

Evidence was introduced of a conversation between some of the witnesses and Margret D. Cooney, occurring in the absence of appellant, in regard to her previous marriage. It is unnecessary here to state that conversation. It went before the jury. This, of course, was not admissible. First, because it was not in the presence or hearing of appellant and a conversation between other parties is not binding upon him, and, second, if Margret D. Cooney, was the wife of appellant, as she states she was, and legally married to him, she could not testify against him. She would not be a competent witness.

There is another bill of exceptions reserved to the ruling of the court, permitting Margret D. Cooney to take the stand and testify against appellant in regard to their former marriage and relations. This bill contains practically all of her testimony, or a large portion of it, and manifests the fact that she was married to appellant in Canada first and subsequently in New Jersey, and that they lived together as man and wife for quite a while. This bill manifests patent error. In cases of bigamy the first wife cannot be used as a witness against her husband. If the first marriage was void or illegal and

was not in fact such a marriage as is contemplated by the statute of bigamy or by our law, or by the law of the marital contract, then a second marriage would not be illegal. There was error, therefore, in permitting the first wife to testify against appellant. This is thoroughly settled in this state: See *Republic of Texas v. Mumford*, Dall. 374; *Boyd v. State*, 33 Tex. Cr. 470, 26 S. W. 1080; *Harville v. State*, 54 Tex. Cr. 426, 113 S. W. 283, decided at the present term of this court; *Moore v. State*, 45 Tex. Cr. 234, 108 Am. St. Rep. 952, 75 S. W. 497, 67 L. R. A. 499; *Thomas v. State*, 14 Tex. Cr. App. 70; *Johnson v. State*, 27 Tex. Cr. App. 135, 11 S. W. 34; *Baxter v. State*, 34 Tex. Cr. 516, 53 Am. St. Rep. 720, 31 S. W. 394. It is unnecessary to cite other Texas cases. This is a ruling followed throughout other jurisdictions: *State v. Chambers*, 87 Iowa, 1, 43 Am. St. Rep. 349, 53 N. W. 1090; *People v. Quanstrom*, 93 Mich. 254, 53 N. W. 165, 17 L. R. A. 723; *Stein v. Bowman*, 13 Pet. 209, 10 L. ed. 129; *Bassett v. United States*, 137 U. S. 496, 11 Sup. Ct. Rep. 165, 34 L. ed. 762. Without citing further authorities we think these are sufficient. The rule is universal and the statute is emphatic that the wife cannot testify against her husband except where the offense is directed against her person. This is so in bigamy, incest, adultery, fornication and similar offenses, and the same rule applies as in bigamy cases.

There is another question in the case which we deem unnecessary ⁶³⁶ to discuss. There was a transcript of some legislative matters from New Jersey introduced. There are various objections urged to the introduction of this evidence which can be supplied upon another trial and these objections removed.

The judgment is reversed and the cause is remanded.

The Crime of Bigamy is the subject of a note to *People v. Spoor*, 126 Am. St. Rep. 201.

On the Proof of Former Marriage in Prosecutions for Bigamy, see the notes to *Hiler v. People*, 47 Am. St. Rep. 228; *Pittinger v. Pittinger*, 89 Am. St. Rep. 200.

The Competency of a Wife to Testify Against Her Husband on a charge of bigamy is discussed in *State v. Kniffen*, 44 Wash. 485, 120 Am. St. Rep. 1009; *Hoch v. People*, 219 Ill. 265, 109 Am. St. Rep. 327; *State v. Burt*, 106 Am. St. Rep. 768.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

WILKINS v. SOMERVILLE.

[80 Vt. 48, 66 Atl. 893.]

ESCROW, Unauthorized Change in Conditions Preceding.—Where parties agree that a conveyance shall be executed and deposited in escrow, the grantor may, nevertheless, annex conditions to his deposit not agreed upon, even to the extent of withdrawing the instrument from the depositary after a specified time. The fact that in so doing he violates the terms of the contract does not change the situation in this respect, nor give the deed any force which it would not otherwise have. (p. 908.)

ESCROW.—Title cannot be Passed by the Escrow Without Complying with the conditions of its deposit. (p. 908.)

ESCROW, Injunction Against Violating Conditions of.—If a conveyance is deposited in escrow and the grantor is about to withdraw, or permit the withdrawing of, the instrument before the expiration of the time during which it was to remain on deposit, and has conveyed to a purchaser with notice, a court of equity will grant relief, and, if necessary, an injunction keeping the title in statu quo and placing the grantor in the same situation that the vendor agreed he should be, by giving the right to perform the condition and receive the deed according to the terms of the contract. (p. 909.)

ESCROW, Time for Performance of When None is Specified.—Where a deed is placed in escrow with no specified time within which the condition shall be performed, this does not constitute any uncertainty, since by implication the performance must be within a reasonable time. (p. 908.)

ESCROW.—A purchaser taking title to property with knowledge that a deed thereof is in escrow will be compelled to convey the land in the same manner and to the same extent as the vendor would have been liable to do had he not transferred the legal title. (p. 909.)

VENDOR AND VENDEE, Relation of to the Title.—From the time of a contract for the sale of land the vendor, as to the land, is considered the trustee for the purchaser, and the vendee, as to the purchase money, the trustee for the vendor. (p. 909.)

VENDOR AND VENDEE.—A Purchaser from the Vendor or the Vendee After the Contract of Sale, with knowledge thereof, and

before a conveyance, is subject to the same equities as would be the party from whom he purchased. (p. 909.)

EQUITY PRACTICE—Amending Bill for Specific Performance. If a case for specific performance is made in every respect, except that the bill does not show that the complainant is ready and willing, nor that he has offered to perform, the court will give him an opportunity to amend in this respect rather than deny the relief. (p. 909.)

Appeal from a decree dismissing a bill seeking to compel specific performance and to prevent the withdrawal of an escrow.

H. S. Peck, for the orator.

M. M. Gordon and George W. Wing, for the defendants.

⁵¹ WATSON, J. On January 16, 1902, a contract was made between the orator and the defendant Samuel Somerville by which it was agreed that the orator should pay the sum of six thousand dollars for that part of Somerville's farm lying in Duxbury, containing his homestead, and that the deed thereof when made should be deposited with the Capital Savings Bank and Trust Company in Montpelier, in escrow, until that sum should be paid. The farm was believed by both to contain valuable veins of asbestos and talc, and this they had in view in their negotiations. On the same day a warranty deed of the property was duly executed by Samuel and his wife, the defendant Eliza M. Somerville, to the orator, and was deposited by the direction of Samuel with the bank in escrow, but instead of the condition being pursuant to his agreement with the orator, he directed the depositary to hold the deed until six thousand dollars should be deposited to his credit, or until called for by him or his attorney, after thirty days from date.

⁵² The orator neither consented to nor had any knowledge of any change in the condition, nor was he afterward informed of it. Indeed, never thereafter did Samuel make reference to the time the deed should remain in the custody of the bank, until September 19th, when he wrote the orator that after thirty days he should think best to take it therefrom. Again, October 6th, he in like manner notified the orator that the date for withdrawing the deed was October 20th, advising him that what he did must be done before then. In answer to each of these communications the orator protested against its withdrawal. Later, Samuel extended the date to October 30th, and the depositary notified the orator that unless payment be made by that time, the deed

would be returned to the vendor. Thereupon the orator protested to the latter that under their agreement he had no right to recall the deed. On the day before the bank was thus to return the deed an order was issued restraining it from so doing.

On the same day Samuel and wife by their deed of warranty conveyed the land, together with land in Fayston, to the defendant Mark Mears, who in making the purchase was co-operating with defendants George D. Mears, A. W. Slocum and Mathew M. Gordan, it being understood and agreed between them that Mark Mears should furnish the money to pay for the property, hold the title, and transfer the same to a company to be formed by them. In this purchase the consideration to be paid was six thousand dollars, of which two thousand five hundred dollars was paid by check, with an agreement to pay the balance in sixty days. The deed to Mears was sent by him to the defendant Eber Huntley, town clerk of Duxbury, for record. Soon thereafter this suit was commenced, with a temporary injunction holding the deed and the title to the property in statu quo.

The vendor, when depositing the deed with the bank, undoubtedly was competent to annex such conditions to its delivery to the orator as he saw fit, even to the extent of retaining the right to withdraw it from the custody of the depository at any time, or after a specified time. The fact that in so doing he violated the terms of his contract does not change the situation in this respect, nor give the deed any force which it would not otherwise have: *Stanton v. Miller*, 58 N. Y. 192. No title could pass by it without a compliance with the conditions of the deposit.

⁵³ It is clear that the orator cannot have adequate remedy by an action at law. In view of the conveyance of the property to a subsequent purchaser, the question is, What relief will be granted in a court of equity? The contract is in its nature and incidents entirely unobjectionable. True, it contained no specified time in which the condition of the escrow should be performed; yet there was no uncertainty in this respect, since by implication performance must be within a reasonable time: *Ordway v. Farrow*, 79 Vt. 192, 118 Am. St. Rep. 951, 64 Atl. 1116. It is found that such reasonable time had not elapsed October 30, 1902, the day finally named by the vendor for the withdrawal of the deed from the bank. Hence the conveyance of the property to Mears the day before was within the time in which the orator by his contract had a right to perform. Yet by that

conveyance the vendor not only disabled himself from carrying out his prior contract, but he prevented its subsequent performance by the orator also. In these circumstances unless the rights of bona fide purchasers without notice intervene, equity requires that the orator be placed as nearly as possible in the same situation as the vendor agreed that he should be in—that he have a reasonable further time in which to perform the condition and receive a deed of conveyance of the property according to the terms of his contract: See *Battell v. Matot*, 58 Vt. 271, 5 Atl. 479; *Ordway v. Farrow*, 79 Vt. 192, 118 Am. St. Rep. 951, 64 Atl. 1116.

But the subsequent purchaser Mears was not without notice. Before he took his deed he knew all concerning the deed to the orator and was put on inquiry as to the restraining order against the bank, issued the same day. Hence Mears, standing on the same equity as his vendor, will be compelled to perform the contract with the orator by a conveyance of the land in the same manner and to the same extent as the vendor would have been liable to do had he not transferred the legal title: 1 *Story's Equity Jurisprudence*, secs. 396, 784; *Taylor v. Stibbert*, 2 Ves. Jr. 438; *Potter v. Saunders*, 6 Hare, 1; *Champion v. Brown*, 6 Johns. Ch. 398; *Ten Eick v. Simpson*, 1 Sand. Ch. 244; *Haughwout v. Murphy*, 22 N. J. Eq. 531.

This doctrine rests upon the general principle in equity that from the time of a contract for the sale of land, the vendor, as to the land, is considered a trustee for the purchaser, and the vendee, as to the purchase money, a trustee for the vendor. ⁵⁴ And every subsequent purchaser from either, with notice, is subject to the same equities as would be the party from whom he purchased: 1 *Story's Equity Jurisprudence*, sec. 789; *Taylor v. Stibbert*, 2 Ves. Jr. 439; *Ten Eick v. Simpson*, 1 Sand. Ch. 244.

The prayer of general relief is sufficient. It is said in substance, however, that the bill does not show the orator ready and willing, nor that he offers, to perform. But since a case for specific performance has been made out in other respects, a court of equity will hesitate to deny such relief without an opportunity to the orator to move for leave to amend his bill.

In the event of such relief being granted, we do not understand that damages are here sought by the orator in addition thereto. Whether in case he does not avail himself of specific performance any claim he may have for damages or for money expended may be here enforced by way of a lien

on the property or otherwise, is a question on which we give no intimation.

It sufficiently appears without further discussion that as far as the temporary injunction relates to the land in question, it was properly issued to protect the orator's equitable rights in the premises; and with such modifications as may be necessary to the carrying out of the decree it should be made perpetual. Provided, that if the orator fails to perform within the time limited, then the injunction should be dissolved for his failure to perfect his title under the decree.

To the extent that the injunction relates to other land, if at all, it was wrongfully issued and should be dissolved. Regarding such land, the case will be proceeded with on the question of injunction damages if any are claimed.

The defendant Huntley has no interest in the matters here litigated, he being made a party to the suit only for purposes of the injunction.

Decree reversed and cause remanded with mandate. Let the costs below be there determined.

ESCROWS.

I. Definitions, 911.

II. Creation and Requisites, 912.

III. Intention of Parties, 917.

IV. Dominion or Control of Depositor, 919.

V. Death of Parties or Either of Them, 920.

VI. What may be Deposited.

- a. All Written Obligations, 922.
- b. Promissory Notes, 922.
- c. Contracts of Purchase, Chattel Mortgages and Notes, 922.
- d. Bonds of Constables, 923.
- e. Contract of Guaranty, 923.

VII. Depositaries.

- a. Functions and General Character of, 923.
- b. The Grantee, 923.
- c. The Attorney or Agent of the Parties, 925.
- d. The Agent of a Landlord, 926.
- e. The Payee of Notes, 927.
- f. The Obligee of a Bond, 929.
- g. The Principal Obligor, 930.
- h. A Co-obligor, 931.
 - i. The Grantee of a Bill of Sale, 932.
- j. The Promisee or Payee in Simple Contracts, 932.
- k. Involuntary Depositor, 932.
- l. Miscellaneous, 932.
- m. Knowledge of Condition by Depositary, Obligee and Others, 932.

n. Delivery to Depositary.

1. Generally, 933.
2. Operation and Effect of, 935.
3. Revocation of, 939.

o. Delivery by Depositary.

1. Generally, 940.
2. Authorized, 943.
3. Unauthorized, 943.

p. Redelivery to Depositor, 948.**q. Liabilities of Depositaries, 949.****VIII. The Conditions.****a. How Expressed, 950.****b. Where Effectual to Create an Escrow, 951.****c. Where Ineffectual to Create Escrow, 955.****d. Performance of Conditions and Occurrence of Contingencies, 958.****IX. Time When Instrument Becomes Operative.****a. Upon the Happening of the Event or Performance of the Condition, 965.****b. From Actual Delivery by Depositary, 967.****c. Relation Back to First Delivery, 968.****X. Wrongful Procurement of Instrument by Party, 970.****XI. Ratification of Wrongful Delivery, 971.****XII. Pleading, Practice, Venue, etc., 973.****I. Definitions.**

An escrow is a deed delivered to a third person upon a future condition to be performed by either party. It must be delivered to a stranger and the condition mentioned. So where a deed was deposited with a third person upon the condition that the depositary should hand it to the grantor when he, the grantor, should have given certain security (within a specified period) to the grantee, otherwise at the expiration of that time limit he should hand it to the grantee, it was held to be an escrow on those conditions: *Raymond v. Smith*, 5 Conn. 555; *Davis v. Clark*, 58 Kan. 100, 48 Pac. 563.

An escrow is a written instrument which by its terms imports a legal obligation, deposited by the grantor, promisor, or obligor or his agent with a stranger or third person—that is, not a party to the instrument, such as the grantee, promisee, or obligee—to be kept by the depositary until the performance of a condition or the happening of a certain event, and then to be delivered over to take effect: *Bronx Inv. Co. v. National Bank of Commerce*, 47 Wash. 566, 92 Pac. 380; *Masters v. Clark* (Ark.), 116 S. W. 186. Delivery as an escrow is defined as a delivery on some collateral condition which must be consistent with the contract, on the happening of which condition alone the contract is to take effect: *State v. Perry, Wright*, 662.

A lucid definition of what is an escrow and how to be delivered is given in *Shepherd's Touchstone*, page 58. "The delivery of a deed as an escrow," says the author, "is said to be when one doth make and seal a deed and deliver it unto a stranger, until certain conditions be performed, and then be delivered to him to whom the deed is made, to take effect as his deed. And so a man may deliver a deed, and such deed is good. But in this case, two conditions must be

heeded: First, that the form of the words used in the delivery of a deed in this manner be apt and proper; second, that the deed be delivered to one that is a stranger to it and not to the party himself to whom it is made." On this definition it was held that when husband and wife executed a deed (of the wife's lands), which was not delivered in her lifetime, it was not operative, and the fact that it was offered to, and refused by, the grantee during the lifetime of the wife could not constitute it an escrow: *Shoenberger's Exrs. v. Hackman*, 37 Pa. 87. The phrase "a stranger" used in this definition, or the phrase "a third person," which in many of the books is used interchangeably with it, means a stranger to the deed, as not being a party to it; or a person so free from any personal or legal identity with the parties to the instrument as to leave him free to discharge his duty, as a depositary, to both parties, without involving a breach of duty to either: *Cincinnati W. & Z. R. Co. v. Iliff*, 13 Ohio St. 235.

A deed deposited as an escrow is nothing more than a mere scroll, until the condition is performed or the contingency happens upon the faith of which it was deposited; and this being so, no delivery of the scroll prior to that time, without the grantor's consent, could give life to the instrument, or convey the title to the grantee or purchasers under him: *Berry v. Anderson*, 22 Ind. 36; *Patrick v. McCormick*, 10 Neb. 1, 4 N. W. 312; *Black v. Shreve*, 13 N. J. Eq. 455; *Smith v. South Royalton Bank*, 32 Vt. 341, 76 Am. Dec. 179.

II. Creation and Requisites.

To constitute an instrument an escrow, it is absolutely necessary that the deposit of it should be irrevocable—that is, that when the instrument is placed in the hands of the depositary, it should be intended to pass beyond the control of the grantor for all time, and that he should actually lose the control of, and dominion over, the instrument—for in case the deposit is made in furtherance of a contract between the parties, the contract must be so complete that it remains only for the grantee or obligee or another person to perform the required condition, or for the event to happen, to have the instrument take effect according to its import: *Masters v. Clark* (Ark.), 116 S. W. 186.

Where two persons exchanged their lands and the original owner of the more valuable lot was to receive in addition a certain sum of money, but was not ready with his title, and all deeds of sale and a mortgage in lieu of the money were duly executed and lodged in a bank till the title referred to was made good and until both parties should consent and order that they be withdrawn—held, the instruments were not deposited on the happening of a certain event, or the performance of a condition, but to be delivered on the joint order of the grantor and grantee, who could cancel or modify them, and as they had not received any permanent force and were within the control of both parties, they were not escrows: *Masters v. Clark* (Ark.), 116 S. W. 186.

No particular form of words is necessary to constitute an escrow. The term "escrow" need not be used, nor will the misuser of that word in designating an instrument necessarily make it an escrow. It need not be in writing, but the terms of the escrow stipulations are to be derived from all the circumstances. Whether an instrument placed with a third person is to be an escrow or a completely executed instrument depends upon the intentions of the parties. If the evidence leaves any doubt upon the subject, the intention of the parties must be determined by the jury upon the whole evidence. A declaration by the depositor that he delivered the instrument as his deed, or that "he delivers [deposits] it as an escrow," is not conclusive, but is a mere matter of evidence to be weighed in connection with other circumstances of the case in order to determine the real character of the transaction: *Bronx Inv. Co. v. National Bank of Commerce*, 47 Wash. 566, 92 Pac. 380.

On a sale of real estate the scheme of settlement was adjusted by defendant's agent, who embodied it in the following letter to the depository: "Upon receipt of the deed please hold it in safekeeping for delivery to W. W. Hay, Esq., only after: (1) Payment to you of \$19,000 in cash; (2) delivery to you of two notes and mortgage sent to Mr. Hay for execution, which are marked by me O. K., with my signature in corner for identification, together with certified copy of Board's resolution; (3) delivery to you of the Osborne abstract to accompany the mortgage; (4) delivery to you of a memorandum release as inclosed signed by Mr. Hay, in evidence of satisfactory consummation." This letter was assented to with a slight variation as to rate of interest which was ultimately agreed upon. It was held that these letters, coupled with the assent to the scheme of settlement outlined, constituted a complete escrow agreement founded on the evidenced intention of the defendant not to reserve control or dominion over the deed if the conditions were complied with: *Bronx Inv. Co. v. National Bank of Commerce*, 47 Wash. 566, 92 Pac. 380. According to Chancellor Kent, an escrow is only a conditional delivery to a stranger, who is to keep the deed until certain conditions are performed, when he is to deliver it to the grantee. Until the conditions are satisfied the estate does not pass, but remains in the grantor: 4 Kent's Commentaries, 454; *James v. Vanderheyden*, 1 Paige, 385; *Seibel v. Higham*, 216 Mo. 121, 129 Am. St. Rep. 502, 115 S. W. 987.

When a grantor hands the deed to a third person and names the conditions on which it is to be handed to the grantee, it is an escrow irrespective of the use of the word: *Jackson v. Sheldon*, 22 Me. 569; *State Bank v. Evans*, 15 N. J. L. 155, 28 Am. Dec. 400. And no memorandum in writing is necessary for its validity: *Baldwin v. Potter*, 2 Root, 81.

Where a bond is imperfect on its face, parol evidence is admissible to show the condition on which it was to take effect, no matter by whom the bond was delivered, since the instrument itself affects the

obligee with notice of its incompleteness: *Blair v. Security Bank of Richmond*, 103 Va. 762, 50 S. E. 262.

Where a bond was executed by all the obligors save one, the fact that that one was named in it and there was a blank left for his signature with a seal set opposite to it was not sufficient evidence per se that the other signatories delivered it in escrow, the condition being that it should be executed by that one: *Towns v. Kellett*, 11 Ga. 286. If such a bond with one blank left for execution by A be executed by B, the other signatories executing it as an escrow to be bound only on condition that it was executed by A, and B was substituted without their consent, it would not be their bond: *Elliott v. Mayfield*, 4 Ala. 417.

Where B agreed to join A as his surety in a forthcoming bond, and executed and delivered the bond as an escrow, upon condition that C should also join in and execute the bond as cosurety, and C agreed to join as surety in the bond and executed and delivered the same as an escrow upon condition that D also should join in and execute the bond as cosecurity, but D never united in the bond, it was held that upon this state of facts neither B nor C was liable for any part of the debt in equity, any more than they would be liable for any part of it at law where the facts would amount to proof of non est factum: *King v. Smith*, 2 Leigh, 157.

Where all the defendants in an execution were named in a replevin bond, and all except one signed it together with their sureties, it cannot be inferred from that circumstance alone that the bond was inchoate and delivered as an escrow only until the omitted defendant should sign it: *Stevens v. Wallace*, 21 Ky. (5 T. B. Mon.) 404. If, when executing a bond, one of the obligors, in presence of some of the others fills in names of other obligors and says, "We acknowledge this instrument, on condition others are to sign it," a jury is at liberty to infer therefrom that it was delivered as an escrow by all the obligors then present. Signatories to a deed in escrow would be much more secure against fraud if the evidence that the writing was delivered as an escrow appeared on its face than by admitting parol testimony of the fact. But the law does not demand it: *Pawling v. United States*, 4 Cranch, 219, 2 L. ed. 601.

A duly executed deed on which the consideration money had not been paid, but which had been filed in the office of the clerk of the court as a step precedent to the collection of the purchase money, was held an escrow and conveyed no title: *Anderson v. Robinson*, 73 Ga. 644.

Where mutual deeds of sale were executed and exchanged and deposited with a third person "until they got proper abstracts," and the parties went each into possession of the land for which he had traded and made improvements thereon, it was held that as there was no intention that the deeds should pass or take effect until proper abstracts were furnished, each party reserving to himself control over his deed till the other produced such proper abstract, both deeds were escrows in the hands of the depositary: *Hoyt v. McLagan*, 87 Iowa,

746, 55 N. W. 18. A delivery of a document, whether a deed or quasi mercantile paper, to a principal by a surety with a condition imposed will not invest it with the privileges of an escrow. For such delivery to inure to the benefit of the depositor it must be delivered to a third person until the happening of the event or to await other signatories: *Millett v. Parker*, 59 Ky. (2 Met.) 608. An agreement provided that A sold his land to B for two thousand dollars and B sold his lease and stock in trade to A for eighteen hundred and eighty-three dollars, and such agreement was deposited with C, and soon after the deed of the lot sold, executed in conformity with the agreement, was also deposited to be delivered to B when he should be entitled under the contract. B produced the stock list, etc., for eighteen hundred and eighty-three dollars, and an assignment of his lease, and the key of the premises and the balance of one hundred and seventeen dollars, and demanded the deed, which was refused, on the ground that A desired to recheck the goods with the bill of sale, which B declined to permit as the agreement did not provide for it. Held, that such deed was delivered in escrow, and as B had complied with the terms of the contract on his part, he was entitled to it: *Knopf v. Hansen*, 37 Minn. 215, 33 N. W. 781. If a deed is delivered by the grantor to a third person to be delivered to the grantee without condition or contingency, and is by that person delivered to the grantee, even after the death of the grantor the title will pass, taking effect from the date of delivery to the third person; but in such case the instrument is not an escrow. The vital characteristic of an escrow is the delivery of the deed to a third party to await the performance of some condition, whereupon the deed is to be delivered to the grantee and the title will pass: *Seibel v. Higham*, 216 Mo. 121, 129 Am. St. Rep. 502, 115 S. W. 987. Where a deed is deposited with a person other than the grantee upon an agreement to deliver it on the performance of certain conditions, it is an escrow; and it is not necessary that the terms authorizing its delivery be expressed in writing, but may be declared orally at the time of the deposit: *Tharaldson v. Everts*, 87 Minn. 168, 91 N. W. 467; *Hillhouse v. Pratt*, 74 Conn. 113, 49 Atl. 905. A mortgage and note delivered to a third person to be delivered by him to the mortgagee and payee, upon the transmission to him of the amount of the loan, are escrows: *Davis v. Clark*, 58 Kan. 100, 48 Pac. 563. So a warranty deed, duly signed and acknowledged, purporting to convey lands not by metes and bounds, but by description so definite that they can be ascertained with certainty, and delivered by the grantor to a third person, under an agreement with the grantee that the depositary is to deliver the deed to him on the doing of a certain thing by the grantee, is an escrow. The mere omission of the formal description was a matter of inconvenience, but affected neither the escrow nor the validity of the deed. *Id certum est quod certum reddi potest*: *Guild v. Althouse*, 71 Kan. 604, 81 Pac. 172. In order to inoculate the delivery with the condition, the formal words "This is an escrow" need not be used. All that is required is that such

should be the intention of the parties and that it should be the conclusion to be drawn from the circumstantial evidence. It is not necessary that the condition upon which the deed is delivered in escrow be expressed in writing; it may rest in parol, or be partly in writing and in part oral: *Gaston v. City of Portland*, 16 Or. 255, 19 Pac. 127.

When the agent for the vendor and purchaser left the unexecuted deed with a magistrate, and the vendor subsequently called and executed the deed unconditionally, there was no escrow, and subsequent instructions given by the agent are empty words, because the post declarations to an unqualified delivery to a third person cannot transform what was absolute into what is conditional. And even if the deed was improperly obtained by the purchaser and transferred to a bona fide purchaser, the onus of showing there was no absolute delivery lies on the original vendor. The rule is that when the vendor parts with the deed without any qualification, the title vests from the instant it is so delivered: *Blight v. Schenck*, 10 Pa. 285, 51 Am. Dec. 478.

"In *Everts v. Agnes*, 4 Wis. 343, 65 Am. Dec. 314, the contrary was held. But in the latter case the court appears to have acted in ignorance of the decision in the former case, although the former decision was made six years before *Everts v. Agnes*. This, as it seems to us, was an unfortunate oversight, for the former decision is supported by reasoning so strong, and so satisfactory, we cannot resist the conviction that, if the attention of the court had been called to it and the principle on which it rests, a different conclusion would have been reached": *Hubbard v. Greeley*, 84 Me. 340, 24 Atl. 799, 17 L. R. A. 511. The defendant made an oral agreement to convey land to the plaintiff for a stipulated price, part of which was to be paid in money and the remainder to be secured by notes and a mortgage. The plaintiff thereupon paid a small part of the purchase money, and the defendant executed a deed wherein was specified the consideration for the sale but not the terms of payment, and gave it to H., with instructions to deliver it to the plaintiff upon his depositing the money and the notes and mortgage within a given time. These were duly deposited with H. and the deed demanded, but H., under instructions from defendant, refused to deliver it. An action against defendant and H. to compel a delivery of the deed failed on the ground that the deed was not a sufficient note or memorandum of the contract under the statute of frauds, as it did not contain the terms of payment; that, therefore, the contract was invalid and the deed was not an escrow; and that plaintiff could not recover—per *Lyon, J.* If a person who has made a parol agreement to convey land executes an instrument in the form of a conveyance to the vendee and deposits it in escrow, if such instrument contains the terms of the parol agreement, including the consideration, it is a sufficient compliance with the requirements of the statute of frauds: *Campbell v. Thomas*, 42 Wis. 437, 24 Am. Rep. 427.

A chattel mortgage was delivered to the attorney of the mortgagee and was sent to his client the same day. A copy was immediately filed in the register's office, although that was claimed to have been done by mistake. The mortgage was to be released if the mortgagor gave the mortgagee approved bills for the amount. The mortgagee retained the original, no approved bills having been delivered, until after a fire destroyed the chattels, and he made a demand for the insurance moneys. The insurer declined to pay on the ground that giving a chattel mortgage vitiated the policy by express words contained therein. It was held that there was no delivery in escrow of the chattel mortgage and that nothing had been done by either party to impair its enforceability. The intention of the mortgagee was to obtain security—he did not seek nor sanction as escrow: *Adler v. Germania Fire Ins. Co.*, 17 Misc. Rep. 347, 39 N. Y. Supp. 1070.

III. Intention of Parties.

In all cases the question, "Deed or escrow?" depends upon the intention of the parties. The true principle to be deduced from the authorities is that when a paper is signed and sealed and handed to a third person to be handed to another, upon a condition which is afterward complied with, the paper becomes a deed by the act of parting with the possession, and takes effect presently, without reference to the precise words used, unless it clearly appears to be the intention that it should not then become a deed: *Price v. Pittsburg, F. W. & C. R. Co.*, 34 Ill. 13.

Plaintiff (purchaser) and defendants (vendors) entered into a contract for the sale of lands. Defendants lodged the deed with a third person as an escrow and gave a duplicate of it to plaintiff, who recorded it and claimed that it was a deed delivered. It was held that the defendants were entitled to show it was an escrow—per Knowles, J. "The delivery of a deed may be proven by parol, to the end that the intention of the parties to the delivery may be made known. The notion that a grantor cannot show, as between him and the grantee, what additional facts there may be connected with this delivery, to qualify or explain it, is not supported by any valid reason. Justice demands in such cases that the whole truth should be known, and, when this intention is made known, full force and effect given it": *Minah Consol. Min. Co. v. Briscoe* (C. C.), 47 Fed. 276.

Where a deed and a note were respectively lodged by A and B with C in escrow, and A and B both informed C the contract was abandoned, and C, relying on A's honor, gave him both documents in order that he should retain his own and give B his, but A kept B's and sued him upon it, he was properly nonsuited, as no absolute delivery was constituted by the transaction: *Clark v. Gifford*, 10 Wend. 310.

Where the future delivery is to depend upon the performance of some condition, it will be deemed an escrow; where it is merely to wait the lapse of time or the happening of some contingency, and

not the performance of a condition, it will be deemed the grantor's deed presently. Thus where husband and wife executed a deed to their son and gave it to a stranger to be delivered to the son immediately after the decease of both his parents, no title passed till delivery, when it vested as from the original deposit, because there being no condition to be performed before delivery it was no escrow: *Hathaway v. Payne*, 34 N. Y. 92.

Where a grantor leaves an executed deed with his agent to be handed over to the purchaser on payment of the purchase money at a time specified, and the purchaser making default, the deed is returned to the grantor, the purchaser has no remedy and cannot maintain that it was a deposit in escrow, for the reason that the possession of the grantor's agent is the grantor's own possession, and the agency is revocable by him: *Watson v. Chandler* (Ky.), 119 S. W. 186.

The construction of particular agency is not always to be placed upon an agent's relation with his principal, and while a depository in escrow should be a "stranger," the fact that the agent has acted in other matters for the principal does not affect the validity of the deposit if placed as such; and if the maker of a note gave it to such an agent with directions to deliver it to another on the performance of a condition, it is a good delivery in escrow: *St. Paul's Episcopal Church v. Fields* (Conn.), 72 Atl. 145.

The statement of the depository as to the terms and conditions on which an agreement is deposited with him in escrow is admissible in evidence on the issue whether such an agreement was actually made between the principals. The alleged agreement was between those signing an indemnity to a bank, of the one part, and the bank by its cashier and representative of the other, that the indemnity should be held in escrow by the bank until all the stockholders in another corporation had signed it, the statements of the cashier being in substance that the indemnity was signed and delivered on that basis: *Blair v. Security Bank*, 103 Va. 762, 50 S. E. 262. The distinction in the law of admissibility of parol evidence between unsealed and sealed instruments is to be regarded. In case of the former it is always competent, between the original parties, to prove that a paper perfect on its face, whether negotiable or not, was delivered to the payee, or any other person, on condition that it was not to take effect except in a given event or upon a given condition or was only to be used for a given purpose: *Kelly v. Oliver*, 113 N. C. 442, 18 S. E. 698; *McCormick Harvesting Mach. v. Faulkner*, 7 S. D. 363, 58 Am. St. Rep. 839, 64 N. W. 163; *Solenberger v. Gilbert's Admr.*, 86 Va. 778, 11 S. E. 789; *Catt v. Olivier*, 98 Va. 580, 36 S. E. 980; *Ware v. Allen*, 128 U. S. 590, 9 Sup. Ct. Rep. 174, 32 L. ed. 563; *Burke v. Dulaney*, 153 U. S. 228, 14 Sup. Ct. Rep. 816, 38 L. ed. 698. As to sealed instruments and the inadmissibility of parol evidence to affect their validity on delivery to the obligee, see post, subdivision VI; *Ward v. Churn*, 18 Gratt. 801, 98 Am. Dec. 749;

Miller v. Fletcher, 27 Gratt. 403, 21 Am. Rep. 356. The inflexible rule appears to be that when a bond perfect on its face is delivered in escrow to a third person, who prematurely delivers it to the obligee, with or without notice of the condition, the delivery is ultra vires, and the obligor is not bound. If imperfect, parol evidence is admissible to show the conditions, no matter by whom delivered, the instrument being notice of its contents: Ward v. Churn, 18 Gratt. 801, 98 Am. Dec. 749; Crawford v. Jarrett's Admr., 2 Leigh, 630; Wendlinger v. Smith, 75 Va. 309, 40 Am. Rep. 727; Blair v. Security Bank, 103 Va. 762, 50 S. E. 262.

IV. Dominion or Control of Depositor.

Where the possession of the depositary is subject to the control of the depositor, the deed cannot be said to be delivered, and it is not an escrow. An escrow differs from a deed in one particular only, and that is the delivery, and until both parties have definitely assented to the contract, the instrument executed, though in form a deed, is neither a deed nor an escrow: Fitch v. Bunch, 30 Cal. 208.

When the parties agreed to an exchange of their lands after inspection and approval, and for convenience deeds were executed and deposited with a third person, to take effect when and if the exchanges were mutually approved, but in the meantime were subject to the grantor's respective directions, it was held that they were not escrows, and in the absence of a written contract evidence of conversations leading up to the signing and deposit of the deeds was properly excluded: Nichols v. Oppermann, 6 Wash. 618, 34 Pac. 162.

Where the grantor executes and delivers a deed to the grantee, to be by him deposited with a third person until the return from a journey of the grantor and then to be redelivered by such third person to the grantor, no delivery as an escrow is constituted, and parol evidence of the conditional delivery was properly excluded. "If I seal my deed and deliver it to the party himself, to whom it is made, as an escrow upon certain conditions, etc., in this case let the form of the words be what it will. The delivery is absolute, and the deed shall take effect as his deed presently": Shepherd's Touchstone, 59; Braman v. Bingham, 26 N. Y. 483. Where the grantor executed a deed of lands to a grantee and placed it in the hands of a depositary to hold subject to grantor's control until his death and then to hand it to the grantee, there was no valid delivery, and nothing passed by the deed: Prutsman v. Baker, 30 Wis. 644, 11 Am. Rep. 592. So in the case of a promissory note under seal: Hillsdale College v. Thomas, 40 Wis. 661. And where the grantor preserves his right of control notwithstanding the depositary has instructions to hand the deed to the grantee on his complying with certain conditions, it is not an escrow: Campbell v. Thomas, 42 Wis. 437, 24 Am. Rep. 427.

An assignment of a land contract to a firm, delivered to one of the partners to hold until the firm should execute a mortgage back, the possession both of the contract and assignment being necessary to

the grantor to make good the title on which the mortgage was to be founded, is inconsistent with a delivery in escrow: *Ortmann v. Plummer*, 52 Mich. 76, 17 N. W. 703. So where a present operative conveyance of land is accepted by a grantee to secure him for money advanced on the taxes till title was perfected, the deed takes immediate effect and is not an escrow: *Whelan v. Tobener*, 71 Mo. App. 361.

The deposit of mining stock with a writing authorizing its purchase by a certain person for a stated price within a stated time is not binding as an escrow, though so styled, if there is no binding contract therefor between the parties: *Clark v. Campbell*, 23 Utah, 569, 90 Am. St. Rep. 716, 65 Pac. 496, 54 L. R. A. 508.

An unsigned memorandum in the handwriting of grantee found among his personal effects after death, wrapped about a quitclaim deed of certain property from himself and his wife to his grantor, and apparently designed to accompany the deposit of this deed in escrow, and to serve as a memorandum of terms and conditions on which it was to be delivered, about the contents of which memorandum the grantees in the quitclaim deed knew absolutely nothing whatever, was insufficient to establish either a delivery in escrow or that there was a written contract between the parties as to the terms on which the property had been conveyed and was to be held: *Wadleigh v. Phelps*, 149 Cal. 627, 87 Pac. 93. The mere giving a deed to a third party cannot constitute per se a delivery in escrow or any delivery, for the vital element in the act is the intention with which the act of parting with the instrument was done: *Baker v. Baker* (Cal.), 100 Pac. 892.

V. Death of Parties or Either of Them.

An escrow is unaffected by the death of the depositor. The death of one of several vendors who had delivered a deed in escrow does not entitle the representative of the decedent to recall the deed. If there was no delivery in escrow, the death of the principal revoked the authority to recall the deed, but if there was an escrow, the death of one of the grantors would have no effect. The rule that the instrument does not take effect as a deed, bond, etc., until delivery or until performance of the condition is modified to the extent that, where justice requires it, the delivery will be held by fiction of law to relate back to the deposit, "*ut res magis valeat quam pereat.*" Any title acquired by the grantor between the deposit and the delivery passes by such delivery to the grantee. This principle applies where either of the parties to the instrument dies before the condition is performed, or before final delivery, whether grantor or grantee, or both parties: *Hayden v. Collins*, 1 Cal. App. 259, 81 Pac. 1120; *Bronx Inv. Co. v. National Bank of Commerce*, 47 Wash. 566, 92 Pac. 380.

The grantor executed a deed of gift to his grandchildren and gave it to one of the subscribing witnesses, with instructions to have it recorded and to hold it as his agent until he, the grantor, should be dead, and then to deliver it to the donees, all which the agent as

directed did. Notwithstanding several cases (see *Wheelwright v. Wheelwright*, 2 Mass. 447, 3 Am. Dec. 66) decided such an instrument to be a deed delivered confessedly as an escrow, it was held that it was not an escrow, and as by its operation it could only take effect on the death of the grantor, it was a will no matter in what form expressed: *Wellborn v. Weaver*, 17 Ga. 267, 63 Am. Dec. 235.

Where a grantor having executed a deed to the grantees and having received back from them at the same time a lease for the term of her natural life, for the same premises, and she having accepted said lease, depositing it, with the deed, with a third party, with instructions to deliver the deed to the grantees on the event of her death, and she not having recalled or exercised control over it, the delivery was complete and the deposit was not an escrow. The conduct of the parties showed there was no condition precedent to be performed: *Martin v. Flaharty*, 13 Mont. 96, 40 Am. St. Rep. 415, 32 Pac. 287.

This distinction is well sustained by the decisions. Under them there can be no doubt that a deed may be placed in escrow to be delivered to the grantee upon the grantor's death, and that it will become effective if accepted by the grantee: *Note to Brown v. Westerfield*, 53 Am. St. Rep. 553.

The distinction between *Wellborn v. Weaver*, 17 Ga. 267, 63 Am. Dec. 235, and *Martin v. Flaharty*, 19 L. R. A. 242, is, that while the deed was to take effect after death in both cases, in the former it was subject to the control of the grantor, and in the latter it was untrammelled by any reservation.

A mortgage executed by husband and wife, on lands of the husband, with note of deposit, placed in the hands of a third person for delivery to the mortgagee on receipt of specified moneys, is an escrow; and upon the performance of the stipulated condition the depositary is bound to deliver the mortgage notwithstanding the intervening death of the husband. The escrow takes effect by constructive delivery upon performance of the stipulated conditions by the mortgagee; and such delivery by fiction of law relates back to the delivery made to the depositary in the lifetime of the mortgagor and payor, and is substituted for the same: *Hoig v. Adrian College*, 83 Ill. 267; *Benner v. Bailey*, 234 Ill. 79, 84 N. E. 638; *Davis v. Clark*, 58 Kan. 100, 48 Pac. 563; *McIntyre v. McIntyre*, 147 Mich. 365, 110 N. W. 960; *Hunter v. Hunter*, 17 Barb. 25; *Shoenberger's Exrs. v. Hackman*, 37 Pa. 87; *Pruitsman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592. Where a deed executed by a man to his grandchildren is deposited with his daughter on condition that she is to deliver it to the grantees on his death, it is not an escrow, nor is she a depositary in the sense in which that word is used in dealing with escrows; she is a bailee for the grantees, burdened with the duty to deliver on his death: *McKnight v. Reed*, 30 Tex. Civ. App. 204, 71 S. W. 318.

VI. What may be Deposited.

a. All Written Obligations.—The law of escrow is not confined to sealed instruments. A promissory note or other simple contract in writing, as well as a deed, may be delivered in escrow, and the law of escrows is substantially the same in both cases, and such note or contract cannot be delivered directly to the promisee, to be held by him as an escrow: *Baum v. Parkhurst*, 26 Ill. App. 128; *Massman v. Holscher*, 49 Mo. 87; *St. Paul's Episcopal Church v. Fields* (Conn.), 72 Atl. 145.

On a sale of land pursuant to a decree, notes to the clerk and master, signed by a surety and delivered, may be accepted in escrow on the express assurance that they are not to be operative until they are also signed by another solvent surety. The obligor in a note to a clerk and master cannot be governed, in respect to what shall constitute a valid execution and delivery of a note by any different rules from those that apply to other parties: *Majors v. McNeilly*, 54 Tenn. (7 Heisk.) 294.

b. Promissory Notes.—Like deeds, promissory notes can be delivered as escrows, to take effect only upon the happening of a certain event to be proved by parol; but such proof must not go to the extent of varying the terms of a note absolute on its face: *Foy v. Blackstone*, 31 Ill. 538, 83 Am. Dec. 246.

c. Contracts of Purchase, Chattel Mortgages and Notes.—When a machine was sold and notes taken for the price, which were handed to the seller's agent with contract of purchase and mortgage on the machine to hold for the vendor, if the machine stood test of trial, and if not to be returned to the purchaser, it was held a valid escrow was established. When the rights of no third parties intervene, and there is nothing inconsistent with the agent's duty to his principal in holding the paper subject to the conditions agreed upon when it was executed, the writing may be delivered to the agent of the adverse party, to be held by him until he receives instructions to deliver it to his principal. The cases decided in support of the proposition that a paper, to be an escrow, must be placed in the hands of a third party are not in conflict. The rule announced in those cases is only extended to embrace agents who are deemed to occupy the relation of third parties to the transaction: *J. I. Case Threshing Mach. Co. v. Barnes* (Ky.), 117 S. W. 418.

A chattel mortgage, which it was necessary, under the local laws, should be immediately recorded to be valid against creditors, was executed on the 23d of April and delivered to a third party on the condition that, if the debt it represented were paid by the 23d of May following, it should be returned to the mortgagor, and if not, then to the mortgagee. The debt was not paid by the date specified, and the mortgage was given to the mortgagee, who recorded it. Subsequently it was foreclosed. At the suit of a judgment creditor to follow the proceeds of the sale of the chattels, it was held that the chattel mortgage was null and void as against the plaintiff on

account of the unreasonable delay in filing it. On appeal it was contended that the instrument was delivered in escrow to a third person, who had undertaken to deliver it to the grantee if the grantor failed to perform the condition in the specified time; that there was nothing in the lien law forbidding such a delivery in escrow; and consequently the subsequent delivery of the chattel mortgage and its subsequent filing made the mortgage a valid lien as against the plaintiff. The court, however, affirming the decision, held that the doctrine of delivery in escrow could not be successfully invoked to uphold the transaction, without disregarding the intent of the statute and ignoring the main object sought to be accomplished by the enactment, and that a sanction to keep such a document off the file for a month could be extended indefinitely. The delivery of the mortgage in question was deemed to relate back to its receipt by the third party, and hence a delay of a month in placing it on the file was properly held by the trial court to be so unreasonable as to invalidate the mortgage against the creditors: *Tooker v. Siegel-Cooper Co.*, 194 N. Y. 442, 87 N. E. 773, affirming a judgment for the plaintiff (55 Misc. Rep. 68, 106 N. Y. Supp. 277), which was affirmed by the appellate division (126 App. Div. 913, 110 N. Y. Supp. 1147).

d. Bonds of Constables.—A constable's bond may become the subject of deposit in escrow: *Robertson v. Coker*, 11 Ala. 466.

e. Contract of Guaranty.—A contract of guaranty delivered to the obligee himself, even with a condition alleged, cannot be construed as an escrow in Alabama, it being the settled law there that there can be no such delivery in escrow: *Lefkovits v. First Nat. Bank*, 152 Ala. 521, 44 South. 613.

VII. Depositaries.

a. Functions and General Character of.—The depositary is the pivot on which the whole machinery of an escrow revolves. He is sometimes spoken of as the agent of the grantor and sometimes as the agent of both parties, but while that may be correct in a limited sense, yet to be accurate, he is not an agent at all, but the trustee of an express trust, with duties to perform for each of the parties, and which neither can forbid, without the consent of the other: *Seibel v. Higham*, 216 Mo. 121, 129 Am. St. Rep. 502, 115 S. W. 987. It is proposed to consider who have been adjudged competent and who incompetent to hold the position.

b. The Grantee.—A deed may be delivered as an escrow to any person other than the grantee, and does not become a conveyance so long as it remains in that condition, or until the condition is performed on which it is to take effect: *Gaston v. City of Portland*, 16 Or. 255, 19 Pac. 127. A deed can never be delivered as an escrow to the grantee himself: *Cherry v. Herring*, 83 Ala. 458, 3 South. 607; *Campbell v. Jones*, 52 Ark. 493, 12 S. W. 1616, 6 L. R. A. 783; *Larsh v. Boyle*, 36 Colo. 18, 86 Pac. 1000; *Jordan v. Pollock*, 14 Ga. 145; *Duncan v. Pope*, 47 Ga. 445; *Heitman v. Commercial Bank of*

Savannah (Ga. App.), 65 S. E. 590; *Anderson v. Goodwin*, 125 Ga. 663, 54 S. E. 679; *Weber v. Christen*, 121 Ill. 91, 2 Am. St. Rep. 68, and note, 11 N. E. 893; *Russell v. Mitchell*, 223 Ill. 438, 79 N. E. 141; *Benner v. Bailey*, 234 Ill. 79, 84 N. E. 638; *Foley v. Cowgill*, 5 Blackf. 18, 32 Am. Dec. 49; *Phoenix Ins. Co. v. Adams' Trustee*, 8 Ky. Law Rep. 532; *Graves v. Tucker*, 18 Miss. (10 Smedes & M.) 9; *Wight v. Shelby R. R. Co.*, 16 B. Mon. 4, 63 Am. Dec. 522, and note; *Lawton v. Sager*, 11 Barb. 349; *Braman v. Bingham*, 26 N. Y. 483; *Ordinary v. Thatcher*, 41 N. J. L. 403, 32 Am. Rep. 225; *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330, and extended note; *Gaston v. City of Portland*, 16 Or. 255, 19 Pac. 127; *McAllister v. Mitchner*, 68 Miss. 672, 9 South. 829; *Miller v. Fletcher*, 27 Gratt. 403, 21 Am. Rep. 356; *Hicks v. Goode*, 12 Leigh, 479, 37 Am. Dec. 677, and note; *Blair v. Security Bank of Richmond*, 103 Va. 762, 50 S. E. 262; *Flagg v. Mann*, 2 Sum. 486, Fed. Cas. No. 4847.

The grantor who has placed his deed in escrow with the grantee in the event of the latter's improperly mortgaging the property contrary to the agreement, is estopped as against the mortgagee from denying the delivery of the deed. By his own acts in putting the land and deed therefor into the grantee's possession, he has plainly said to the world that the grantee was owner and might be safely dealt with as such: *Resor v. Ohio & M. R. Co.*, 17 Ohio St. 139.

Delivery to the grantee, though purporting to be in escrow, is an absolute delivery thereof, and the condition is void: *Mays v. Shields*, 117 Ga. 814, 45 S. E. 68; *McCann v. Atherton*, 106 Ill. 31; *Stevenson v. Crapnell*, 114 Ill. 19, 28 N. E. 379; *Baker v. Baker*, 159 Ill. 394, 42 N. E. 867; *Foley v. Cowgill*, 5 Blackf. 18, 32 Am. Dec. 49; *Fairbanks v. Metcalf*, 8 Mass. 230; *Dawson v. Hall*, 2 Mich. 390; *Arnold v. Patrick*, 6 Paige, 310; *Miller v. Fletcher*, 27 Gratt. 403, 21 Am. Rep. 356. Aliter if the condition appear on the face of the deed: *Newman v. Baker*, 10 App. D. C. 187.

The rule that a deed cannot be delivered to a party to whom it is made as an escrow, and that, in such case, the delivery is absolute, and the condition of no effect, is applicable only to those deeds which are upon their face complete contracts, requiring nothing but delivery to make them complete contracts, according to the intention of the parties: *Ward v. Churn*, 18 Gratt. 801, 98 Am. Dec. 741; *Nash v. Fugate*, 32 Gratt. 595, 34 Am. Rep. 780; *Hicks v. Goode*, 12 Leigh, 479, 37 Am. Dec. 677; *Wendlinger v. Smith*, 75 Va. 309, 40 Am. Rep. 727. And parol evidence is inadmissible to show upon what conditions they shall take effect: *Whitney v. Dewey*, 10 Idaho, 633, 80 Pac. 1117, 69 L. R. A. 572. If a deed shows that some other party is to unite in it before it becomes completely executed, a delivery even to the grantee is not conclusive evidence of delivery so as to cut off inquiry: *Nash v. Fugate*, 32 Gratt. 595, 34 Am. Rep. 780; *Hicks v. Goode*, 12 Leigh, 479, 37 Am. Dec. 677; *Wendlinger v. Smith*, 75 Va. 309, 40 Am. Rep. 727.

But where the deed is perfect in itself, and bears no evidence on its face that the wife of one of the grantors is to unite in its execution, its delivery to the grantee is absolute, and it is not competent to prove by parol evidence that it was delivered as an escrow, not to operate until completed by the wife: *Hargrave v. Melbourne*, 86 Ala. 270, 5 South, 285; *East Texas Fire Ins. Co. v. Clark*, 1 Tex. Civ. App. 238, 21 S. W. 277.

c. The Attorney or Agent of the Parties.—A deed cannot be delivered in escrow to the agent or attorney of the grantor, nor to the agent or attorney of the grantee: *Raymond v. Smith*, 5 Conn. 555; *Dixon v. Bristol Sav. Bank*, 102 Ga. 461, 66 Am. St. Rep. 193, 31 S. E. 96; *Anderson v. Goodwin*, 125 Ga. 663, 54 S. E. 679; *Hubbard v. Greeley*, 84 Me. 340, 24 Atl. 799, 17 L. R. A. 511; *Day v. Lacasse*, 85 Me. 242, 27 Atl. 124; *Wier v. Batdorf*, 24 Neb. 83, 38 N. W. 22; *Merchants' Ins. Co. of New Orleans v. Nowlin* (Tex. Civ. App.), 56 S. W. 198; *Ward v. Lewis*, 4 Pick. 518; *Gilbert v. North Am. F. Ins. Co.*, 23 Wend. 43, 35 Am. Dec. 543; *Clark v. Gifford*, 10 Wend. 310; *Bond v. Nelson*, 129 N. C. 325, 40 S. E. 179.

Delivery to the grantee is unaffected by a subsequent lodgment in alleged escrow: *Gibson v. Partee*, 19 N. C. (2 Dev. & B.) 530. A releasor may make the agent of the releasee his own agent to hold the deed of release as an escrow; provided he there and then constituted him his own agent for the purpose of holding and returning to him the paper, in case of the nonperformance of the condition. The operation of changing manual possession does not necessarily imply a delivery; and where the depositary can accept the trust without violating a duty owed to either party, it is competent to appoint him. In giving judgment the court said: "And I believe no case can be found, no opinion of any jurist can be cited, to the effect that the agent of one party is incapacitated from becoming the depositary of an escrow, and if we were to decide that such incapacity existed, we should originate a distinction hitherto unknown to the books": *Cincinnati, W. & Z. R. Co. v. Iliff*, 13 Ohio St. 235; *McLaughlin v. Wheeler*, 1 S. D. 497, 47 N. W. 816.

The delivery of a deed to an agent or attorney of the grantee employed to obtain possession of the instrument, or to make the purchase for the grantee, is tantamount to a delivery to the grantee; provided the agency includes the very matter of obtaining the conveyance for the grantee; but while this rule applies where the delivery is made to the agent of the grantee as such agent, it has no application to a transaction, in the nature of an escrow, where the depositary is, though an agent or attorney of the grantee, yet not an agent to procure the conveyance, and the delivery is to him as the agent of both parties. In a broad sense, every depositary of an escrow is the agent of both parties. For the purpose of making delivery upon the performance of the conditions, he is no less the agent of the grantee than the agent of the grantor: *Dixon v. Bristol Sav. Bank*, 102 Ga. 461, 66 Am. St. Rep. 193, 31 S. E. 96.

A deed expressed in its body that it was a conveyance from A and his wife B to C. At the end it was signed and sealed by A and under that a blank and seal. Following that an acknowledgment by A before a justice of the peace. Immediately under that an unsigned and undated form of acknowledgment filled in with the name of B. The deed was delivered to D, the attorney for C, to obtain his title and by him given to C, by whom it was recorded. On suit by the wife B, it was held that the rule that delivery of a deed to a grantee or his attorney cannot be a delivery in escrow does not cover a deed not perfect on its face. The delivery to D was not of a deed completed, and did not become a consummated conveyance vesting the legal title in C: *Shelby v. Tardy*, 84 Ala. 327, 4 South. 276.

But where the grantor delivered a deed to the attorney of the grantee, together with a document describing the deed and the condition on which the grantee's attorney was to hold it, and the court was not left in doubt nor required to rely on the dangers and uncertainties attending oral testimony in arriving at the intention of the depositor, it was held that the delivery in escrow was legal and valid: *Ashford v. Prewitt*, 102 Ala. 264, 48 Am. St. Rep. 37, 14 South. 663; *Watkins v. Nash*, L. R. 20 Eq. Cas. 262.

No escrow is constituted where the delivery of the deed is absolutely unconditional, and there is a post-delivery request to an agent to hold it until the price is paid. The title passed on the unqualified delivery eo instanti: *Parrish v. Steadham*, 102 Ala. 615, 15 South. 354.

Delivery of a deed to an officer or servant of a corporation is delivery to the corporation if it is for the use and benefit of the corporation and with intent to pass an absolute property or interest. Delivery is a matter in pais, and there is no doubt that the possession of a deed by the grantee, acknowledged by the grantor for record, is evidence of delivery, but the authorities do not make it more than prima facie evidence of the fact, which is susceptible of explanation or rebuttal. The grantor may show fraud, mistake or accident. But there is no such personal identity between a corporation and its officers that a deed may not be placed in the hands of the latter, as an escrow, until the performance of some condition, etc.: *Blair v. Security Bank of Richmond*, 103 Va. 762, 50 S. E. 262. Nor is it material that there should be any formal notification by words at the time of the deposit or delivery to the officers of the company that it was to operate as an escrow: *Southern Life Ins. & Trust Co. v. Cole*, 4 Fla. 359; *Foley v. Cowgill*, 5 Blackf. 18, 32 Am. Dec. 49; *Worrall v. Munn*, 1 Seld. (N. Y.) 229. And the doctrine has been applied in the following instances: Delivery to an insurance agent (*Price v. Home Ins. Co.*, 54 Mo. App. 119); to the director of a bank (*Andrews v. Thayer*, 30 Wis. 228).

d. **Agent of a Landlord.**—Where a lessee delivered a lease and rent notes to an agent of the landlord conditionally that they were to be

returned to him in case a proposed sale of the land to him was consummated, this did not create an escrow: *Bemis v. Allen*, 119 Iowa, 160, 93 N. W. 50.

e. The Payee of Notes.—A note cannot be held by a payee as an escrow: *English v. Breneman*, 5 Ark. 377, 41 Am. Dec. 96; *Campbell v. Jones*, 52 Ark. 493, 12 S. W. 1016, 6 L. R. A. 783; *Roche v. Roanoke Classical Seminary*, 56 Ind. 198; *Clanin v. Esterly Harvesting Mach. Co.*, 118 Ind. 372, 21 N. E. 35, 3 L. R. A. 863; *Hubble v. Murphy*, 62 Ky. (1 Duvall) 278; *Massmann v. Holscher*, 49 Mo. 87; *Henshaw v. Dutton*, 59 Mo. 139; *Jones v. Shaw*, 67 Mo. 667. A negotiable note under seal cannot be delivered to the obligee as an escrow: *Neely v. Lewis*, 10 Ill. (5 Gilm.) 31. A note cannot be delivered to the payee or his agent as an escrow: *Stewart v. Anderson*, 59 Ind. 375. Nor can it be delivered in escrow to one acting at the time as attorney for the payee, and such delivery is delivery to the payee: *Murray v. W. W. Kimball Co.*, 10 Ind. App. 141, 37 N. E. 736. But see as to deposit with seller's agent, *J. I. Case Threshing Mach. Co. v. Barnes (Ky.)*, 117 S. W. 418.

When a negotiable promissory note, perfect in form, executed by a number of persons, is intrusted to one of the makers by all, there is a presumption that the party so holding the note has authority to deliver it to the payee. When a note so executed is presented by such maker to the payee, without any notice to the payee of any understanding between the makers affecting the right to deliver to the payee, or of other conditions imposed upon its deposit with him, he is justified in assuming that the parties who so signed the note intended to be bound thereby; and he may receive the note and deliver the consideration therefor, without first making inquiries of the other parties to the instrument for the purpose of learning whether there are any secret agreements or understandings affecting it. The instrument, being handed to the payee, was not an escrow: *Carter v. Moulton*, 51 Kan. 9, 37 Am. St. Rep. 259, 32 Pac. 633, 20 L. R. A. 309. And the same principle is affirmed and on the same reasoning in *Dils v. Bank of Pikeville*, 109 Ky. 757, 60 S. W. 715, with the addition of an important obiter dictum that defendant might by counterclaim recover damages for the breach of the agreement. In *Murphy v. Hubble*, 2 Duvall (63 Ky.) 247, in the opinion by Chief Justice Marshall, the premises on which such an action might be maintained were considered, and it was said "that though it had been decided in numerous cases that the obligatory effect of a note or bond cannot be destroyed (nor impaired) by a contemporaneous parol agreement between obligor and obligee relating to, and purporting to restrain, its obligation, and that such note or bond delivered by the obligor to the obligee cannot be made an escrow by a parol agreement between them made at the time of the delivery that it shall not be obligatory unless some specified act be done by the obligee, it does not follow that such an agreement, and especially if it comprises an undertaking by the obligee

to procure another surety, must, because it is ineffectual for certain purposes, and even for that for which it appears to have been primarily designed, therefore be deemed utterly invalid and ineffectual for all purposes. The law will not enforce such an agreement for the attainment of its direct and immediate or expressed object of changing the terms or legal effect of a written instrument, which is the act and deed of the party who seeks enforcement, or of defeating the legal effect of the delivery by which, according to law, it has become his act and deed. The agreement, therefore, cannot be specifically enforced upon or against the instrument to which it relates, and which remains obligatory, notwithstanding the agreement. But although to this extent unenforceable, it is not prohibited by law. It is not illegal, but merely insufficient in its form to operate coercively in the particular manner designated; and the obligee in the bond might observe and give effect to it without any violation of the law or public policy. If such agreement be founded on a legal and sufficient consideration—for instance, if it be made as the inducement to one of the parties to become bound to the other as surety for his debtor (a third person) in a new obligation, whereby his responsibility is created or prolonged, and if actual damage accrue to the party thus induced, in consequence of the failure of the creditor to perform his part of the agreement by procuring the additional surety—we do not perceive nor admit that the incompetency of the agreement to impair the force of the instrument executed by the surety should deprive him of all remedy for redress of the injury he sustains by the nonperformance of the obligee's undertaking, by the performance of which the responsibility upon the note would have been divided between two, and his own loss would have been reduced one-half."

Where the maker of a promissory note signed it on the express condition that others who were jointly liable for the debt it represented should also sign, and the holder did not obtain their signatures, but sought to make the maker liable, evidence of the condition on which it was signed was properly admitted. The rule of the common law that there could be no delivery of a deed to the grantee does not apply to this species of contract, and the manual tradition of the document does not affect the result. There is a plain difference between showing by extrinsic evidence the nonperformance of a condition precedent as to which the writing is silent and showing by extrinsic evidence that the writing is incomplete or not finally uttered because of the nonperformance of a condition stated in the writing to have been performed or to have been agreed upon as unnecessary. In the former case the writing is not contradicted; in the latter it is. For example, if the written instrument, as signed by both parties, contains a stipulation that it is not to be binding until it is signed by a certain number of persons named therein, it would be a violation of the so-called parol evidence rule to allow parol evidence of an agreement that other signatures than those

mentioned in the contract were to be secured as a condition precedent to its final utterance. The real *raison d'être* of the rule excluding parol evidence which alters a written agreement is to be found in the principle that the law looks to express and not abstract intent: *Heitman v. Commercial Bank of Savannah* (Ga. App.), 65 S. E. 590.

When land was purchased under contract, and a promissory note given for the consideration and lodged with a third party who was to receive from the vendor the deed, and he did receive a deed which did not correspond in the particular description of the lands with the contract, and the note maturing and not being paid, and the vendor sued on it, declaring it in the possession of the depository, the contract and the facts in *globo* were properly admitted in the defense and the escrow established. If the evidence had proved the deed to be in accordance with the contract, the payee of the note (the vendor) would have been entitled to recover, even though the note was in the possession of the depository, as the law would then have recognized the depository as his agent. The deed and the contract not being in accord, the depository did not become the payee's agent and the vendee (the maker) was entitled to the note: *Glover v. Chase*, 3 McCrary, 599, 11 Fed. 375.

f. The Obligees of a Bond.—A bond cannot be delivered as an escrow to the obligee: *Firemen's Ins. Co. v. McMillan*, 29 Ala. 147; *Pope v. Latham*, 1 Ark. 66; *Scott v. State Bank*, 9 Ark. 36; *State v. Chrisman*, 2 Ind. 126; *Hubble v. Murphy*, 62 Ky. (1 Duvall) 278; *Blume v. Bowman*, 24 N. C. (2 Ired.) 338; *Cross v. Long*, 51 N. C. (6 Jones) 153; *Easton v. Driscoll*, 18 R. I. 318, 27 Atl. 445; *Hagood v. Harley*, 8 Rich. 325; *Johnson v. Branch*, 11 Humph. 521; *Brown v. State*, 18 Tex. App. 326; *Newlin v. Beard*, 6 W. Va. 110.

A bond cannot be delivered as an escrow to the obligee, or to one of several obligees; and a delivery to one obligee is a delivery to all: *Neely v. Lewis*, 5 Gilm. (Ill.) 31; *Miller v. Fletcher*, 27 Gratt. (Va.) 403, 21 Am. Rep. 356; *Johnson v. Branch*, 11 Humph. 521; *Moss v. Riddle*, 9 U. S. (5 Cranch) 351, 3 L. ed. 123; *Blewitt v. Front St. C. Ry. Co.*, 49 Fed. 126.

A bond cannot be delivered as an escrow to an obligee or his agent: *Cocks v. Barker*, 49 N. Y. 107. A replevin bond on a distress for rent cannot be delivered to the sheriff as an escrow, since he is a party: *Herdman v. Bratten*, 2 Harr. 396.

A guardian's bond to a county surrogate, he acting as the deputy of the ordinary, the obligee, cannot be delivered in escrow. The bond called in its premises for three sureties. It was executed by two, they telling the guardian to obtain the signature of the third. He promised, but failed to keep his promise. Held, the bond was effective against those executing: *New Jersey State Ordinary v. Thatcher*, 41 N. J. L. 403, 32 Am. Rep. 225.

A specialty obligation cannot be an escrow after its delivery to the obligee: *Wood v. Kendall*, 30 Ky. (7 J. J. Marsh.) 212.

A contract cannot be delivered as an escrow to the obligee himself, to take effect upon a condition not appearing in the contract, even though the contract was one which would have been valid if it were not under seal. The law of escrows is substantially the same in both cases: *Ryan v. Cooke*, 68 Ill. App. 592, judgment affirmed, 172 Ill. 302, 50 N. E. 213.

g. The Principal Obligor.—A bond may be delivered to the principal obligor as an escrow by a surety: *Bibb v. Reid*, 3 Ala. 88; *Guild v. Thomas*, 54 Ala. 414, 24 Am. Rep. 703; *Wright v. Lang*, 66 Ala. 389; *Crawford v. Foster*, 6 Ga. 202, 50 Am. Dec. 327; *People v. Bostwick*, 32 N. Y. 445; *Perry v. Patterson*, 5 Humph. 133, 42 Am. Dec. 424; *Pawling v. United States*, 8 U. S. (4 Cranch) 219, 2 L. ed. 601; *United States v. Hammond*, Fed. Cas. No. 15,292, 4 Biss. 283; *United States v. Leffler*, 11 Pet. 86, 9 L. ed. 642.

Contra: This principle, however, is not universally recognized, for in *Millett v. Parker*, 2 Met. (Ky.) 608, the direct converse was held, and the opinions of the courts in *Pawling v. United States*, 4 Cranch, 219, 2 L. ed. 601, and that case are deserving of comparison for the cogency of the reasons which induced the totally opposed conclusions in the latter case.

And in later cases the principle was regarded as well settled that although a surety execute a note or bond and deliver it conditionally to his principal, yet if that instrument is delivered to the obligee or officer authorized to accept it, without notice to him of the condition, it will bind the surety. The implied discretionary authority to use the note arising out of its possession by the principal, uncontradicted by its terms or anything apparent on its face, cannot be restricted by any agreement between the payors themselves, of which the payee had no notice: *Smith v. Moberly*, 10 B. Mon. 266, 52 Am. Dec. 543; *Garvin v. Mobley*, 1 Bush, 48. But a conditional delivery of a bond to a clerk of the court was held not necessarily a delivery to the obligee, and that consequently the instrument might be so delivered as an escrow merely: *Whitaker v. Crutcher*, 68 Ky. (5 Bush) 621. This principle does not, however, apply, where the sureties suffer the principal obligor to act under such bond, after acquiring knowledge, or being charged with notice, of the fact that it has been delivered: *Wright v. Lang*, 66 Ala. 389. But an entirely new departure was made in *Smith v. Peoria County Commrs.*, 59 Ill. 412, in which, after dissenting from *People v. Bostwick*, 32 N. Y. 445, the court decided that it was no part of the duty of the obligee to satisfy himself that there were no outstanding conditions between the principal obligor and his sureties, but that if the obligee have notice of the condition, an escrow is properly constituted: *Smith v. Peoria County Commrs.*, 59 Ill. 412; *Deardorff v. Foresman*, 24 Ind. 481; *State v. Pepper*, 31 Ind. 76; *State v. Peck*, 53 Me. 284; *Passumpsic Bank v. Goss*, 31 Vt. 315. And where the surety set up the defense

that other sureties were to be obtained, and that the name of one cosurety was forged, and that he became surety on the faith of the signature being genuine, and was otherwise ignorant of the circumstances, he failed as against the obligee without notice. The court held the bond was complete on its face and the conditions unknown to the obligee: *State v. Potter*, 63 Mo. 212, 21 Am. Dec. 440; judgment affirmed, *State v. Baker*, 64 Mo. 167, 27 Am. Rep. 214.

And the whole weight of recent decisions has followed these cases. There is, of course, an infinite variety of minute differences in the conditions—in some cases the principal obligor's name alone appearing on the bond when his co-obligors signed; in others, other blanks to be filled in to make it perfect—but the same rule has guided the more modern decisions, that where the obligee receives the bond, bona fide, with no notice of conditions, and the bond itself carries nothing on its face to either arouse his suspicion or put him on his inquiry, his acceptance of it renders the obligors liable to him and leaves them to their remedy over, if any, against their principal: *Webb v. Baird*, 27 Ind. 368, 89 Am. Dec. 507; *State v. Pepper*, 31 Ind. 76; *State v. Blair*, 32 Ind. 313; *Emmons v. Carpenter*, 55 Ind. 329; *Allen v. Marney*, 65 Ind. 398, 32 Am. Rep. 73; *Inhabitants of South Berwick v. Huntress*, 53 Me. 89, 87 Am. Dec. 535. And it was held so far back as 1824 that a party to an instrument can never hold it as an escrow, and therefore a plea that the bond was delivered to one of the co-obligors to hold as an escrow was ill: *State Bank at Elizabeth v. Chetwood*, 8 N. J. L. 71.

And the principle established by *Millett v. Parker*, 2 Met. (Ky.) 608, has been carried to the extent that when the condition on which the obligor signed has been reduced to writing, as in the case of an agreement in writing made by the principal and his surety in a supersedeas bond that other sureties were to execute it in addition or it should not inure, the obligee without notice is unaffected by the collateral agreement. And even though the bond were lodged with the clerk of the court, the obligee's rights are unfettered, if the conditions were not communicated to the clerk or himself: *Whitaker v. Crutcher*, 68 Ky. (5 Bush) 621. And to the length that when a principal obtained the signature of his surety to a government bond in which both names of other sureties and even the amount of the penalty were omitted, on the condition that he would fill it in for a named sum and procure the signatures of other solvent sureties, and the bond having been delivered to the government with the signatures of worthless and insolvent sureties, it was held that in the absence of notice on the face of the bond or otherwise to the obligee, no escrow had been generated by the agreement between the principal and his first surety: *Butler v. United States*, 21 Wall. 272, 22 L. ed. 614, following *Dair v. United States*, 16 Wall. 1, 21 L. ed. 491.

h. Co-obligor.—In a comparatively old case the court held that one co-obligor may "perhaps" deliver a bond to another co-obligor as an escrow, but the judgment goes on to say that an instrument

cannot be so delivered to the obligee or payee or the agent of either. Such delivery is, in law, absolute: *Madison & I. Plank Road Co. v. Stevens*, 10 Ind. 1. But it was laid down specifically that a co-obligor may hold a bond as escrow in *Hoboken City Bank v. Phelps*, 34 Conn. 92.

i. Grantee of Bill of Sale.—When a bill of sale is delivered to the grantee himself, neither party will be heard to assert that it was delivered only as an escrow to be operative only on a contingency: *Morgan v. Smith*, 29 Ala. 283; *Thomason v. Dill*, 30 Ala. 444.

j. Promisee or Payee in Simple Contracts.—The law of escrows is not confined to sealed instruments. A promissory note or other simple contract in writing, as well as a deed, may be delivered as an escrow, and the law of escrows is substantially the same in both cases, but such note or contract cannot be delivered directly to the promisee to be held by him as an escrow: *Baun v. Parkhurst*, 26 Ill. App. 128; *Seymour v. Cowing*, 1 Keyes, 532.

k. An Involuntary Depositor.—When a third person, holding a deed in escrow according to the grantor's contract, tenders it on the performance of the condition and the grantee has refused to accept it, such third person holds the same as the depositary of both parties, according to their respective rights. The grantee cannot by his refusal undo the effect of the transaction: *Adams v. Smilie*, 50 Vt. 1.

l. Miscellaneous.—A committeeman appointed among others by the inhabitants of a town to obtain subscriptions to the stock of a railroad company, which were to be delivered to the company only upon certain parol conditions, acting as such, could not be considered the agent of the railroad company in any sense, but if he was, it was a qualified and subordinate agency growing out of his appointment by the committee, and could not prevent his receiving the subscription list as an escrow; and if he delivered it to the company without the consent of the subscribers, and without the performance of its conditions, such delivery was not binding: *Beloit & M. R. Co. v. Palmer*, 19 Wis. 574.

A commissioner appointed under the charter of a railway company to receive and accept subscriptions of stock cannot be a depositary in escrow. A subscription received by him, even if it could, under any circumstances, be made to assume the character and attributes of an escrow, could not effectually take it, inasmuch as when it was received by him it became just as obligatory as a promissory note would be upon the maker, who left it with the payee or his agent: *Wight v. Shelby R. Co.*, 55 Ky. (16 B. Mon.) 4, 63 Am. Dec. 522.

m. Knowledge of Condition by Depositary, Obligee and Others.—It is essential to the constitution of an escrow not only that the grantor and grantee are at one as to the conditions under which the deposit is to be made, but that such conditions should be com-

municated to the depositary. And where a bond is claimed to have been delivered as an escrow, evidence not tending to show that the condition of the delivery was communicated or known to the person to whom the delivery was made was properly rejected: *Price v. Cloud*, 6 Ala. 248. And it is equally essential that the grantee or obligee is aware of every circumstance in connection with the conditions likely in any way to affect the liability under it. A bond with sureties was required from a deputy sheriff to the sheriff and furnished with the names of A, B, C, D, E and F as sureties. It was executed by the principal and A, B, E, F, G and H, the latter two not being named in it and apparently being substituted for C and D. When E signed, he did so on the express condition that all the parties named in the bond should sign it before delivery, of which fact the obligee had notice. In an action upon it by the obligee it was held that the claim of E to have the deposit declared an escrow on that condition was sound; that the bond was delivered and accepted by the sheriff in the same condition it was in when signed by E. The face of the instrument was plain as to the terms upon which E had agreed to become liable. The bond purported to be the bond of those who never executed it, and gave every evidence to the holder that it was an incomplete instrument. He saw the names of those who signed, and, as an ordinarily prudent man, should have felt put on his inquiry. The extent of the liability was plain and unmistakable, and was notice to the sheriff of the condition upon which E had agreed to become bond: *Hall v. Smith*, 77 Ky. (14 Bush) 604.

The same principle is to be found in *Perry v. Patterson*, 5 Humph. 133, 42 Am. Dec. 424, in which a court of equity enjoined a suit at law upon a note given as surety upon the express condition that another person's signature was also to be obtained.

n. Delivery to Depositary.

1. Generally.—There can be no escrow without conditional delivery of an instrument to a depositary and such delivery must be actual, whether manual or symbolical. Delivery does not necessarily mean direct change of manual possession between depositor and depositary, nor need it even be positively proved. It may be inferred from circumstances, not the least frequent of which in its occurrence is the possession of the deed by the grantee, and when the testimony is indeterminate, the inquiry of delivery *vel non* is one of intention to be determined by the jury. And where an instrument intended as an escrow was handed by grantor to grantee, to be by him delivered to one who had been nominated as depositary, and such deed was handed to such depositary, who noted the terms of the agreement between the parties, such delivery was a good delivery in escrow. And it has been held that "leaving a deed in the hands of the grantee, to be by him transmitted to a third person, to hold in escrow until the happening of a certain event, is not a de-

livery to the grantee, so as to vest title in him." In other words, if the delivery is not to the grantee qua grantee, it is no accomplished delivery in law; for example, delivery of a deed to the grantee for inspection, or to hold while he had some proposal under advisement, or if the deed while in the hands of the grantee is to be considered in transition to the third person's possession. If the grantee is the grantor's special agent, the agency is paramount: *Alexander v. Alexander*, 71 Ala. 295; *Cherry v. Herring*, 83 Ala. 458, 3 South. 667; *Hayden v. Collins*, 1 Cal. App. 259, 81 Pac. 1120; *Gilbert v. North Am. Fire Ins. Co.*, 23 Wend. 43, 35 Am. Dec. 543; *Brown v. Reynolds*, 37 Tenn. (5 Sneed) 639; *Fairbanks v. Metcalf*, 8 Mass. 230. But when all the solemnities of signing, sealing and delivering have been performed, desultory conversation as to the most expedient means of safeguarding the muniments of title, resulting even in their deposit with a third person as custodian, until the parties should call for them is entirely without the question of escrow. The latest time when escrow could be entertained would be before the actual delivery: *Gibson v. Partee*, 19 N. C. 530.

Until a deposit is made, the depository is only such in name, and with no rights, duties or liabilities to either party, and that, too, even if he be named in a legislative act as the person who is to be the depository. An act of the Mississippi legislature granted a charter to a railroad company. The charter contained provisions authorizing any county through which the road might be located by the vote of the qualified voters of the county to subscribe to the capital stock of the road and pay therefor in bonds. The act provided that when the bonds were issued, they should be deposited with a certain trust company of New York, to be held in escrow, and delivered to the railway company at a time to be agreed on between the company and the county. A county duly voted bonds under the provisions referred to, and they were prepared, signed, but not handed over to the trust company. The trust company brought suit for them, and it was held that the language of the act could not be construed to raise a binding contract between the county and the trust company. The charter in no way added to, or helped out, the language of the statute, which imposed no duty on the trust company, but practically told it to wait until the county and the railway company agreed, etc. That the matter was therefore left for adjustment to the parties, and until delivery the "depository" could not have any interest in their negotiations, notwithstanding its appointment by the legislative act; and it therefore had no such right as would support an action to compel the county to deliver the bonds: *Farmers' Loan & Trust Co. v. Board of Supervisors of Alcorn County (Miss.)*, 93 Fed. 579, 35 C. C. A. 460.

If a grantor, when depositing a deed with another person, without the grantee's knowledge or assent, annexes his own conditions to the delivery of it, the grantee must perform those conditions before he is entitled to the deed. And it makes no difference if the condition

be the payment of a specified sum of money. But where the grantor deposited a deed with a third person, conditioned to deliver to the grantee on payment of a sum of money, and the grantor died before the grantee signified his acceptance of the proposal, the transaction is unlike one where all the terms and conditions are agreed upon, understood, and consented to between the parties before the death of the grantor. In this case, the minds of the contracting parties had not met at the time of the vendor's demise, leaving at his death no agreement between them. The power to recall the instruments before acceptance of the condition annexed to them having been with the grantor, of which power he was, through no fault of his own, deprived before acceptance of his proffered terms, the subsequent acceptance thereof was ineffectual. But the grantor had that power, and the grantee was not, after the grantor's death, entitled to accept the condition and demand delivery. As to the depositary, he was the agent of the grantor up to the moment of acceptance, and his agency not being coupled with any interest, it ceased on the grantor's death, and therefore deprived him of the power to make a valid delivery: *Byars v. Spencer*, 101 Ill. 429, 40 Am. Rep. 212; *Taft v. Taft*, 59 Mich. 185, 60 Am. Rep. 291, 26 N. W. 426; *McIntyre v. McIntyre*, 147 Mich. 365, 110 N. W. 960; *Stockwell v. Williams*, 68 N. H. 75, 41 Atl. 973; *Soward v. Moss*, 59 Neb. 71, 80 N. W. 268; *De Bow v. Wollenberg*, 52 Or. 404, 96 Pac. 536, 97 Pac. 717; *Campbell v. Thomas*, 42 Wis. 437, 24 Am. Rep. 427.

Evidence of the subscribing witness proving a deed to have been delivered to a third person with a condition, and that on the performance of that condition it was to be handed to the grantee, is admissible: *Moore v. Parker*, 5 N. C. 37.

2. **Operation and Effect of.**—The necessity of delivery before the escrow is created is only equaled by the careful scrutiny of the effect of that delivery, both with regard to parties and the hiatus in the title, which the law permits. In the first place, it is well settled that a deed held as an escrow conveys no title, though it does not follow that the grantee has no interest in the land which he can mortgage. He is not clothed with the legal title, but is with an equitable estate, which is the subject of mortgage, and the remedy lies in equity to have a lien declared on the land, and a decree for its sale to pay the purchase money. For where the vendor executes a deed in escrow, and gives possession to the vendee, he thereby disposes of his legal title and interest in the land, and reserves only an equity to be enforced if the vendee fails to pay the purchase money in the manner above described: *Foster v. Trustees of the Athenaeum*, 3 Ala. 302; *Bankhead v. Owen*, 60 Ala. 457; *Ware v. Curry*, 67 Ala. 275; *Suddeth v. Knight* (Ala.), 14 South. 475; *Berry v. Anderson*, 22 Ind. 36; *Westfall v. Stark*, 24 Ind. 377; *Koons v. Ferguson*, 25 Ind. 288; *Calvert v. Landgraf*, 34 Ind. 388; *Bibbler v. Walker*, 69 Ind. 362; *Bankam v. Burk*, 96 Ind. 270; *Whitfield v. Harris*, 48 Miss. 710.

The contract of deposit is not revocable at the mere will of either of the parties, nor will the death of either of them abrogate such contracts (see ante, V); but takes effect, by constructive delivery, upon the performance of the stipulated conditions by the grantee; and such delivery, by fiction of law, relates back to the delivery made to the depositary in the lifetime of the grantor, and is substituted to the same; for as there was *traditio inchoata* in the lifetime of the parties, and *postea consummatio* exists by the performance of the condition, it takes effect by the first delivery. And when it clearly appears that the grantor places a deed with a depositary, to be kept continuously by him until after grantor's death and then to be delivered to the grantee, all of which is afterward done, the estate vests in the grantee from the time of the execution of the deed: *Bostwick v. McEvoy*, 62 Cal. 496; *Jones v. Jones*, 6 Conn. 111, 16 Am. Dec. 35; *Peck v. Goodwin*, Kirby, 64; *Price v. Pittsburg etc. R. R. Co.*, 34 Ill. 15; *Davis v. Clark*, 58 Kan. 100, 48 Pac. 563; *Guild v. Althouse*, 71 Kan. 604, 81 Pac. 172; *Wheelwright v. Wheelwright*, 2 Mass. 447, 3 Am. Dec. 66; *Hedge v. Drew*, 12 Pick. 141, 22 Am. Dec. 416; *Foster v. Mansfield*, 3 Met. 412, 37 Am. Dec. 154; *O'Kelly v. O'Kelly*, 8 Met. 436; *Shaw v. Hayward*, 7 Cush. 170; *Timothy v. Wright*, 8 Gray, 522; *Wallace v. Harris*, 32 Mich. 380; *Taft v. Taft*, 59 Mich. 185, 60 Am. Rep. 291, 26 N. W. 426; *Tharaldson v. Everts*, 87 Minn. 168, 91 N. W. 467; *Fred v. Fred* (N. J. Ch.), 50 Atl. 776; *Craddock v. Barnes*, 142 N. C. 89, 54 S. E. 1003; *Lessee of Shirley v. Ayres*, 14 Ohio, 307, 45 Am. Dec. 546; *Gilmore v. Whitesides*, Dud. Eq. 14, 31 Am. Dec. 563; *Prutsman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592; *Hunter v. Hunter*, 17 Barb. 25; *Perryman's Case*, 5 Coke, 84. But a deed deposited in escrow does not become operative to convey the title until the performance of the conditions or happening of the event on which it was intended to be delivered to the grantee designated, except in certain cases arising through incapacity on the part of the grantors, where by fiction of law it is allowed to take effect from the first delivery: *Flanagan's Estate v. Great Cent. Land Co.*, 45 Or. 335, 77 Pac. 485.

On a trial, the plaintiffs produced a deed properly executed and acknowledged by all of them and tendered it to the defendant. On defendant's refusal to accept it, it was, by order of the court, deposited with the clerk for their benefit. This was a delivery in escrow, and was therefore not affected by the death of one of the grantors prior to delivery to the grantee: *Webster v. Kings County Trust Co.*, 80 Hun, 420, 30 N. Y. Supp. 357; *Hunter v. Hunter*, 17 Barb. 25; *Ruggles v. Lawson*, 13 Johns. 285.

A purchaser of land, who is to pay a part of the consideration in money and the balance by another piece of land after the deeds have been deposited in escrow, to be delivered on payment of the balance of the consideration, and after being in possession of the purchased land four years, is deemed to have waived all objections to the formal execution of the deeds, and cannot refuse payment of the balance

until the alleged objections to title are cleared off: *Torrey v. Thayer*, 37 N. J. L. 339.

Where a deed of land is in escrow until the intended grantee shall attain a specified age, he has not an expectant estate in the lands which entitles him to the intermediate rents and profits under the fortieth section of the title of the statutes relative to the creation and division of estates: *Hunter v. Hunter*, 17 Barb. 25.

While a bond for the payment of money on certain conditions is in the hands of a third party as an escrow, to be delivered to the payee when the conditions are complied with, its execution is incomplete, and no action can be maintained upon it; but it is nevertheless effectual, while it remains properly in the depositary's hands, to preclude the obligee from ignoring its existence and maintaining an action on the consideration. If retained wrongfully by the depositary, there can be no doubt a court of equity will interpose and compel the delivery of the instrument: *Carter v. Turner*, 37 Tenn. (5 Sneed) 178.

The essential requirements of a deposit in escrow is that the depositor part with all present or temporary right of control until the performance of some future condition or the happening of some future event, upon which, according to the circumstances, his right of possession may return or pass, but there must be a parting with power and control by the grantor for the benefit of the grantee at time of delivery. When a mortgagee, on the representation that the mortgagor was prepared to pay off the mortgage, executed a release and gave it to the mortgagor's agent for delivery on payment, his parting with the temporary control did not invalidate the deposit in escrow; and, if delivered in escrow to be delivered on payment of money, which is not paid as specified, the deed is of no effect: *West v. Reed*, 55 Ill. 242; *Green v. Capps*, 142 Ill. 286, 31 N. E. 597; *Fitch v. Miller*, 200 Ill. 170, 65 N. E. 650; *Craddock v. Barnes*, 142 N. C. 89, 54 S. E. 1003; *Prutsmann v. Baker*, 30 Wis. 644, 11 Am. Rep. 592; *Franklin v. Killilea*, 126 Wis. 88, 104 N. W. 993.

The holder of a horse-car franchise assigned his rights to the concession, and agreed to give a further assurance by proper transfer when the authorities should grant a right to use electricity as a motive power for the road, which assignment defendant acknowledged in writing he had received, and was to hold in escrow "in accordance with the terms of the agreement," "which trust I hereby accept." The receipt constituted a mere escrow contract, by which defendant agreed to hold the assignment until an electric concession was granted, and the interpretation that in all subsequent matters relating to the concession the depositary acted as the holder's trustee could not be sustained. And the contract having been canceled three years after it was made, the fact that defendant had acted as the depositary of the escrow agreement did not preclude him, after the contract was canceled, from himself obtaining an assignment of the original concession: *Havana City Ry. Co. v. Ceballos*, 131 Fed. 381; affirmed in 139 Fed. 538, 71 C. C. A. 326.

Where a deed was executed in escrow, to be delivered when the grantee had paid all the claims against the estate of a deceased person, and neither the deed nor the agreement to pay was intended to be absolute, the creditors acquired no lien on the land by such arrangement to secure the payment of their claims: *Marshall v. Blass*, 82 Mich. 518, 46 N. W. 947, 47 N. W. 516. An unexercised right of revocation is of no effect to defeat a deed delivered in escrow, and the same doctrine is generally held applicable to promissory notes. So where the maker of a note delivers it to a third person to hold and deliver to the payee in case the maker dies without having recalled it, a delivery to the payee after the maker's death vests title in the payee; but if the third person were simply to take and hold it as the servant of the depositor, she could not effectually deliver it to the payee after the death of the maker: *Daggett v. Simmonds*, 173 Mass. 340, 53 N. E. 907, 46 L. R. A. 332; *Morse v. Slason*, 13 Vt. 296; *Blanchard v. Sheldon*, 43 Vt. 512. But where the deposit is subject to recall by the grantor, the grantee acquires no right, and the grantor may exercise his power of revocation or recall at any time: *Thompson v. Calhoun*, 216 Ill. 161, 74 N. E. 775; *Osborne v. Eslinger*, 155 Ind. 351, 80 Am. St. Rep. 240, 58 N. E. 439; *Pennington v. Pennington*, 75 Mich. 600, 42 N. W. 985; *Burk v. Sproat*, 96 Mich. 404, 55 N. W. 985; *Cole v. Cole*, 144 Mich. 676, 108 N. W. 101.

By agreement in writing defendant contracted to sell plaintiff certain shares of stock for ten thousand dollars on or before April 10, 1892. The stock and money were deposited with a third person under the further provision that the contract was not to be performed, unless the stockholders should vote to increase the capital stock of the corporation from twenty-five thousand dollars to thirty-five thousand dollars, and that the contract should not be enforced if the increase of stock was prevented by legal proceedings. A meeting of the stockholders was called to increase the stock, but was restrained from acting by injunction issued at the instigation of defendant, and no increase of the stock was made till October, when it was fixed at fifty thousand dollars. Plaintiff succeeded in an action to recover back the money deposited by him, and the verdict was sustained on appeal: *Lovell v. Jacobs*, 150 N. Y. 84, 44 N. E. 792.

Where plaintiff, who agreed to transfer his interest in a company, including three-fifths of the entire stock, the stock to be delivered in escrow to a certain company on payment of a certain amount on or before a certain day, performed his contract, only in part, by lodging thirty-three shares less than three-fifths of the stock, and defendant, after depositing the amount agreed on with the escrow, refused to allow payment of it to plaintiff, the plaintiff was not entitled to rescind and recover the stock deposited by him, as compliance by him with the terms of the escrow agreement was an indispensable condition to its performance and a continuance of the contract: *Dady v. O'Rourke*, 65 App. Div. 465, 72 N. Y. Supp. 827, 172 N. Y. 447, 65 N. E. 273; reversing 61 App. Div. 529, 70 N. Y. Supp. 694. The de-

livery of a deed in escrow renders it absolute when the condition is fulfilled: *Gammon v. Bunnell*, 22 Utah, 421, 64 Pac. 958.

3. Revocation of.—While the conditions on which a deed is placed in the hands of a depositary remain executory, they are variable by mutual consent, for that which exists in parol may be discharged by parol: *Raymond v. Smith*, 5 Conn. 555; *Beamer v. Morrison*, 210 Ill. 443, 71 N. E. 402.

An escrow signed, sealed, and deposited upon a valuable consideration is not revocable by the depositor, except according to the terms of the agreement and deposit. The depositary, under such circumstances, is as much the agent of the grantee as of the grantor; and he is as much bound to deliver the deed, on performance of the condition, as he is to withhold it until performance: *Belden v. Carter*, 4 Day, 66, 4 Am. Dec. 185; *Hatch v. Hatch*, 9 Mass. 307, 6 Am. Dec. 67; *Shirley's Lessee v. Ayres*, 14 Ohio, 307, 45 Am. Dec. 456; *Ruggles v. Lawson*, 13 Johns. 285; *Jackson v. Rowland*, 6 Wend. 666, 22 Am. Dec. 557; *Stanton v. Miller*, 65 Barb. 58, 1 Thomp. & C. 23; affirmed, 58 N. Y. 192.

If a deed is left with a stranger, that is not a party to the deed, to be delivered to the grantee on the happening of a contingency, the first delivery is complete and irrevocable by death or otherwise: *Hammond v. Hunt*, Fed. Cas. No. 6003, 1 Barn. & A. 111.

The depositary of an escrow is the agent of both parties, and an escrow contract is not revocable at the will of either party or their representatives, but may be enforced under Revised Statutes of 1898, section 3935, relating to the enforcement of written contracts for the conveyance of realty: *Gammon v. Bunnell*, 22 Utah, 421, 64 Pac. 958.

From the moment a deed is delivered in escrow it ceases to be revocable by the vendor. Thus, in the case of an ordinary sale of realty, where the deed is executed and handed to a third person to hold till purchase money is paid and the purchaser takes possession, the deed is beyond recall: *Cannon v. Handley*, 72 Cal. 133, 13 Pac. 315; *Millett v. Parker*, 2 Met. (Ky.) 608; *Shirley's Lessee v. Ayres*, 14 Ohio, 307, 45 Am. Dec. 546. And the power to recall a voluntary conveyance without consideration, which was intended as a gift to a scholastic institution and left with the scrivener as custodian and not to be delivered pending inquiries, has long since been established, and where such an undelivered deed was, without any authority, recorded by the scrivener three days after the death of his principal, it was set aside as a cloud upon the title that had descended to the heirs. And generally, the rule may be accepted that when the grantor intends to retain in himself the dominion and control of an instrument, his power to revoke it is absolute: *Wellborn v. Weaver*, 17 Ga. 267, 63 Am. Dec. 235; *Hoig v. Adrian College*, 83 Ill. 267; *Fairbanks v. Metcalf*, 8 Mass. 230; *Hatch v. Hatch*, 9 Mass. 307, 6 Am. Dec. 67; *McGrath v. Reynolds*, 116 Mass. 566; *Shurtleff v. Francis*, 118 Mass. 154; *Hale v. Joslin*, 134 Mass. 310; *Rockwood v. Wiggin*, 16 Gray, 402;

Mechanics' Nat. Bank v. Jones, 175 N. Y. 518, 67 N. E. 1085, affirming, *Mechanics' Nat. Bank v. Roughead*, 76 App. Div. 534, 78 N. Y. Supp. 800.

Where A, a sick and aged man, agreed with B that the latter should have his lands at his death in consideration of personally caring for and attending upon him, and executed and lodged with C a deed to be delivered to B on A's death, A was entitled to rescind and recall the deed on proof of B's failure to perform his part of the agreement. The learned judge who wrote the opinion in *Thomas v. Thomas* quotes from *Ecclesiasticus xxxiii*, 19-23, in support of the decision. The authority may be apocryphal rather than canonical, but it is good enough to be inspired, if not so recognized, and is worthy a place in our legal literature. "Give not thy son and wife, thy brother and friend, power over thee while thou livest, and give not thy goods to another, lest it repent thee, and thou entreat for the same again. As long as thou livest and hast breath in thee, give not thyself over to any. Far better it is that thy children should seek to thee, than that thou shouldst stand to their courtesy. In all thy works keep to thyself the pre-eminence, leave not a stain on thine honor. At the time when thou shalt end thy days and finish thy life, distribute thine inheritance": *Howlin v. Castro*, 136 Cal. 605, 69 Pac. 432; *Thomas v. Thomas*, 24 Or. 251, 33 Pac. 565.

Instructions conveying property to a corporation under an agreement for the settlement of the debts of a firm were placed in escrow in the hands of a third person, who gave a receipt for them, whereby it was among other things provided that he should hold them for two weeks, and if within said term all of the creditors of the firm, except two who were named, assented to the plan of settlement, and surrendered their evidences of the firm's debts, the instruments were to be delivered to the corporation. It was held that the escrow agreement and deposit was a part of the general agreement between the parties for the settlement of the debts and an advantage to the debtors in limiting the time for compliance therewith by the creditors, but did not authorize the grantors to revoke the agreement, and recall the instruments, within the time limited, and before compliance by the creditors: *Mechanics' Nat. Bank v. Roughead*, 76 App. Div. 534, 78 N. Y. Supp. 800; *Mechanics' Nat. Bank v. Jones*, 175 N. Y. 518, 67 N. E. 1085.

o. Delivery by Depositary.

1. **Generally.**—The depositary of an escrow is as much the agent of the grantee as of the grantor, and is as much bound to deliver the deed on performance of the condition as to withhold it until performance: *Cannon v. Handley*, 72 Cal. 133, 13 Pac. 315; *Stanton v. Miller*, 65 Barb. 58, 1 Thomp. & C. 23; *Shirley's Lessee v. Ayres*, 14 Ohio, 307, 45 Am. Dec. 546; *Schmidt v. Deegan*, 69 Wis. 300, 34 N. W. 83. Where a receipt deposited as an escrow is found in the possession of the party for whom it was intended, it is presumed to have been properly delivered: *Clements v. Hood*, 57 Ala. 459.

A debtor agreed to compound a debt with his creditor, and pay the composition at a given date or give him a mortgage in lieu, provided the creditor gave him a receipt in full. He executed the mortgage and deposited it in escrow. He did not pay the composition and required a return of his mortgage, and when it was refused by the depositary he conveyed his property to a fourth person with notice of the facts. Subsequently the depositary gave the mortgage to the creditor, who duly executed a receipt in full of all demands against the mortgagor, and deposited the same with the depositary, and this delivery and acceptance were binding on the mortgagor, and the person to whom he executed the said conveyance took no title: *McDonald v. Huff*, 77 Cal. 279, 19 Pac. 499.

Where a deed is delivered in escrow, and is tendered by the depositary to the party to whom it is made, and he refuses it, a valid delivery may afterward be made if the grantee elect to accept it, and if the condition on which the deed is delivered is "to be delivered to the grantee when he should come to town," and the grantor dies before that time, it is good if afterward delivered by the depositary: *Cook's Admr. v. Hendricks*, 20 Ky. (4 T. B. Mon.) 500.

A deed was lodged in escrow and there was evidence that the conditions had been performed so that the equitable title was in the grantee. The depositary, intending to complete delivery, gave it to the grantor to carry to the grantee, and she took it away for that purpose. This constituted a delivery, if afterward accepted by the grantee as such, and the destruction or retention of the deed by the grantor after such delivery could not divest the grantee's estate: *Moore v. Hazelton*, 9 Allen, 102; *Regan v. Howe*, 121 Mass. 424; *Souverbye v. Arden*, 1 Johns. Ch. 240; *Scrugham v. Wood*, 15 Wend. 545, 30 Am. Dec. 75.

An agreement to deliver a deed as an escrow to the person in whose favor it is made, and who is likewise a party to it, will not make the delivery conditional. If so delivered, notwithstanding it is described as an escrow, it will be deemed an absolute delivery and a consummation of the execution of the deed: *In re Simonton's Estate*, 4 Watts, 180.

Where a depositary holds negotiable bonds in escrow, and it lies within his discretion to determine when the conditions precedent have been performed, and he so adjudges, and delivers the bonds, the depositor cannot defend against them in the hands of bona fide holders on the ground and notwithstanding that the condition had not in fact been performed: *Graff v. Logue*, 61 Iowa, 704, 17 N. W. 174; *Burson v. Huntington*, 21 Mich. 415, 4 Am. Rep. 497; *Fearing v. Clark*, 16 Gray, 74, 77 Am. Dec. 394; *Chase National Bank v. Faurot*, 149 N. Y. 532, 44 N. E. 164, 35 L. R. A. 605; *Vallett v. Parker*, 6 Wend. 615; *Long Island Loan & Trust Co. v. Columbus C. & I. C. R. Co.*, 65 Fed. 455; *Mercer County v. Provident Life & Trust Co.*, 72 Fed. 623, 19 C. C. A. 44, reversed; *Provident Life & Trust Co. v. Mercer County*, 170 U. S. 593, 18 Sup. Ct. Rep. 788, 42 L. ed. 1156.

Where the vendor deposited with a bank notes for collection and a deed of the land sold in accordance with a bond given by him to the vendee, such deed to be delivered to the vendee on payment of the notes, the bank would not be required to deliver the deed upon such payment without surrender of the bond, or a showing that it was not enforceable against the vendor, but upon tender of the bond and the amount of the notes, it is bound to receive the money, and deliver the deed to the grantee or his lawful representatives, unless other facts exist which would in law or equity deprive the grantee of the right to demand delivery of the deed: *Hardin v. Neal L. & B. Co.*, 125 Ga. 820, 54 S. E. 755.

The grantee cannot acquire title by gaining possession of the deed by theft, fraud, or the voluntary act of the depository, who has no authority to waive performance of the conditions, and an unauthorized delivery is ineffectual to pass title.

The plaintiffs in a writ of entry were the heirs of the owner of land, who had conveyed such land to his tenant for three hundred dollars, and the tenant entered thereon and effected improvements, but did not pay the consideration money. The deed was delivered to one of the plaintiffs by the owner, who told her to keep it until she and defendant (the tenant) were married, or until he sold the land, and in such case he was to pay her the three hundred dollars. Some time after this, by a pretense, defendant obtained the deed from her, and evaded her requests to redeliver it, saying he would keep it among his papers, and he then recorded it. She again got possession of it, and in an action of replevin he was adjudged entitled to its possession; and thereafter she and her coheir brought suit against him and succeeded, on the ground that there was sufficient evidence before the jury to show that the deed was delivered as an escrow, and the voluntary parting with it by the depository did not pass the title. The judgment in replevin was no estoppel to the assertion of plaintiff's title to the land in question: *Daggett v. Daggett*, 143 Mass. 516, 10 N. E. 311.

It is the duty of the depository to strictly comply with the conditions on which he holds deeds in escrow, and where, the conditions being performed, he is required by a purchaser to hold them subject to another condition and refuses, and thereupon the vendor rescinds the contract, but while the depository still holds the deeds the purchaser repents and waives the attempt to impose the new condition, the depository should then carry out the original instructions of the parties: *Alexander v. Bernard*, 136 Mich. 642, 99 N. W. 858.

A contract not brought to the notice of those holding stock in escrow until after they have delivered it in pursuance of the terms of the contract under which they hold will not be valid, even though it might have been valid if brought to their notice before delivery: *Walker v. Bamberger*, 17 Utah, 239, 54 Pac. 108. The depository's obligation to deliver the deed is unaffected by the death of one of the vendors before performance of the conditions: *Bronx Inv. Co.*

v. National Bank of Commerce, 47 Wash. 566, 92 Pac. 380. See ante, V.

The delivery to the attorney of the grantee of an instrument executed by the grantor will not convert the instrument from an escrow into a deed, where the character of the delivery negatives its being a delivery to the grantee: *Dixon v. Bristol Sav. Bank*, 102 Ga. 461, 66 Am. St. Rep. 193, 31 S. E. 96.

2. **Authorized.**—The crux of an escrow is the performance of the conditions, and the onus lies on the depositary to deliver strictly in accordance with them. Thus far he is clothed with legal authority, and indeed with legal obligation. He is *ex necessitate* the judge of whether the conditions have been performed, because until they are he must not deliver. But from the moment of delivery in accordance with the conditions, the title of the grantee is complete, and in some cases its creation relates back to the original delivery by the grantor in escrow: See post, X. When a deed of gift is deposited on condition that the donee is to get it when he has lodged another certain deed with the depositary, the latter has no discretion to exercise; he must await the other deed: *Hoig v. Adrian College*, 83 Ill. 267.

Where a depositary holds notes to be "turned over" to plaintiff when a certain right of way has been secured and the plaintiff is thereupon to enter into a certain absolute contract for, etc., the authority of the depositary is exhausted by the performance of the conditions precedent and the handing over of the notes, and this authority he can exercise without further directions from the principals: *Burlington C. R. & M. R. Co. v. Palmer*, 42 Iowa, 222.

3. **Unauthorized.**—An escrow delivered by the depositary before compliance with or contrary to the conditions on which it is to be delivered is inoperative. No title passes to the grantee, and with the exceptions hereinafter noted, a bona fide purchaser for value acquires no rights against the grantor. The mere fact of any person, even the depositary himself, recording it or getting it recorded, surreptitiously or fraudulently, gives it no further efficacy, and the cloud on the grantor's title will be canceled by a court of equity: *Clements v. Hood*, 57 Ala. 459; *Dyson v. Bradshaw*, 23 Cal. 528; *Hamill v. Thompson*, 3 Colo. 518; *Knapp v. Nelson*, 41 Colo. 447, 92 Pac. 912; *Coe v. Turner*, 5 Conn. 86; *Mays v. Shields*, 117 Ga. 814, 45 S. E. 68; *Anderson v. Goodwin*, 125 Ga. 663, 54 S. E. 679; *Haynes v. Griffiths* (Idaho), 101 Pac. 728; *Stanley v. Valentine*, 79 Ill. 544; *Whitaker v. Miller*, 83 Ill. 381; *Race v. Weston*, 86 Ill. 91; *Eichlor v. Holroyd*, 15 Ill. App. 657; *Chicago & G. W. R. R. L. Co. v. Peck*, 112 Ill. 408; *Burnap v. Sharpsteen*, 149 Ill. 225, 36 N. E. 1008; *Berry v. Anderson*, 22 Ind. 36; *Robbins v. Magee*, 76 Ind. 381; *Stringer v. Adams*, 98 Ind. 539; *Jackson v. Rowley*, 88 Iowa, 184, 55 N. W. 339; *Hogueland v. Arts*, 113 Iowa, 634, 85 N. W. 818; *Davis v. Clark*, 58 Kan. 100, 48 Pac. 503; *Rhodes v. School District*, 30 Me. 110; *Daggett v. Daggett*, 143 Mass. 516, 10 N. E. 311; *Abbott v. Alsdorf*,

19 Mich. 157; Taft v. Taft, 59 Mich. 185, 60 Am. Rep. 291, 26 N. W. 426; Davis v. Kneale, 103 Mich. 323, 61 N. W. 508; Hoit v. McIntire, 50 Minn. 466, 52 N. W. 918; Bales v. Roberts, 189 Mo. 49, 87 S. W. 914; Seibel v. Higham, 216 Mo. 121, 129 Am. St. Rep. 502, 115 S. W. 987; Patrick v. McCormick, 10 Neb. 1, 4 N. W. 312; Cotton v. Gregory, 10 Neb. 125, 4 N. W. 939; Roberson v. Reiter, 38 Neb. 198, 56 N. W. 877; Matteson v. Smith, 61 Neb. 761, 86 N. W. 472; Black v. Shreve, 13 N. J. Eq. 455; Ogden v. Ogden, 4 Ohio St. 182; Powers v. Rude, 14 Okl. 381, 79 Pac. 89; Hunter Realty Co. v. Spencer, 21 Okl. 155, 95 Pac. 757, 17 L. R. A., N. S., 622; Gaston v. City of Portland, 16 Or. 225, 19 Pac. 127; Tyler v. Cate, 29 Or. 515, 45 Pac. 800; Bradford v. Durham (Or.), 101 Pac. 897; Blight v. Schenck, 10 Pa. 285, 51 Am. Dec. 478; Schmidt v. Musson, 20 S. D. 389, 107 N. W. 367; Parrott v. Parrott, 48 Tenn. (1 Heisk.) 681; Beaumont Car Works v. Beaumont Imp. Co., 4 Tex. Civ. App. 257, 23 S. W. 274; Houston Land & Trust Co. v. Hubbard, 37 Tex. Civ. App. 546, 85 S. W. 474; Morris v. Blunt (Utah), 99 Pac. 686; Jarvis v. Rogers, 3 Vt. 336; Stiles v. Brown, 16 Vt. 563; Nichols v. Nichols, 28 Vt. 228, 67 Am. Dec. 699; Smith v. South Royalton Bank, 32 Vt. 341, 76 Am. Dec. 179; Wilkins v. Somerville, 80 Vt. 48, ante, p. 906, 66 Atl. 893, 11 L. R. A., N. S., 1183; Dunlevy v. Fenton, 80 Vt. 505, 130 Am. St. Rep. 1009, 68 Atl. 651; Miller v. Fletcher, 27 Gratt. 403, 21 Am. Rep. 356; Virginia Passenger & Power Co. v. Patterson, 104 Va. 189, 58 S. E. 157; White v. Core, 20 W. Va. 272; Everts v. Agnes, 4 Wis. 343, 65 Am. Dec. 314; Chipman v. Tucker, 38 Wis. 43, 20 Am. Rep. 1; Roberts v. McGrath, 38 Wis. 52; Roberts v. Wood, 38 Wis. 60; Franklin v. Killilea, 126 Wis. 88, 104 N. W. 993; Calhoun County v. American Emigrant Co., 93 U. S. 124, 23 L. ed. 826; Hanley v. Sweeney, 109 Fed. 712, 48 C. C. A. 612. See post, X.

But if the grantor's conduct is characterized by negligence, such as, if as soon as he learns that the deed has been delivered or recorded, and he fails to take active measures to recover possession of it, or to have the record expunged, he will be estopped from the assertion of his rights. If, however, the grantee has taken full possession of the land at the time he obtains the deed from the depository, he is clothed with double evidence of ownership, and the grantor is estopped from claiming title as against a purchaser who buys in good faith and has no notice, because he must be the sufferer who put it in the power of the wrongdoer to cause the loss; where one of two innocent parties must suffer, he through whose agency the loss occurred must sustain it: Dixon v. Bristol Saving Bank, 102 Ga. 461, 66 Am. St. Rep. 193, 31 S. E. 96; Mays v. Shields, 117 Ga. 814, 45 S. E. 68; Stanley v. Valentine, 79 Ill. 544; Berry v. Anderson, 22 Ind. 36; Robbins v. Magee, 76 Ind. 381; Freeland v. Charnley, 80 Ind. 132; Vaughan v. Godman, 94 Ind. 191, 103 Ind. 499, 3 N. E. 257; Burkam v. Burk, 96 Ind. 270; Stringer v. Adams, 98 Ind. 539; Quick v. Milligan, 108 Ind. 419, 58 Am. Rep. 49, 9 N. E. 392; Jackson v. Lynn, 94 Iowa, 151, 58 Am. St. Rep. 386, 62 N. W. 704;

Harkreader v. Clayton, 56 Miss. 383, 31 Am. Rep. 369; Ogden v. Ogden, 4 Ohio St. 182; Blight v. Schenck, 10 Pa. 285, 51 Am. Dec. 478; Smith v. South Royalton Bank, 32 Vt. 341, 76 Am. Dec. 179; Chipman v. Tucker, 38 Wis. 43, 20 Am. Rep. 1; Rehbein v. Rahr, 109 Wis. 136, 85 N. W. 315; White v. Core, 20 W. Va. 272. See post, X. This doctrine, however, has been carried to its extreme in Smith v. South Royalton Bank, 32 Vt. 341, 76 Am. Dec. 179, where the court said: "If the deed be delivered over without a performance of the condition, it cannot be an operative delivery to pass the estate. Not being delivered it was a nullity and void, or, more properly speaking, never existed, and must be tainted with the fraud of the depository, which goes to the very existence of the instruments, into whosoever hands they may come." Everts v. Agnews, 4 Wis. 343, 65 Am. Dec. 314, Chipman v. Tucker, 38 Wis. 43, 20 Am. Rep. 1, Rehbein v. Rahr, 109 Wis. 136, 85 N. W. 315, countenance the same conclusion.

Where a bond, perfect on its face, is delivered in escrow to a third person, who improperly delivers it to the obligee with or without notice of a condition, the delivery is ultra vires, and the obligor is not bound, irrespective of the question of good or bad faith of the obligee: Berry v. Anderson, 22 Ind. 36; Black v. Shreve, 13 N. J. Eq. 455; Smith v. South Royalton Bank, 32 Vt. 341, 76 Am. Dec. 179; Blair v. Security Bank of Richmond, 103 Va. 762, 50 S. E. 262; Ward v. Churn, 18 Gratt. 801, 98 Am. Dec. 749. See ante, VI, g.

And the recording of a deed simply for convenience, and on condition that the depository hold it on the same terms as it was originally deposited, will not render it binding in case of a fraudulent delivery of it by the depository to a bona fide grantee: Smith v. South Royalton Bank, 32 Vt. 341, 76 Am. Dec. 179. But if a grantor is ignorant of the material and important fact that a deed has been delivered by the person to whom it was intrusted as an escrow, in violation of the authority conferred, the doctrine of estoppel cannot be applied to his subsequent conduct in attacking its validity: Robins v. Magee, 76 Ind. 381. And a non-negotiable note signed by sureties, deposited in escrow and delivered without performance of the conditions is also inoperative: Daniels v. Gower, 54 Iowa, 319, 3 N. W. 424, 6 N. W. 525. And a bond for a deed, where the obligee fraudulently obtained and assigned it without payment: Roberts v. Mullenix, 10 Kan. 22. Otherwise, however, with ordinary promissory notes, unless the payee had notice of the condition either express or constructive: Deardorff v. Foresman, 24 Ind. 481; Millett v. Parker, 2 Met. (Ky.) 608; Jordan v. Jordan, 78 Tenn. (10 Lea) 124, 43 Am. Rep. 294; Perry v. Patterson, 5 Humph. 133, 42 Am. Dec. 424; Johnson v. Branch, 11 Humph. 521; Breeden v. Grigg, 8 Baxt. 163; Majors v. McNeily, 7 Heisk. 294. It has nevertheless been held in Wisconsin that nondelivery is always a defense on negotiable promissory notes, unless the party sought to be charged is estopped by his own negligence: Chipman v. Tucker, 38 Wis. 43, 20 Am. Rep. 1.

Where a promissory note handed to the payee's agent to hold "for both parties," to be delivered to the payee on the happening of a certain event, was delivered, in violation of the agreement, the delivery was not effective; but in this particular case the payee was the plaintiff and all the circumstances of the escrow were before the court: *Hansford v. Freeman*, 99 Ga. 376, 27 S. E. 706.

And where three bonds, for one thousand dollars each, as a bonus for the establishment of a factory in a village were placed in escrow, to be delivered when the factory was completed as per contract, the delivery by the depositary was sufficient, whether the contract was performed or not, to give an innocent purchaser a valid title to the bonds: *Schmid v. Village of Frankfort*, 131 Mich. 197, 91 N. W. 131.

It is a vendor's duty to give a depositary all information in his power concerning the subject matter of the escrow, and where there is a suppression of fact by him for the purpose of misleading the custodian into signifying the performance of the condition, such indication of satisfaction on his part is without value, and is not sufficient to sustain an action by the vendor: *Wolcott v. Johns*, 7 Colo. App. 360, 44 Pac. 675.

The registration of a mortgage release shown to have been delivered as an escrow is properly enjoined: *Matteson v. Smith*, 61 Neb. 761, 86 N. W. 472.

If there are conditions imposed by a grantor unknown to the grantee, and the depositary delivers the escrow deed unconditionally to him, the grantee is not bound thereby, but if the conditions are conveyed to the grantee, he can claim no rights under the deed without compliance with them: *Virginia Passenger & Power Co. v. Patterson*, 104 Va. 189, 51 S. E. 157.

Papers were held in escrow to be delivered only on the event of a wife getting alimony against her husband, and releasing the same. The plaintiff, however, prevailed against her and got judgment for an absolute divorce. The depositary gave the papers, nevertheless, to the defendant and a verdict was recorded against him, as the papers were unlawfully delivered out of escrow: *Tucker v. Dudley*, 113 App. Div. 500, 99 N. Y. Supp. 339.

After a deposit in escrow the grantor died, and the grantee refused to complete the transaction. One of the beneficiaries, concealing the fact of the grantor's death from the depositary, and believing he had a right to obtain the deed from him, obtained it, and prevailed on the grantee to exercise a quitclaim deed; but, as no title ever passed to the grantee, the quitclaim deed and the deed of the deceased grantor were alike held nugatory: *Seibel v. Higham*, 216 Mo. 121, 129 Am. St. Rep. 502, 115 S. W. 987.

The principle of the innocent holder is applied also to bonds, and where there has been an unauthorized delivery by the custodian in escrow, the surety is not bound unless his knowledge of the unauthorized act and his acquiescence in it amount to waiver and estoppel: *Wright v. Lang*, 66 Ala. 389.

So there was no delivery where an agent with whom a note and mortgage were lodged fraudulently and through the purchaser's negligence took them in his own name, and the vendor was entitled to a lien for the unpaid purchase money, as against a purchaser of the mortgage without notice: *Raymond v. Glover* (Cal.), 37 Pac. 772.

An agent contracted to sell certain land without authority from the owner, who afterward approved of the transaction sufficiently to make a quitclaim deed of the premises to the purchaser, and gave it to the agent as an escrow, with authority to deliver the deed upon certain conditions. After this the agent abandoned the vendor's interests and confederated with the purchaser to defraud him of whatever interest he might have in the land. The agent gave the deed to the purchaser without the conditions being fulfilled. Under the circumstances, the cancellation of the deed would be decreed, and also that the purchaser restore the possession of the property, accounting for the rents and profits: *Clement v. Evans*, 15 Ill. 92.

Where a deed was delivered as an escrow, to be delivered on the grantee paying a certain sum in cash, and the custodian afterward delivered the deed to him on receiving a promissory note of some one other than the grantee, the delivery was ineffectual, and the estate remained in the grantor, and the possession of the deed by the grantee, under such circumstances, imported no delivery: *Peter v. Wright*, 6 Ind. 183.

The depository of an escrow deed, of which plaintiff was the grantor, during the pendency of an equity suit concerning the land it purported to convey, and he being one of the defendants, wrongly and to defeat the plaintiff delivered the deed to another defendant. The suit resulted in a decree that plaintiff was the owner and the transfer of the deed gave the grantee no title. The maxim, "*pendente lite nihil innovetur*," is applicable to prevent such a transaction taking effect: *McGregor v. McGregor*, 21 Iowa, 441.

Where a mortgage, in anticipation of a purchase, was deposited in escrow to await completion of title in the mortgagor on consummation of a verbal agreement to purchase, and the vendor sells the land in the meantime, the delivery of the mortgage in violation of the escrow terms will not operate to make it a valid mortgage. It was a conditional deposit of a paper to be delivered in future in case a contract was made in future and it was at all times subject to recall: *Powell v. Conant*, 33 Mich. 396.

Where a release of dower, and promissory notes given therefor, were delivered as an escrow, to take effect on delivery of the premises on a day certain, but before that day the widow died, the notes had no legal existence until the conditions were performed, and such conditions were not fulfilled by delivery to her son in law by the depository without the maker's consent: *Archer v. Whalen*, 1 Wend. 179.

Where the depository, in violation of the escrow agreement, gave the vendor the mortgage over the property sold and which was prior to another given by the purchaser, which, however, was first recorded,

the vendor does not lose his priority by accepting and recording his mortgage, nor by any subsequent acts which were not prejudicial to the rights of the other mortgagee: *Balfour v. Parkinson*, 84 Fed. 855; *Balfour v. Hopkins*, 93 Fed. 564, 35 C. C. A. 445.

He is not an innocent lender who is advised that the borrower is without title, and that deeds are deposited in escrow, but is put upon inquiry as to the terms of the escrow; and if he rests upon the statement of the depository, and makes the loan, and the deeds are delivered contrary to the escrow agreement, he cannot claim as against the rights of the vendor, but takes subject thereto: *Balfour v. Parkinson*, 84 Fed. 855; *Balfour v. Hopkins*, 93 Fed. 564, 35 C. C. A. 445.

If a grantor places a deed in the custody of a depository, with express instructions to deliver it to the grantee, upon the payment by the grantee to the grantor of a certain note given by the former to the latter, and the grantee fraudulently procures the instrument from the depository without paying the note, the depository being innocent of any wrong or bad faith, the deed passes no title, either to the grantee or to an innocent purchaser from him, and the fact that it may not be technically an escrow, because of a secret understanding between the grantor and the grantee that the note was never to be paid, and that the instrument was never to be delivered (there being no negligence or fraudulent design on the part of the grantor), does not alter the principle of the above ruling, but rather strengthens the position that no title passes from the grantor, since it was never intended that the instrument should be legally executed by a delivery to the grantee: *Dixon v. Bristol Sav. Bank*, 102 Ga. 461, 66 Am. St. Rep. 193, 31 S. E. 96; *Everts v. Agnes*, 4 Wis. 343, 65 Am. Dec. 314, 6 Wis. 453.

p. Redelivery to Depositor.—Where the plaintiff did not comply with the terms of the condition upon which an escrow deed was to be delivered, the depository is justified in redelivering it to the depositor: *Hayden v. Meeks* (Ark.), 14 S. W. 864.

An escrow agreement, which provides for the redelivery to the depositors of three certificates of a mining company, representing shares held by several co-owners, does not cast on the depository, in case of noncompliance with the conditions, the unusual burden of dividing the stock and procuring for and delivering to the several owners new certificates for the shares to which they would be respectively entitled: *Christian v. First Nat. Bank*, 155 Fed. 705, 84 C. C. A. 53. But the delivery is deemed unauthorized where a deed had been duly executed and placed in escrow by the grantor, to be delivered to the grantee upon the payment of the purchase price, and such deed was redelivered by the depository to the grantor, there being no evidence that the redelivery was authorized or that the conditions had not been complied with: *Grove v. Jennings*, 46 Kan. 366, 26 Pac. 738. The depositor may found his claim for redelivery from the depository on the Civil Code, section 3380: *Harrison v. Woodward* (Cal. App.), 103 Pac. 933.

A grantor has an insurable interest in property the subject matter of a deposit in escrow, and if the conditions are unfulfilled and a loss by fire occurs, he has the right to moneys due under a policy of insurance: *Merchants' Ins. Co. of New Orleans v. Nowlin* (Tex. Civ. App.), 56 S. W. 198.

q. Liabilities of Depositaries.—As the depositary is bound by the terms of the deposit and charged with the duties voluntarily assumed by him, his liability attaches to him if he improperly parts with his deposit. Thus, on an agreement for the sale of land where "earnest-money" was deposited, to be forfeited for nonperformance of contract, and the contract not being performed, the custodian repaid the money to the depositor, he did it at his peril, and was liable for it to the seller: *Nathan v. Rehkopf*, 57 Ill. App. 212. And the same principle applies to the deposit of a promissory note, on which, in consequence of the maldelivery by the custodian, the maker was liable to an innocent indorsee. The custodian was liable in damages over to the maker: *Riggs v. Trees*, 120 Ind. 402, 22 N. E. 254, 5 L. R. A. 696. And where a depositary was careless of the collection of notes deposited with him for that purpose, and the bank suspended payments in specie, substituting a depreciated paper, the depositary was liable for the difference in value: *Dupeux v. Creditors*, 7 Rob. (La.) 242. But where the depositary, being warned by the maker not to deliver certain notes, retains them, he has been held not liable for the nondelivery though the maker would be: *Lafarge v. Morgan*, 11 Mart. (O. S.) 462. This case, however, must be considered controlled by later decisions wherein it is laid down that the depositary is as much the agent of the grantee as of the grantor, and he is as much bound to deliver the deed on performance of the condition as he is to withhold it until performance: *Belden v. Carter*, 4 Day, 66, 4 Am. Dec. 185; *Hatch v. Hatch*, 9 Mass. 307, 6 Am. Dec. 67; *Stanton v. Miller*, 65 Barb. 58, 1 Thomp. & C. 23, affirmed in 58 N. Y. 192; *Ruggles v. Lawson*, 13 Johns. 285; *Jackson v. Rowland*, 6 Wend. 666, 22 Am. Dec. 557; *Shirley's Lessee v. Ayres*, 14 Ohio, 307, 45 Am. Dec. 546.

Where the depositary of stock in escrow refused to deliver to the party entitled when demanded, after fulfillment of the conditions, and set up an idle defense in behalf of the other party wholly without merit, the plaintiff recovered damages, in addition to the value of the stock: *Clarke v. Eureka County Bank*, 123 Fed. 922; affirmed, *Eureka County Bank v. Clarke*, 130 Fed. 325, 64 C. C. A. 571.

An escrow holder has no authority to receive any payments after a certain named time for such payments has expired, without the consent of both parties: *Brinton v. Lewiston Nat. Bank*, 11 Idaho, 92, 81 Pac. 112.

The death of the depositor does not affect the depositary's obligation to deliver on performance of the conditions: *Bronx Inv. Co. v. National Bank of Commerce*, 47 Wash. 566, 92 Pac. 380. See ante, V.

VIII. The Conditions.

a. How Expressed.—There can be no escrow except the deposit be conditional. The condition upon which a deed is delivered in escrow need not be expressed in writing. It may rest in parol, or be partly in writing and in part oral. The rule that a contract or instrument made in writing inter partes must be deemed to contain the entire writing or understanding has no application: *Fred v. Fred* (N. J. Ch.), 50 Atl. 776; *Stanton v. Miller*, 58 N. Y. 192; *Gaston v. City of Portland*, 16 Or. 255, 19 Pac. 127; *Campbell v. Thomas*, 42 Wis. 437, 21 Am. Rep. 427. But when a deed or other writing has been delivered, parol evidence is not admissible to vary its effect, or if delivered directly to the grantee or payee, to show that it was to take effect only upon some further condition, which has not been performed: *Foy v. Blackstone*, 31 Ill. 538, 83 Am. Dec. 246; *McCann v. Ather-ton*, 106 Ill. 31; *Ryan v. Cooke*, 68 Ill. App. 592; *Forbis v. Reeves & Co.*, 109 Ill. App. 98.

Where the language of a written escrow agreement is vague and indefinite, it is the duty of the court in construing it to inquire into the circumstances and conditions existing when it was made, in order to ascertain the intention and actual meaning of the parties: *Clarke v. Eureka County Bank*, 123 Fed. 922; affirmed in *Eureka County Bank v. Clarke*, 130 Fed. 325, 64 C. C. A. 571.

The conditions on which a deed is placed in the hands of a depositary, while they remain executory, are variable, by mutual consent; for that which exists in parol may be discharged by parol eodem modo oritur, eodem modo dissolvitur. And if such contract can be dissolved by parol, a fortiori it can be varied by parol: *Raymond v. Smith*, 5 Conn. 555.

Where a deed is delivered in escrow, a memorandum of the terms of the escrow written on the deed by the depositary does not preclude evidence of other parol terms: *Skinner v. Kelley*, 138 Mich. 134, 101 N. W. 205; *Francis v. Francis*, 143 Mich. 300, 106 N. W. 864.

On a judgment for alimony, a verbal agreement for the settlement was arrived at, provided the husband's notes for an amount less than the judgment debt indorsed by another person were delivered to one L., who was to deliver them to the wife upon the presentation of a written consent signed by the respective attorneys for husband and wife. A receipt for the notes to be so delivered was signed by L. alone. In a bill by the wife for specific performance she alleged that the notes were to be deposited with L. until the husband's attorney could ascertain the proper method of satisfying the decree, and then the notes should be delivered to her. The answer alleged that the amount of the notes (except a small sum) was to be paid only when the decree was satisfied and canceled. It was held that the terms upon which the notes were to be delivered by L. to the wife were, that the decree was to be satisfied and canceled—that the receipt signed by L., the depositary, was not intended to express the entire contract inter partes as to the terms and conditions upon which

the wife was to receive the notes, but was intended to relieve the depository from the responsibility of deciding whether those terms and conditions had been performed: *Fred v. Fred* (N. J. Ch.), 50 Atl. 776.

The person alleging that a note under seal was delivered by him as an escrow must prove that he executed it on express condition that he was not to be bound, unless, etc. Discussion, at the time of sealing, leading him to believe that others were also to execute the deed is not sufficient. The announcement of the express terms is a *sine qua non*: *Perry v. Patterson*, 24 Tenn. (5 Humph.) 133, 42 Am. Dec. 424; *Carriek v. French*, 26 Tenn. (7 Humph.) 459; *Johnson v. Branch*, 30 Tenn. (11 Humph.) 521; *Ward v. Cullom*, 2 Coldw. 353; *Merritt v. Duncan*, 7 Heisk. 156, 19 Am. Rep. 612.

The vendor when depositing a deed can, without awaiting the vendee's consent, annex such conditions thereto as he may see fit, and the vendee is entitled to a delivery thereof only upon a strict compliance with the requirements constituting the conditions precedent to the transfer of the title. The specified conditions on which an instrument is deposited constitute the depository as the trustee of an express trust, with duties to perform for all the parties which none can forbid without the consent of the rest. And this principle has been carried much further, and extends to a case where the grantor deposited his deeds in escrow for delivery to the grantee on certain conditions, which were directly in violation of the conditions on which he had contracted in writing to deposit them. In such case, it was held that the original contract non obstante, the grantee, whatever other his remedies might be, was not entitled to the deeds from the depository, until performance of those conditions, with which the grantor had clothed them on the lodgment: *Seibel v. Higham*, 216 Mo. 115, 121, 129 Am. St. Rep. 502; *Hilgar v. Miller*, 42 Or. 552, 72 Pac. 319; *De Bow v. Wollenberg*, 52 Or. 404, 96 Pac. 536, 97 Pac. 717; *Wilkins v. Somerville*, 80 Vt. 48, ante, p. 906, 66 Atl. 893, 11 L. R. A., N. S., 1183.

Conditions in the deposit of a deed in escrow for the sole benefit of one of the parties may be waived by him, and a delivery enforced notwithstanding such conditions: *Tharaldson v. Everts*, 87 Minn. 168, 91 N. W. 467.

b. Where Effectual to Create an Escrow.—Where, to settle a pending action, it was agreed that the plaintiff should give the defendant certain approved promissory notes within a specified time, and as security should execute a deed of his lands to the defendant, such deed to be deposited with a third person, upon the condition that it was to be returned to plaintiff if plaintiff gave the notes referred to within the time limited, and if not to be delivered to the defendant, it was a valid escrow: *Raymond v. Smith*, 5 Conn. 555.

So where a deed was lodged in a bank, by the grantor, money by the grantee, and a note of the conditions of the escrow, which provided for the delivery, on certain precedent conditions being com-

plied with, a legal escrow was held to be established, and on compliance within a reasonable time the grantee was entitled to the deeds. The statute of frauds only requires the note or memorandum in writing as evidence of the contract of a sale of land. Nothing in it has reference to any conditions for the delivery of the deed in escrow or its subsequent delivery to the grantee; and such conditions may be verbal or written, or partly verbal and partly written: *Manning v. Foster*, 49 Wash. 541, 126 Am. St. Rep. 876, 96 Pac. 233, 18 L. R. A., N. S., 337.

Where there was a contract for the sale of a hotel and furniture, and the deed and bill of sale were deposited in escrow pending the removal, before a certain date, of certain clouds and encumbrances against the property, and with the further condition that if the vendor before that date failed so to remove such encumbrances, the deeds, etc, should be returned, and the agreement to convey be at an end, and the premises were destroyed by fire before such date, it was held that notwithstanding the purchaser was in possession of the hotel under another and oral agreement, the general property was in the vendor at the time of the destruction and the consequent loss would fall on him: *Bright v. Hanover Fire Ins. Co.*, 48 Wash. 60, 92 Pac. 779.

A deed and will were deposited with a third person, who was expressly directed not to deliver the deed until after decedent's death, and then to deliver it to the grantee, and to no other person. The parties both planned and intended that, in case the grantor survived the grantee, the property should belong to her absolutely. The depository made, dated and signed the following indorsement on the deed: "This deed has been delivered to me in escrow, to be delivered to the within grantee [naming him] on the death of the grantor [naming her] and not before." The circuit judge treated this memorandum as very persuasive, if not controlling, upon the question of fact, and found that the only restriction upon the depository was that the deed should not be delivered in the grantor's lifetime. The grantor did survive the grantee, and it was held the condition inured in her favor, she not having authorized the delivery except on a condition which was unfulfilled: *Skinner v. Kelley*, 138 Mich. 134, 101 N. W. 205.

When the court authorized a purchase of land for a wife by her trustee, and it was made on condition that a certain part of the purchase money should be paid in cash, and the deed should be delivered in escrow until such cash payment should be made, on the trustee's judgment creditors bringing suit to subject the land to their debts, it was held that the deed so delivered as an escrow could not be placed on record until the cash payment was made, and when that was made, the trustee held possession under an equitable title antecedent to the judgment debts, and that a deed delivered as an escrow in proceedings in a court of equity, administering trust funds, was not within the intendment of the act for recording titles: *Trout's*

Admr. v. Warwick, 77 Va. 731, approving *Floyd v. Harding*, 28 Gratt. 401.

A car company obtained from the owner a certain deed of land, the consideration for which was that the car company, in furtherance of its objects, would construct thereon buildings. The avowed object in getting the deed signed was to enable the car company to secure the bonds it proposed to negotiate. The deed was handed to the trustee of the bonds, on condition that it was not to take effect till the bonds were negotiated. The trustee recorded the deed, the bonds not having been negotiated. It was held that it was a good deposit in escrow and the recording by the trustee did not constitute a delivery: *Beaumont Car Works v. Beaumont Imp. Co.*, 4 Tex. Civ. App. 257, 23 S. W. 274.

Defendant placed a piece of land for sale with an agent, who negotiated a sale to a company about to be formed, of which the agent was to be a member. One L. paid defendant one half of the purchase money and the balance was to be secured by a mortgage. Defendant executed the deed of conveyance and sent it to the agent for delivery when the mortgage was executed. The mortgage not being given, defendant rescinded the sale. The delivery to the agent was a delivery in escrow only: *Tyler v. Cate*, 29 Or. 515, 45 Pac. 800.

A deed executed by parents to their son was confided to the custody of a third party, and was not to be delivered to the grantee until he should attain the age of twenty-five years. If he should die under that age, having married with the consent of his parents, and having lawful issue at the time of his death, the title of the premises was to vest in, and the deed was to be delivered immediately and for the benefit of, such issue. It was held that it was a good delivery in escrow, and did not become inoperative and void by the death of one of the grantors prior to the time specified for the delivery, but that the title might be perfected by the depository delivering it to the grantee after he attained the age named in the deed: *Hunter v. Hunter*, 17 Barb. 25.

And where a document accompanying a deed declares the terms of the escrow, notwithstanding there were intermediate provisions for the management of the property, the depository is a trustee for the grantee to hold the deed provisionally for him, the additional directions not invalidating the escrow: *Tyler v. Cate*, 29 Or. 515, 45 Pac. 800.

Where the condition in a deposit in escrow was, that the deed deposited should be given to the grantee on receipt by the depository of a deed of certain other property for the grantor, a finding by a referee that "plaintiff was never given or tendered any conveyance, sufficient or otherwise," of the property is immaterial, inasmuch as the receipt by the depository, and not by the plaintiff, is required by the condition referred to: *Cotton v. Gregory*, 10 Neb. 125, 4 N. W. 939.

Where plaintiff signed a deed for land, and by agreement was to pay a certain consideration therefor, if the title were satisfactory,

and the deed was placed in a bank, with instructions to deliver it to defendant "upon receipt of the contract price," such deposit was an escrow, and there was no delivery and acceptance, and until the conditions were performed the sale of the land was not complete, and plaintiff could not recover the price: *Helm v. Kleinschmidt*, 12 Mont. 586, 31 Pac. 542.

The condition on which plaintiff signed an application for fire insurance and delivered it to the agent of the insurance company was, that it should be retained by him until he could get the consent of another insurance company that had an outstanding policy upon the same property. The agent, who was only an agent for soliciting and taking applications, in violation of plaintiff's instructions, delivered the application to the company without obtaining such consent, and the company issued a policy, which the plaintiff refused to receive. The policy issued on such application was void, since the delivery of the application to the agent was merely in escrow, and such an agent could properly be custodian or depositary of the application: *Price v. Home Ins. Co.*, 54 Mo. App. 119.

A bond to execute a conveyance of land on payment of the purchase money can form the subject of delivery in escrow. Its condition is void for nonperformance. It is not then in law the bond of the party making it, and gives neither title in equity nor right of action at law against the obligor. And even when the conveyance itself was left with a bank cashier to be handed to the vendee, if a certain draft drawn by the vendee on a person in a distant place were paid, and such draft was returned protested for nonpayment, no title passed to the grantee, the deposit having the constitution of a valid escrow. Or where having been so deposited it has been wrongly obtained from the depositary and recorded, a subsequent purchaser with notice would take subject to the equities; and when the sheriff executed a conveyance of lands sold under a *fi. fa.* and delivered it to the attorney for the plaintiff to be handed to the purchaser on payment of the purchase money, the deed in question is clearly an escrow. And so when the deed lay for ten years in the hands of the depositary and was then delivered upon an order of the court without performance of the condition, no title passed by the undelivered deed: *Furness v. Williams*, 11 Ill. 229; *Illinois Cent. R. Co. v. McCullough*, 59 Ill. 166; *Skinner v. Baker*, 79 Ill. 496; *Roberts v. Mullenix*, 10 Kan. 22; *Jackson v. Catlin*, 2 Johns. 248, 3 Am. Dec. 415; *Simonds v. Catlin*, 2 Caines, 61; *Robins v. Bellas*, 2 Watts, 359.

It is not essential to an escrow that the obligee either should be privy to its delivery or that the condition is to be performed by the obligee himself: *Mayor & Commonalty v. Moore*, Fed. Cas. No. 9359, 1 Cranch C. C. 193.

Equity may enforce the specific performance of a contract by decreeing the delivery of promissory notes and other instruments in writing to the persons entitled to the possession thereof, when an

express trust in reference to the same has been created by the terms of the contract. So where the contract provided for the vendor's execution of a conveyance of land and the vendee's signature of promissory notes in payment, both to be deposited with one B, to hold until the plaintiff should produce a satisfactory title to the property, and B gave a receipt therefor which contained the terms of the lodgment and that he was to hold between the parties until plaintiff produced to him (B) "an abstract of title showing his right to convey," the condition was upheld, and B adjudged to be the sole arbiter as to the sufficiency of the title. He, being satisfied, the plaintiff was entitled to the notes: *Henderson v. Johns*, 13 Colo. 280, 22 Pac. 461.

A unique condition was upheld in a case where one of two covenantees sued the covenantor. The latter wishing to avail himself of the deposition of the other covenantee executed, but did not deliver, a release, which was placed in the hands of a third person to be given to the releasee on the termination of the action referred to. The completed deposition being also lodged, the effect of the transaction was, that the release was an escrow and so continued till the action was finished: *Wolcott v. Coleman*, 1 Conn. 375. The finding of a trial court that a deed executed by the plaintiff and deposited in escrow with a third person, to be delivered to the vendee on performance by him of certain conditions was delivered by the depository by instructions from the vendor before all the conditions of the holding had been complied with was not disturbed on appeal, where there was evidence in the case to sustain the proposition: *Eggleston v. Pollock*, 38 Neb. 188, 56 N. W. 805. Where A purchased a share in a partnership and gave therefor certain land, and deposited with a third person the deed therefor to be held "until the firm's debts are paid," such deposit operated to hold the delivery in abeyance, and the debts not being paid, the grantor's only remedy was to withhold the title to the land. Aside from this, the mere depositing of the deed in escrow furnished no security for anything he might be called upon to pay, or which might be taken from the assets of the firm: *Tuller v. Leaverton* (Iowa), 121 N. W. 515.

A agreed to build a road for B, who was to pay the agreed price by two promissory notes at two and four months. These notes were deposited with C, to be delivered to A on the certificate of an engineer that the work was done, and four months, weather permitting, was fixed as the time for its completion. The road was not completed within the four months, but A received the notes when it was finished, notwithstanding B's direction to C not to deliver them. A sued and recovered the amounts, as the completion of the road within four months was not a condition precedent to his right to obtain them: *Witmer Bros. Co. v. Weid*, 108 Cal. 569, 41 Pac. 491.

c. Where Ineffectual to Create Escrow.—The main question as to conditions must always be gathered from the expressed or implied intent of the parties, and where deeds are left with another "to take

care of," they are not deposited in escrow. So where an attorney depositary testified that deeds were not delivered to him, but simply left in his possession until after the death of grantor's mother and then delivered, and that such course was advisedly adopted, inasmuch as the grantor had no title except as heir to his mother, the deeds were not "delivered" until the death of the mother, and not being lodged for the performance of a condition, there was no escrow.

And so in the case of bonds delivered by a father to a stranger, with the request "to take care of them and deliver them to his sons, in case he died without a will." Being revocable during his lifetime, by the making of his will, they created no debt until his decease intestate, and then operated only as testamentary papers: *Carey v. Dennis*, 13 Md. 1; *Rendlen v. Edwards*, 116 Mo. App. 390, 92 S. W. 731.

So mere words, creating an expectation or promise that something will be done, do not constitute that "condition" which is indispensable to an escrow: *Cutter v. Whittemore*, 10 Mass. 442; *Black v. Lamb*, 12 N. J. Eq. 108; *New Jersey State Ordinary v. Thatcher*, 41 N. J. L. 403, 32 Am. Rep. 225; *Evans v. Gibbs*, 6 Humph. 405; *Duncan v. United States*, 7 Pet. 435, 8 L. ed. 739; *Cumberlege v. Lawson*, 1 Com. B., N. S., 709, 26 L. J. C. P. 120, 5 W. R. 237, 40 E. L. & Eq. 228; *Bowker v. Burdekin*, 11 Mees. & W. 128, 12 L. J. Ex. 329.

Where a promissory note signed by the maker, without consideration moving to him, is placed in the hands of a third party, with written instructions to deliver upon the happening of a certain contingency, and, in the event such contingency does not happen, then on the giving of indemnity thereafter to be agreed on by both the maker and payee in the note, and before the happening of the contingency, or the indemnity to be given has been agreed on, the maker of the note dies, the agency of the third party to make delivery of the note ceases, and the note does not become the binding obligation of the estate of the deceased. There was no such condition as an escrow compels. It was an agency, not coupled with an interest, and was revoked by the principal's death: *Farmer v. Marvin*, 63 Kan. 250, 65 Pac. 221; *Ware v. Allen*, 128 U. S. 590, 9 Sup. Ct. Rep. 174, 32 L. ed. 563.

The owner executed and delivered a deed as an escrow to his two children. Upon the back of the deed the following provision was indorsed, viz.: "The foregoing deed is not to be delivered, recorded or take effect, except in the event of the death or the written order of the said A [the owner], and is placed in the hands of B, as an escrow. [Signed] A." The deed was not recorded until after A's death, which occurred in 1872. After the execution of the escrow, the owner executed a deed of relinquishment of a right of way over the property described in the escrow to a railroad company, and the company went into possession under their deed, and it and its successors held possession ever since, but the deed was not recorded. The beneficiaries were aware of the railroad being constructed and

apparently acquiesced, and lost the rights they otherwise would have had under the escrow. The title of the railroad company, though unrecorded, prevailed, and the grantees in the escrow took subject to the right of way: *Blair v. St. Louis, H. & K. R. Co. (C. C.)*, 24 Fed. 539.

Where a note was signed payable to a college, and delivered to the latter's agent with an agreement that the agent was to hold it until a certain time, to be returned to the maker in case the latter should not decide to purchase a scholarship, the note in the meantime not to be considered as delivered to the college, and at the specified time the maker intimated that he did not intend proceeding any further with the purchase and demanded a return of the note, the transaction was not an escrow, and there was no delivery of the note, and hence it never had an inception or legal existence as the note of the maker: *Hillsdale College v. Thomas*, 40 Wis. 661.

Where certain shares of stock were purchased and paid for by promissory notes, and shares and notes were deposited with a third person, the notes not to be delivered to payee till maturity and the shares not to be delivered to the purchaser until paid for, there was no delivery in escrow. It was a mere matter of convenience and protection to the maker that his notes would not be transferred pending maturity, and their validity was not dependent upon the performance by respondent of any condition. The delivery was unconditional, though the negotiation was restricted: *Glenn v. Hill*, 11 Wash. 541, 40 Pac. 141.

Defendant executed a deed of certain lands to vendor as part payment for goods, and the deed was placed in the hands of a third person until defendant should be saved harmless from certain lawsuits then pending against the vendor. This transaction did not constitute a delivery in escrow, as the title was absolutely transferred, subject to defendant's lien for indemnity, and the misuse of the word "escrow" in the memorandum of deposit did not aid in investing it with that character: *Wallace v. Butts (Tex.)*, 31 S. W. 687.

Where a mortgage is executed and left with a third person until it is acknowledged by the mortgagor, then to be delivered to the grantee, it is not an escrow. One of the essentials of an escrow is the performance of some condition by the grantee and not by the grantor. The mortgagor having done all that was needful for him to give complete effect to the instrument, cannot by subsequent act or omission prevent his own deed from being operative: *White's Admrs. v. Williams*, 3 N. J. Eq. 376. And so a deed left by a grantor in his own agent's hands, to await the arrival of funds of the grantee, is not an escrow: *Wier v. Batdorf*, 24 Neb. 83, 38 N. W. 22.

If a deed is given by a grantor to a third person to be delivered when "everything is all right and perfect," and there is nothing to indicate that the matter is to be settled otherwise than by the future agreement of the parties, it is not an escrow; and the person having the custody of the deed is a mere caretaker, subject to the

future orders of the grantor, and without right to deliver the deed until notified by the grantor that the title is satisfactory to him. There can be no escrow until there is an actual contract of sale on the one side and of purchase on the other. Unless both parties have definitely assented to the contract the instrument executed by the proposed grantor, though in form a deed, is neither deed nor escrow: *Fitch v. Bunch*, 30 Cal. 208; *Miller v. Sears*, 91 Cal. 282, 25 Am. St. Rep. 176, 27 Pac. 589. And no escrow is created where a grantor, without agreement with the grantee, having deposited deeds with a third person for delivery, when the grantee should pay a fourth person the consideration money, dies before the grantee assents to the conditions. The grantor could have withdrawn it at any time before acceptance, and a fortiori it was beyond acceptance after his death: *De Bow v. Wollenberg*, 52 Or. 404, 96 Pac. 536, 97 Pac. 717.

d. Performance of Conditions and Occurrence of Contingencies.—

When the parties have mutually agreed upon the terms of a deposit in escrow, and it has been made on those terms, the conditions alone remain to be performed in order to make it operative and binding: *Chandler v. Chandler*, 21 Ark. 95; *Ober v. Pendleton*, 30 Ark. 61; *Dyson v. Bradshaw*, 23 Cal. 528; *McLaughlin v. Clausen*, 85 Cal. 322, 24 Pac. 636; *Wolcott v. Johns*, 7 Colo. App. 360, 44 Pac. 675; *Furness v. Williams*, 11 Ill. 229; *Stone v. Duvall*, 77 Ill. 475; *Skinner v. Baker*, 79 Ill. 496; *Arnold v. Covington & C. Bridge Co.*, 62 Ky. (1 Duvall) 372; *Chase v. Gates*, 33 Me. 363; *Gorsuch v. Rutledge*, 70 Md. 272, 17 Atl. 76; *Fairbanks v. Metcalf*, 8 Mass. 230; *Bodwell v. Webster*, 30 Mass. (13 Pick.) 411; *Daggett v. Daggett*, 143 Mass. 516, 10 N. E. 311; *St. Louis Plattdeutscher Club v. Tegeler*, 17 Mo. App. 569; *Fertig v. Bucher*, 3 Pa. 308; *Lewis v. Taylor*, *Riley Eq* 179; *Mechanics' Nat. Bank v. Jones*, 175 N. Y. 518, 67 N. E. 1085, affirming *Mechanics' Nat. Bank v. Jones*, 76 App. Div. 534, 78 N. Y. Supp. 800; *Calhoun County v. American Emigrant Co.*, 93 U. S. 124, 23 L. ed. 826; *Carr v. Hoxie*, Fed. Cas. No. 2438, 5 Mason, 60.

Where the parties agreed to a deposit in escrow of the deed of lands sold on the terms of delivery to the purchaser on payment of the consideration money, and no time was fixed for such payment, the law is that a reasonable time is implied, and the contract is in that respect good. And where the vendor had, contrary to the contract and unknown to the purchaser, named a day for completion, and subsequently extended the time giving notice thereof to the purchaser, who protested, a sale by the vendor to another person the day before the expiration of the extension so created by the vendor himself, it was held that a reasonable time had not elapsed to enable the purchaser to perform his part of the contract: *Ordway v. Farrow*, 79 Vt. 192, 118 Am. St. Rep. 951, 64 Atl. 1116; *Wilkins v. Somerville*, 80 Vt. 48, ante, p. 906, 66 Atl. 893, 11 L. R. A., N. S., 1183.

The condition is strictly construed, for where a deposit in escrow was made of an agreement for the sale of lands and the giving of a

note by the purchaser for the consideration money, and there was also a condition that a warranty deed duly executed should be deposited by the vendor, and such deed being deposited, the note was handed over, and it was afterward discovered that the deed contained a description of land which did not correspond with the agreement, the vendor had no remedy on the note, as there was no consideration and no delivery of it to him: *Beem v. McKusick*, 10 Cal. 538; *Dyson v. Bradshaw*, 23 Cal. 528; *Hinman v. Booth*, 21 Wend. 267; *Glover v. Chase*, 3 McCrary, 599, 11 Fed. 375. And performance of the stipulated conditions is enough. Where other conditions were improperly introduced by the grantor and the depository, whereby the depository became an interested party and adverse to his principal, the performance of the original condition entitled the grantee to the title which passed to him: *Holt v. Colton*, 4 Dak. 67, 22 N. W. 495.

The nonperformance of the condition in cases where an executed deed of sale of land is the subject of the deposit re-establishes the vendor in his original position. The party in default has no rights; no title passes and all his claim to the land is extinguished: *Skinner v. Baker*, 79 Ill. 496. Where one of the conditions of an escrow was the erection of a railway depot at a point on the land, and the depot was erected long afterward by another company, it was not a compliance with the terms of the deposit: *Sioux City & I. F. Town Lot & Land Co. v. Wilson*, 50 Iowa, 422. Neither will part performance of the conditions of an escrow suffice to entitle the grantee to delivery. A part performance passes no title—gives no interest in it. When the payee of a note was to deliver two hundred thousand hedge plants to entitle him to delivery of it from the depository, a delivery of less than that number neither entitles him to the note nor gives him any remedy for such part of the note as the value of the plants delivered represents: *Taylor v. Thomas*, 13 Kan. 217.

Where a grantor conveys real estate to the clerk of the district court as his agent, with the understanding that if the clerk shall obtain from plaintiff satisfaction of a judgment in that court against the grantor, then that deed shall be recorded, and the land belong to plaintiff, and subsequently plaintiff, at the instance of the clerk, accepts the deed, and delivers to the clerk a written satisfaction of the judgment, and pays the costs thereof, and also the taxes on the land, it belongs to plaintiff, notwithstanding the clerk fails to file or record the satisfaction of the judgment and the deed: *Elston v. Chamberlain*, 41 Kan. 254, 21 Pac. 259.

The terms of an escrow were that the instruments were to be delivered when defendant's counsel had examined them and so directed. The condition was held to have been performed where the depository before giving them up asked defendant's counsel for directions but received none, though the documents were easily intelligible, and that defendant had made no effort to see her counsel and no objection

when she learned of the delivery which, under such circumstances, was justifiable. If the act covenanted or agreed to be done by one party cannot be completed without the concurrence of the party for whom it is to be done, the former must do all that he can do, without such concurrence to complete the act; and, if he does this, he does what is equivalent in law, to actual performance: *Mudd v. Green*, 12 S. W. 139. Where notes were deposited in escrow, the receipt of the depositary providing for their delivery to the payee on the presentation of a written consent signed by the respective attorneys of the parties, such consent must be given by the attorneys whenever the condition of the deposit is fulfilled, and their failure or refusal to give it cannot be allowed to defeat the delivery: *Fred v. Fred* (N. J. Ch.), 50 Atl. 776.

Where a deed is delivered as an escrow, to become absolute on the execution of a bond by the grantee for the maintenance of a third person during life, nothing can be claimed under it, unless the bond is executed, although the person has died, and was supported during his life by the grantee: *Hinman v. Booth*, 21 Wend. 267.

But where there can be no delivery of the deed by reason of the grantor's death, the deposit is not a valid escrow and a pseudo performance confers no title. Where a father, having executed a deed to his son, retained control over it, and left instructions with his daughter that, after his death, she was to give it to the son on condition that he signed a certain note, no escrow was created, and as the deed was inoperative, the delivery to the son was a mere manual exchange: *Wellborn v. Weaver*, 17 Ga. 267, 63 Am. Dec. 235; *Taft v. Taft*, 59 Mich. 185, 60 Am. Rep. 291, 26 N. W. 426; *Jackson v. Dunlap*, 1 Johns. Cas. 114, 1 Am. Dec. 100; *Stillwell v. Hubbard*, 20 Wend. 44; *Fisher v. Hall*, 41 N. Y. 416.

By the terms of a contract, the consideration of the deed was a stock of goods and a transfer of the lease of the store. An invoice of the goods had been made, and the amount and value thereof fixed to the satisfaction of both parties, and, upon the second day thereafter, the vendor duly tendered the key of the store and an assignment of the lease, and, upon the refusal of the vendee to accept the same, deposited them with the holder of the deed. There being no change in the amount or condition of the goods, and no objection being made to the form or place of the tender, performance of the condition was complete and the seller entitled to a delivery of the deed. The purchaser was not entitled to add to the conditions of the escrow that the seller should allow him to re-examine the goods: *Knopf v. Hansen*, 37 Minn. 215, 33 N. W. 781. Where there are alternative conditions to be performed, it is necessary to show non-performance of both to defeat the escrow; as where either a sum of money for the grantor or an order from him to deliver a deed. The deed was not legally delivered where neither condition had been performed: *Ela v. Kimball*, 30 N. H. 126; and where performance has been effected in strict accordance with the conditions, the

grantor is estopped from denying the delivery of his deed on the ground that his wife had not acknowledged it and that it was erroneously registered: *Frost v. Beckman*, 1 Johns. Ch. 288.

The parties to a deed deposited it in a bank, with a written agreement that it was to be delivered immediately upon the grantor's death, provided the grantee "faithfully cared for and furnished him during his natural life all needful food, clothing, medicine and medical attendance, and a decent burial at his death; but if he failed to perform either of said conditions, the deed was to be redelivered to the grantor." In an action to set aside the deed, parol evidence of what the parties said prior to the consummation of their contract was tendered to vary the terms but was not admitted, the court being of opinion that the agreement superseded all other understandings the parties may have had in relation to the services required or to be performed, and statements of grantor's intention to give the deed to the grantee were also excluded: *Hilgar v. Millar*, 42 Or. 552, 72 Pac. 319; *Culy v. Upham*, 135 Mich. 131, 106 Am. St. Rep. 388, 97 N. W. 405.

An escrow agreement provided that a deed should be delivered to the grantee upon the execution and registration of a mortgage. The mortgage was executed and delivered to the clerk, who in recording it made the error of writing "three hundred" in place of "three thousand dollars," and the deed was delivered to the grantee. Relief was refused and performance of the condition upheld: *Beckman v. Frost*, 18 Johns. 544, 9 Am. Dec. 246. But the condition was held unperformed where A and his wife executed a deed and deposited it with B for delivery to C, when C should lodge a certain other deed duly executed with B for A's wife, and C having received the deed from B failed to lodge the other deed as agreed: *Pendleton v. Hughes*, 65 Barb. 136, affirmed in 53 N. Y. 626.

Where, however, the conduct of the grantor is calculated to throw the grantee off his guard, and to induce him to believe that time is not the essence of the contract, he will get no relief. Thus, where the payment on an escrow deposit was to be within ten days and the grantor gave three several extensions for thirteen days, three days and two days, and then said to grantee, "Let it rest a few days and if I need the money I will come and see you," and the grantee tendered the money within five days from such statement, the grantor in the meantime not having called for the money, the grantor's notice to the depositary not to hand over the deed was improper, and the grantee was entitled to it. The propositions were all consistent with the contract of deposit which was well established in a valid escrow. But when a contract amounts to giving a mere option to purchase for a sum certain, on or before a given date, in the absence of any stipulation to the contrary or any extension mutually agreed on, time will be considered the essence of the contract, and if the one party has performed his share by lodging the necessary documents and the other has neither paid nor even ten-

dered payment, he is irremediably in default and entitled to no relief either against the other party or the depositary: *Duffy v. Hobson*, 40 Cal. 240, 6 Am. Rep. 617; *Treat v. De Celis*, 41 Cal. 202; *Armstrong v. Lowe*, 76 Cal. 616, 18 Pac. 758; *Grant v. Ede*, 85 Cal. 418, 20 Am. St. Rep. 237, 24 Pac. 890; *White v. Bank of Hanford*, 148 Cal. 552, 83 Pac. 698; *Appeal of Baum*, 113 Pa. 58, 4 Atl. 461. And where time is of the essence of the contract, the escrow holder has no authority to receive payment after the stipulated time has expired without the consent of both parties: *Brinton v. Lewiston Nat. Bank*, 11 Idaho, 92, 81 Pac. 112. And the condition is well performed on the waiver of some of its details by the grantor, if the remaining ones are strictly complied with; as where, among other things, the grantee was to pay a certain bond and the grantor for valuable consideration canceled it, the delivery of a deed conditioned on such payment is a good delivery: *Gish v. Brown*, 171 Pa. 479, 33 Atl. 60. The conditions must be substantially performed. And where a note was deposited on condition that the payee should institute proceedings which would culminate in advantage to the makers, and the payee began but immediately discontinued them, he did not perform the condition substantially, so as to entitle him to the benefit either of delivery of the note or of obtaining the fruits of it by another suing for him: *Jarvis v. Rogers*, 3 Vt. 336.

Where the condition has not been performed, a deed deposited in escrow is not admissible qua deed by reason of its nondelivery: *Stiles v. Brown*, 16 Vt. 563. Where the condition was that when the plaintiff should execute and deliver to the depositary a release to the defendant of a then pending action, she should be entitled to a note from the defendant secured by a mortgage also to be deposited, the performance by the plaintiff entitled her to the note and mortgage notwithstanding it was alleged that plaintiff had no legal capacity to sue in the action: *Schmidt v. Deegan*, 69 Wis. 300, 34 N. W. 83. And where the condition is the announcement of a certain fact to the depositary, it is well performed if conveyed to him when ascertained, in discharge of his antecedent obligation; for instance, where the grantee is entitled to stock when a certain fact shall be ascertained, viz., that a suit in which the parties were interested and in which the subject matter of the action included the land in the deed, "should be finally determined." On the entry of the final decree in such suit and notice of it, the performance was completed and the grantee was entitled to the stock: *Clarke v. Eureka County Bank*, 123 Fed. 922; affirmed in *Eureka County Bank v. Clarke*, 130 Fed. 325, 64 C. C. A. 571.

Where a vendor of land received part of the purchase price in cash, and the promissory notes of the vendee for the balance, and deposited the notes for collection, and transferred the same to a bank and signed and sealed a deed such as was contemplated by the bond for title on payment, and deposited that in the same bank for delivery to the vendee on payment of the notes, the bank would not be required to deliver the deed on the payment of the notes

without surrender of the bond for title by the vendee, or a showing that it was not in any event enforceable against the vendor; but the vendor could perform by tendering the balance, demanding his deed and assenting to the return of the bond to the vendor, in the absence of any facts which at law or in equity should deprive him of his rights. This rests upon the reason which entitles the maker of a promissory note to surrender thereof by the payee upon payment: *Jackson v. Brown*, 102 Ga. 87, 66 Am. St. Rep. 156, 29 S. E. 149; *Hodges v. Smith*, 118 Ga. 789, 45 S. E. 617; *Moultrie Repair Co. v. Hill*, 120 Ga. 732, 48 S. E. 143; *Belmont Farm v. Dobbs Hardware Co.*, 124 Ga. 827, 53 S. E. 312; *Hardin v. Neal Loan & Banking Co.*, 125 Ga. 820, 54 S. E. 755.

Where the owner of an undivided half interest in land deposits a contract, not signed by the owner of the other undivided half, to sell the whole land to a third person in escrow, to be delivered to the grantee upon the payment of a certain sum, and thereafter acquires the title to the whole, the grantee named in that contract, upon the payment of such sum, becomes entitled to his rights thereunder, although the person holding it in escrow refuses to deliver it: *Naylor v. Stene*, 96 Minn. 57, 104 N. W. 685.

An ordinary deposit of deeds and money in escrow was made, the latter to be paid at a stipulated time, and was paid in time, but the purchasers notified the depositary not to deliver the deeds until the title was freed from certain encumbrances. The owner then notified the purchasers that as they had refused to perform their part of it, he declared the contract forfeited. Afterward the purchasers notified the depositary that they canceled all previous notices to him in reference to withholding the deeds, and demanded that the deeds be delivered to them, and as they had performed their part of the contract by payment in good time, and their first notice was ex abundante cautela and outside the contract, they were held entitled to the deeds: *Alexander v. Bernard*, 136 Mich. 642, 99 N. W. 858.

Where the conditions on which deeds of conveyance are deposited in escrow are performed in the time prescribed, the grantors therein cannot revoke the escrow agreement and withdraw the deeds, though this might have been done before such performance: *Mechanics' Nat. Bank v. Jones*, 76 App. Div. 534, 78 N. Y. Supp. 800; *Mechanics' Nat. Bank v. Jones*, 175 N. Y. 518, 67 N. E. 1085.

Delivery of a deed in escrow, to be valid, must be on the performance of the conditions imposed by the grantor, and if its delivery depends on performance of certain conditions, his consent is withheld until such performance, and the grantor may recover it or have it removed as a cloud on his title if delivered or improperly obtained before performance: *Eichlor v. Holroyd*, 15 Ill. App. 657; *Jackson v. Lynn*, 94 Iowa, 151, 58 Am. St. Rep. 386, 62 N. W. 704; *Daggett v. Daggett*, 143 Mass. 516, 10 N. E. 311; *Taft v. Taft*, 59 Mich. 185, 60 Am. Rep. 291, 26 N. W. 426; *Powers v. Rude*, 14 Okl. 381, 79 Pac. 89; *Smith v. Royalton Bank*, 32 Vt. 341, 76 Am. Dec. 179;

Everts v. Agnes, 4 Wis. 343, 65 Am. Dec. 314; **Calhoun County v. American Emigrant Co.**, 93 U. S. 124, 23 L. ed. 826.

Where under a contract of sale of land the deed was deposited to be handed to the grantee on payment of the price, after examination and approval by his attorney, and the purchaser complied with all conditions precedent and obtained the deed, but the vendor had sold the land to another person (both having notice of the facts) a few hours after the payment by the first purchaser, the title passed under the escrow to the first grantee, the grantor not having revoked before acceptance and having made no stipulation as to precise day of payment: **Wright v. Astoria Co.**, 45 Or. 224, 77 Pac. 599. No time being fixed in the escrow agreement, performance within a reasonable time is implied and satisfies the law: **Wilkins v. Somerville**, 80 Vt. 48, ante, p. 906, 66 Atl. 893, 11 L. R. A., N. S., 1183.

Where the escrow deposit was to be, from one of the parties a lease of certain pasture lands and a bond for quiet enjoyment of them, and from the other notes in payment, the lease and notes to be exchanged when bond was lodged with depositary, the contract was not consummated by the execution and delivery of the notes only, defendants failing to execute the bond: **Gentry v. Gatlin**, 14 Tex. Civ. App. 419, 38 S. W. 223.

It is not performance where money and deed are deposited in a bank, the money to be paid when the vendor removes a cloud on the title created by the levy of an execution on the land, if the vendor shows that the levy had really created no lien upon the land and he had taken no steps to remove it: **Frichott v. Nowlin** (Tex. Civ. App.), 50 S. W. 164. But where the vendor made a contract to sell a piece of state school land, the title to which was "to some extent questionable," and the contract and the notes of the vendee were duly deposited in escrow, and the vendor formally relinquished her claim to the land in favor of the vendee, who made application for it, which was at first improperly refused, but on renewal was granted, by connivance of the vendee, to vendee's son, the vendor had performed her obligation sufficiently to entitle her to the notes; the award of the land to the vendee's son being practically the outcome of vendor's relinquishment: **Hodo v. Leeman**, 27 Tex. Civ. App. 204, 65 S. W. 381. And where the condition on notes deposited was the delivery of property, a machine sold to the maker, but no place of delivery was appointed, delivery or an offer to deliver, at the place where the machine was at the time of the sale, if made within a reasonable time, would be a performance of the escrow condition: **Pacific Nat. Bank v. San Francisco Bridge Co.**, 23 Wash. 425, 63 Pac. 207. And where stock was sold, to be paid for in monthly installments, and the stock was lodged in escrow to be delivered on payment of the whole amount of the purchase money, which payment was to be acquired by the seller drawing on the depositary, the drafts to be honored by the purchaser, and where three-fourths of the price had been paid and the balance was slightly in arrear, but the depositary

was prepared to honor the final draft of the seller when presented, the contract was so substantially performed as to preclude the seller from forfeiting, and to entitle the purchaser to the stock on payment of the final balance: *Boyd v. American Sav. Bank & Trust Co.*, 40 Wash. 571, 82 Pac. 904. But where the carrying out of the complete agreement is impossible, an alleged performance cannot be maintained where the case presented is clearly one of failure to complete the contract by reason of the death of one of the parties to it, whose support during life constituted in part the consideration upon which the binding contract is to rest—the obligations die with the principal. The grantor executed a deed of gift to his son, and deposited it in escrow to be delivered when the son should secure an annuity to the grantor and to the grantor's wife during their joint lives and the life of the survivor of them. The son did not so secure the annuity, but on the death of the father tendered it for the benefit of his mother. The doctrine of relation back to the first delivery would have resulted in a manifest inequity: *McIntyre v. McIntyre*, 147 Mich. 365, 110 N. W. 960.

It is the performance of the condition, and not the second delivery, that gives its vitality as a deed, sufficient to pass the title. When the condition is complied with, the depositary holds the deed for the grantee, the same as if it had originally been delivered to him as the latter's agent, in which case the grantee would, of course, get the title, and could by proper action compel an actual delivery by the depositary: *White Star Line Steamboat Co. v. Moragne*, 91 Ala. 610, 8 South. 867; *Hughes v. Thistlewood*, 40 Kan. 232, 19 Pac. 629; *State Bank v. Evans*, 15 N. J. L. 155, 28 Am. Dec. 400; *Crad-dock v. Barnes*, 142 N. C. 89, 54 S. E. 1003; *Baum's Appeal*, 113 Pa. 58, 4 Atl. 461.

Where, by mutual agreement, a deed is executed and acknowledged and placed in the hands of a third person as the agent of both parties to be delivered on payment of the purchase money, the contract is performed without a formal tender of the deed: *Olmstead v. Smith*, 87 Mo. 602.

IX. Time When Instrument Becomes Operative.

a. Upon the Happening of the Event or Performance of the Condition upon which manual delivery should be made, although not in fact physically delivered to him, a deed theretofore in escrow becomes ipso facto the deed of the grantee in whom the title vests, and thenceforth the depositary or holder is regarded as the mere agent or trustee of the grantee. And in all cases the intention of the parties is to be considered, and if it is manifest that the parties intended the deed should take effect from the day of its execution, if the conditions are performed, and they are performed, it will so take effect; but, on the other hand, in the absence of such expressed intention, it will relate back to the execution of the deed only when justice requires it: *Campbell v. Larmore*, 84 Ala. 499, 4 South. 593;

White Star Line Steamboat Co. v. Moragne, 91 Ala. 610, 8 South. 867; Couch v. Meeker, 2 Conn. 302, 7 Am. Dec. 274; Price v. Pittsburg, Ft. W. & C. R. Co., 34 Ill. 13; Jackson v. Rowley, 88 Iowa, 184, 55 N. W. 339; Taylor v. Thomas, 13 Kan. 217; Chase v. Gates, 33 Me. 363; Francis v. Francis, 143 Mich. 300, 106 N. W. 864; Naylor v. Stene, 96 Minn. 57, 104 N. W. 685; Simpson v. McGlathery, 52 Miss. 723; Hall v. Harris, 40 N. C. 303; Craddock v. Barnes, 142 N. C. 89, 54 S. E. 1003; Shirley's Lessee v. Ayres, 14 Ohio, 307, 45 Am. Dec. 546; May v. Emerson, 52 Or. 262, 96 Pac. 454, 1065; Ketterson v. Inscho (Tex.), 118 S. W. 626; Foxley v. Rich (Utah), 99 Pac. 666; Prutsman v. Baker, 30 Wis. 644, 11 Am. Rep. 592.

And when no time is fixed, the law implies a reasonable time: Ordway v. Farrow, 79 Vt. 192, 118 Am. St. Rep. 951, 64 Atl. 1116; Wilkins v. Somerville, 80 Vt. 48, ante, p. 906, 66 Atl. 893, 11 L. R. A., N. S., 1183. And, as a corollary, if the delivery be premature but the condition is performed within the time specified, the delivery is good from the time of complete performance of the condition: Connell v. Connell, 32 W. Va. 319, 9 S. E. 252. But if a grantee obtains premature delivery and sells the lands, and his purchaser has notice of the escrow, he takes it subject to the liabilities attaching under the escrow, and that even if he get notice after part payment because he could at that stage rescind: Balfour v. Parkinson, 84 Fed. 855, affirmed in Balfour v. Hopkins, 93 Fed. 564, 35 C. C. A. 445.

At the time of delivery of a deed, the grantee, purporting to be a corporation, was not completely incorporated, and the deed was delivered to a third person to be handed to the proper officer of the corporation when legally cognizable. A few days thereafter the incorporation was completed and the deed which had in the meantime been recorded was delivered. Such deed took effect eo instanti and was valid and effectual from the time of such delivery, though prior to the instant of delivery, it may be conceded, it was a nullity: Santaquin Min. Co. v. High Roller Min. Co., 25 Utah, 282, 71 Pac. 77.

The time when the instrument becomes effective is not affected by conditions subsequent to the lodgment in escrow. Where a bill of sale and note were so deposited and the condition fulfilled, and the note delivered to the seller, but the bill of sale retained by a private arrangement between the depositary and the buyer, the latter was liable on his note from the time of its delivery: Ketterson v. Inscho (Tex.), 118 S. W. 626.

When the condition on which an original delivery made in the lifetime of a party transpires, the conditional delivery becomes absolute, and the absolute delivery takes effect against the contracting parties from the date of the delivery of the contracts as escrows, notwithstanding the death of one of the contractors before the happening of the condition: Peck v. Goodwin, Kirby, 64; Bostwick v. McEvoy, 62 Cal. 496; Wheelwright v. Wheelwright, 2 Mass. 447, 3 Am. Dec. 66; Hatch v. Hatch, 9 Mass. 307, 6 Am. Dec. 67; Bodwell

v. Webster, 13 Pick. 411; Flagg v. Teneick, 29 N. J. L. 25; Perryman's Case, 5 Coke, 84.

Where the equitable owner of land executed a quitclaim deed to be held in escrow, and delivered to the grantee on the affirmance by the supreme court of a decree in a case involving litigation concerning the land in question, and that contingency happened and the deed was delivered, the effect was to convey not only the equitable title, but the legal title which the owner acquired by the litigation referred to: Prewitt v. Ashford, 90 Ala. 294, 7 South. 831.

b. From Actual Delivery by Depositary.—A deed executed and delivered to a third person, to be delivered to the grantee upon some future event, has been said not to be the grantor's deed until the second delivery: Fuller v. Hollis, 57 Ala. 435; Price v. Pittsburg, Ft. W. & C. R. Co., 34 Ill. 13; Demesmey v. Gravelin, 56 Ill. 93; Wheelwright v. Wheelwright, 2 Mass. 447, 3 Am. Dec. 66; May v. Emerson, 52 Or. 262, 96 Pac. 454, 1065; Hunter v. Hunter, 17 Barb. 25; Cagger v. Lansing, 43 N. Y. 550, reversing 57 Barb. 421. But it is operative only from the performance of the condition and actual delivery to grantee, except where a relation to the first delivery is necessary to give effect to the deed or intermediate conveyance of grantee: Taft v. Taft, 59 Mich. 185, 60 Am. Rep. 291, 26 N. W. 426; Stephens v. Rinehart, 72 Pa. 434; Frost v. Beekman, 1 Johns. Ch. 268; Green v. Putnam, 1 Barb. 500. But see cases cited in the preceding subdivision, apparently holding that it is the performance of the condition rather than the actual delivery of the writing which makes it effective.

One being in embarrassed circumstances made a deed of his property to the father of one of his friends, and delivered it to the friend with a request that he should take it to his father; and if he would purchase the land in the deed for the price named in it (which was the full value) he should deliver the deed to him. The father consented and shortly afterward paid the consideration money. The deed was held to be a valid escrow in the hands of the son until delivered to the father, and from the moment of that delivery it commenced its existence as a deed: Sparrow v. Smith, 5 Conn. 113.

But a deed sent in a letter to a third person, not the agent of the grantee, to be delivered to the grantee upon the payment of money by the grantee, does not vest the title in him before actual delivery to him or payment of the money, the letter accompanying it being silent as to its being an escrow: White v. Bailey, 14 Conn. 271.

And where husband and wife made a deed and the wife intrusted it to her husband and authorized him to arrange for payment and to consummate delivery, his placing it in escrow pending payment was a step in the delivery of it, and her signature to the memorandum of deposit was unnecessary, and when the condition was performed, it was the duty of the depositary to deliver it without regard to any admonition from the husband or wife: Hughes v. Thistlewood, 40 Kan. 232, 19 Pac. 629. And if the grantor is able to make and

the grantee to receive such second delivery themselves absolutely, the second delivery does not take effect by relation back: *May v. Emerson*, 52 Or. 262, 96 Pac. 454, 1065.

c. Relation Back to First Delivery.—If a deed is delivered to a stranger to be delivered to the grantee on the performance of conditions, which are performed, and the deed delivered, that deed takes effect upon the second delivery, and is considered the deed of the party from that time except where justice or necessity demand a resort to fiction to ward off intervening claims or liens, to prevent injury, or to uphold the deed; but when the grantor after the deposit of the deed as an escrow dies or becomes insane before the grantee has performed the conditions, in such cases the law will make the second delivery relate back to the time of the deposit as an escrow: *Price v. Pittsburg F. W. & C. R. Co.*, 34 Ill. 13; *Wheelwright v. Wheelwright*, 2 Mass. 447, 3 Am. Dec. 66; *Lindley v. Groff*, 37 Minn. 338, 34 N. W. 26; *Whitfield v. Harris*, 48 Miss. 710; *Simpson v. McGlathery*, 52 Miss. 723; *Beekman v. Frost*, 18 Johns. 544, 9 Am. Dec. 246; *Jackson v. Rowland*, 6 Wend. 666, 22 Am. Dec. 557; *State v. Pool*, 27 N. C. 105; *Hall v. Harris*, 38 N. C. 189, 40 N. C. 303; *Black v. Hoyt*, 33 Ohio St. 203; *Stephens v. Rinehart*, 72 Pa. 434; *Gish v. Brown*, 171 Pa. 479, 33 Atl. 60; *Foxley v. Rich* (Utah), 99 Pac. 666; *Ruggles v. Lawson*, 13 Johns. 285, 7 Am. Dec. 375; *Green v. Winter*, 1 Johns. Ch. 27, 7 Am. Dec. 475. For instance, if it is necessary to protect the grantee against intervening rights: *McDonald v. Huff*, 77 Cal. 279, 19 Pac. 499; *Shirley's Lessee v. Ayres*, 14 Ohio, 307, 45 Am. Dec. 546; *Beekman v. Frost*, 18 Johns. 544, 9 Am. Dec. 246; or if it is in furtherance of the evident and lawful intention of the parties: *Hatch v. Hatch*, 9 Mass. 307, 6 Am. Dec. 67; *Andrews v. Farnham*, 29 Minn. 246, 13 N. W. 161; *Hunter v. Hunter*, 17 Barb. 25; *Clarke v. Gifford*, 10 Wend. 310; *Stanton v. Miller*, 58 N. Y. 192; *Van Tassel v. Burger*, 104 N. Y. Supp. 273, 119 App. Div. 509; *Gammon v. Bunnell*, 22 Utah, 421, 64 Pac. 958. As where the agreement was that when payment was made the deed should take effect from a given date: *Price v. Pittsburg, Ft. W. & C. R. Co.*, 34 Ill. 13.

But where the deed is sent speculatively to a probable vendee by a third person, whose mission was to ask him to buy, and if he would, to deliver the deed to him, the delivery dated from the time of its acceptance by the vendee: *Sparrow v. Smith*, 5 Conn. 113.

The payment of interest from the date of a contract is a preponderating factor in enabling the court to arrive at the intentions of the parties. Where the intention or understanding was that when a certain transaction was consummated the times of payment of the installments of interest on notes and a mortgage should be computed from the date of the execution and delivery to the depository, such interest and the times of its payment would be computed, not from the date of the consummation of the transaction by the delivery of the note and mortgage by the depository to the respective parties, but

from the original date agreed upon: *Bither v. Christensen*, 1 Cal. App. 90, 81 Pac. 670. And all conditions precedent having been performed, the deed relates back to the date of making the escrow agreement for the purpose of cutting off any intervening rights or equities acquired by a third person with notice of the terms and conditions of the escrow: *McDonald v. Huff*, 77 Cal. 279, 19 Pac. 499; *Marr v. Rhodes*, 131 Cal. 267, 63 Pac. 364; *Whitmer v. Schenk*, 11 Idaho, 702, 83 Pac. 775; *Leiter v. Pike*, 127 Ill. 287, 20 N. E. 51; *Bragg v. Lamport*, 96 Fed. 630, 38 C. C. A. 467.

Where a contract for a sale of land is executed and deposited in escrow, and the grantor executes his deed and places it with the contract, to be delivered on full payment of the price, and the grantee complies with the contract, and pays interest on the price from the date of the contract, and receives the deed, the covenants of the deed relate back to the date of the contract of sale, and, in the absence of stipulations to the contrary, the grantee is entitled to the rents and profits after that date: *Scott v. Stone*, 72 Kan. 545, 84 Pac. 117. But where the deed has been delivered in escrow, and at the time of the lodgment there was standing on the land a building belonging to another, which under the agreement of sale was not intended to pass with the land, and the vendee, if he wished to own it, was to deal with that other for the purchase of such building, the delivery was only allowed to take effect, subject to the claim of the owner of the building: *Steel v. Miller*, 40 Iowa, 402; *Hoyt v. McLagan*, 87 Iowa, 746, 55 N. W. 18.

Where a judgment creditor who had purchased the land of his debtor and sold it, executing the deed four days before the time for redemption accrued, and deposited the deed in escrow, the deed being subsequently legally delivered to the grantees, and the validity of such deed being questioned by junior judgment creditors, the deed was held to date from its second delivery, i. e., when the grantor had full right to convey and when his rights acquired under the execution sale, subsequent to the actual date but prior to the second delivery of the deed, had accrued: *Andrews v. Farnham*, 29 Minn. 246, 13 N. W. 161.

When a deed was delivered by a father to his daughter and by her given back to him to take care of it, and he handed it to a stranger to hold for his daughter and give it to her at his death, and judgments were obtained against him by creditors who sought to attach the land, the deed was held to relate back to the first delivery, which was beyond the power of the grantor to revoke or reclaim: *Maynard v. Maynard*, 10 Mass. 456, 6 Am. Dec. 146; *Brown v. Austen*, 35 Barb. 341.

While a deed held in escrow is frequently held to relate back, to avoid the difficulty of the grantor's incapacity or death occurring before it is handed over by the depositary, yet, except for that formal purpose, there is no universal relation. Intermediate rights are valid against the second delivery. There are cases, as we have shown,

affirming that second delivery is necessary to carry title. Campbell, C. J., in the opinion of the court in *Taft v. Taft*, 59 Mich. 185, 60 Am. Rep. 291, 26 N. W. 426, says: "In *Beekman v. Frost*, 18 Johns. 544, 9 Am. Dec. 246, by a singular blunder in the headnote of the case in the original report, the doctrine of the court which was to this effect is misrepresented, and in the digests the same mistake has been perpetrated."

There is doubtless a conflict in the language of the opinions upon this subject, some of them purporting to give effect to the instrument from the first delivery, viz., that to the depositary in escrow, and others from the second or final delivery, viz., that made by the depositary, pursuant to the terms of the escrow agreement and on compliance with its conditions; and a third view, as we have seen, is to declare that such compliance makes the instrument effective, whether or not the depositary performs his duty of delivering it. There may not be any substantial conflict in the authorities, but only such variance in language as is likely to result when treating of dissimilar conditions. An escrow must, to make it of any value, often be given an effect by relation, otherwise the grantor could avoid it by making transfers or creating encumbrances before the second delivery, either before or after the performance of the condition. Where the instrument is one not effective against purchasers or encumbrances for value and in good faith, and having no actual or constructive notice of it, it manifestly cannot create rights paramount to theirs until actually delivered and filed for record, as must have been the case had there been no escrow previously to its delivery to the grantee. With this exception we believe the instrument must, so far as necessary to the protection of the grantee, be treated as taking effect, by relation, as of the moment when it was placed in escrow. At all times, however, prior to the performance of the condition, the grantee holds the title to the property and has an interest therein subject to attachment and execution under process against him: *Wolcott v. Johns*, 7 Colo. App. 360, 44 Pac. 675; *Hoyt v. McLagan*, 87 Iowa, 746, 55 N. W. 18; *Jackson v. Rowland*, 6 Wend. 666, 22 Am. Dec. 557. Some, if not all, of these decisions indicate that the rights of the attachment or execution creditors and of purchasers under their writs are paramount to those of the grantee even after the deed, because of the performance of the conditions, has been released from escrow and delivered. We apprehend that this is a mistaken view, and, on the contrary, that the deed, operating by relation, cuts off the rights and titles of all such persons, except when they are protected by the registry or recording acts of the various states before whose courts the question is presented for determination.

X. Wrongful Procurement of Instrument by Party.

An escrow taken fraudulently from the depositary without compliance by the grantee of the conditions passes nothing: *Hamill v. Thompson*, 3 Colo. 518; *Dixon v. Bristol Sav. Bank*, 102 Ga. 461, 66 Am. St. Rep. 193, 31 S. E. 96; *Roberts v. Mullenix*, 10 Kan. 22;

Wheelwright v. Wheelwright, 2 Mass. 447, 3 Am. Dec. 66; Daggett v. Daggett, 143 Mass. 516, 10 N. E. 311; Harkreader v. Clayton, 56 Miss. 383, 31 Am. Rep. 369; Miller v. Fletcher, 27 Gratt. 403, 21 Am. Rep. 356; Everts v. Agnes, 4 Wis. 343, 65 Am. Dec. 314, 6 Wis. 453; Chipman v. Tucker, 38 Wis. 43, 20 Am. Rep. 1; Franklin v. Killilea, 126 Wis. 88, 104 N. W. 993. See ante, VII, n, 3.

A deed delivered in escrow, which is fraudulently abstracted from the depositary by the grantee without performing the conditions on which it was to be delivered to him is void even in the hands of a bona fide purchaser of the land: Haven v. Kramer, 41 Iowa, 382; Patton v. Cook, 83 Iowa, 71, 48 N. W. 994; Golden v. Hardesty, 93 Iowa, 622, 61 N. W. 913; Jackson v. Lynn, 94 Iowa, 151, 58 Am. St. Rep. 386, 62 N. W. 704; Lewis v. Prather (Ky.), 21 S. W. 538; Seibel v. Higham, 216 Mo. 120, 129 Am. St. Rep. 502, 115 S. W. 987; Everts v. Agnes, 4 Wis. 343, 65 Am. Dec. 314; Tisher v. Beckwith, 30 Wis. 55, 11 Am. Rep. 546.

The rule that a fraudulent delivery by a procurement from the depositary of a deed deposited in escrow will not operate to pass the title, even in favor of a subsequent purchaser in good faith without notice, will not go to the extent of enabling the grantor to recognize or affirm the grantee's possession of the instrument as valid for some purposes, and to disclaim it as being nugatory for all others, especially when to do so would result in injury to an innocent party: Cotton v. Gregory, 10 Neb. 125, 4 N. W. 939. And where a deed is procured from the depositary by unfair means and a mortgage given on the land to a stranger, the latter acquires no lien on the land prior to that which the grantee was by mortgage to secure to the grantor before he was entitled to possession of the deed: Ogden v. Ogden, 4 Ohio St. 182.

But where the deed was to be delivered when the grantee had paid certain liens on the land conveyed, and was after the grantor's death obtained by the grantee without performance of the conditions, and by him recorded, the grantee's title was voidable by proof of the facts rebutting the presumption of delivery, but not void: Blight v. Schenk, 10 Pa. 285, 51 Am. Dec. 478; Landon v. Brown, 160 Pa. 538, 28 Atl. 921.

A vendor contracted to sell land, the deed to be delivered on payment of an installment of the price. The deed was left with vendor's attorney to be delivered on payment. The purchaser abandoned the contract under which no payment was ever made. The deed was improperly obtained and recorded, and there was then a regular chain of conveyances down to defendant, in the absence and ignorance of the vendor, whose complaint against defendant to quiet title averring these facts was good: Henry v. Carson, 96 Ind. 412.

XI. Ratification of Wrongful Delivery.

If an escrow has been improperly delivered or obtained from the depositary, the grantor may ratify the delivery. Express ratification is unnecessary, but in its absence injury caused by the grantor's

silence, when called upon to speak, acquiescence, or inaction, such as failing to take active measures to recover possession of the deed or to have the record expunged, must be shown before a ratification of wrongful delivery can be presumed against him from the facts. His conduct may be such as to create an estoppel in pais as to a bona fide purchase from the grantee. But a ratification, to be binding, must have been made with a full knowledge of all material facts: *State v. South Western R. R. Co.*, 70 Ga. 11; *De Vaughn v. McLeroy*, 82 Ga. 687, 10 S. E. 211; *Dixon v. Bristol Sav. Bank*, 102 Ga. 461, 66 Am. St. Rep. 193, 31 S. E. 96; *Mays v. Shields*, 117 Ga. 814, 45 S. E. 68; *Whitney v. Dewey*, 10 Idaho, 633, 80 Pac. 1117, 69 L. R. A. 572; *Haven v. Kramer*, 41 Iowa, 382; *Hoit v. McIntyre*, 50 Minn. 466, 52 N. W. 918; *Blight v. Schenck*, 10 Pa. 285, 51 Am. Dec. 478; *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611.

An unavailing demand for the payment of the balance of purchase money cannot be regarded as an acquiescence in the wrongful delivery of an escrow, so as to deprive the vendor of his right to rescind: *Hamill v. Thompson*, 3 Colo. 518. And where on an exchange of lands the deeds were deposited in escrow, the recording of his deed by one party and his entering into possession of the land granted to him in accordance with his contract is not a ratification of the other's wrongfully abstracting the other deed from the possession of the depository: *Jackson v. Lynn*, 94 Iowa, 151, 58 Am. St. Rep. 386, 62 N. W. 704. The ratification discharges the depository from all liability for deviating from his instructions: *Eichlor v. Holroyd*, 15 Ill. App. 657.

A mortgage was held as an escrow until he, at whose request the mortgage was made, should furnish the mortgagors with P.'s bond of indemnity. The understanding was that, when the bond was given, it was to be used with the state treasurer for the benefit of the defendants, a banking corporation. Before the bond was furnished, and without authority, the depository delivered the mortgage to the bank, which in good faith advanced the consideration therefor. The mortgagors' subsequent willingness to accept the bond of B. in place of P., and their failure for two months to notify the bank that the mortgage was invalid, did not amount to a ratification of the depository's wrongful act: *Smith v. South Royalton Bank*, 32 Vt. 341, 76 Am. Dec. 179.

Where the defendant claimed that a note and mortgage sued on were wrongfully delivered to plaintiff by a depository in escrow, his knowledge of the plaintiff's possession for two years, his receipt without protest of the certificate of stock for which the securities were given, and the fact that for a further period of five years he did not intimate to the plaintiff the nature of the facts he now relied on, were construed as waiving the original conditions on which the delivery was to be made: *Truman v. McCollum*, 20 Wis. 360.

XII. Pleading, Practice, etc.

Where the conditions are fulfilled and the depositary refuses to deliver, the remedy lies against him, and not the other party to the escrow agreement: *Bronx Inv. Co. v. National Bank of Commerce*, 47 Wash. 266, 92 Pac. 380. Such remedy may be founded on section 3380, Civil Code; *Harrison v. Woodward* (Cal. App.), 103 Pac. 933.

When a depositary of funds in escrow is sued in conjunction with others, he is entitled to prove any facts which would defeat the plaintiff's claim, and show the title thereto in his codefendants: *Brockway v. Reynolds*, 77 Neb. 225, 109 N. W. 154.

In pleading an escrow it is necessary to aver the condition upon which the deed was executed: *Graves v. Tucker*, 18 Miss. (10 Smedes & M.) 9.

A deed delivered in escrow, to be delivered to the grantee on the performance of certain conditions, is not admissible in evidence where the conditions have not been performed: *Stiles v. Brown*, 16 Vt. 563.

A statement by the depositary to a grantee that "the deed was ready for her" is not admissible to prove delivery, in an action by the grantor against an insurance company on a policy issued upon the property, the subject of the escrow: *Merchants' Ins. Co. of New Orleans v. Nowlin* (Tex. Civ. App.), 56 S. W. 198.

The nature of the delivery, absolute or conditional and what were the intentions of the parties are questions of fact to be settled by a jury, where the evidence leaves any doubt upon the subject: *White v. Bailey*, 14 Conn. 271; *Clark v. Gifford*, 10 Wend. 310. So, also, is the question of ratification, where an escrow has been improperly delivered or obtained by fraud, and if reasonable men might differ as to the inferences to be drawn from the evidence: *Dixon v. Bristol Sav. Bank*, 102 Ga. 461, 66 Am. St. Rep. 193, and notes, 31 S. E. 96.

Where a deed was deposited in escrow and the plaintiff refused to accept it upon the specified conditions, and it was thereupon canceled, it was deemed wholly inoperative. When the depositary claims no interest beyond that of custodian, he cannot allege by way of defense that plaintiffs seek to enforce a forfeiture, and in an action against him, the plaintiffs are not required to allege the value of the property: *Harrison v. Woodward* (Cal. App.), 103 Pac. 933; *Mills v. Mills*, 21 How. Pr. 437.

Where there is an attempt by one of the parties to an escrow agreement to improperly obtain the deposit from the custodian, specific performance and an injunction to hold the deed and the title in statu quo will be granted: *Wilkins v. Somerville*, 80 Vt. 48, ante, p. 906, 66 Atl. 893, 11 L. R. A., N. S. 1183.

Where the issue is delivery or no delivery of an escrow, the grantor who alleges nonperformance has the onus of proving nondelivery: *Swain v. McMillan*, 30 Mont. 433, 76 Pac. 943.

In an action to set aside a deed on the ground of nondelivery, the reply alleging that after the time for delivery according to the escrow agreement the defendant caused plaintiff to mortgage the premises

to the grantee is not conclusive that it had not then been delivered, as under section 754, Code of Civil Procedure, it was new matter and is deemed denied by defendant: *Swain v. McMillan*, 30 Mont. 433, 76 Pac. 943.

Parol negotiations, effective for modification, must take place after a written instrument is executed and in effect, but a bill of sale while it is in escrow pending payment of purchase money cannot be so modified. All negotiations prior to, or contemporaneous with, its execution are merged in and are incompetent to contradict that writing: *Schoblasky v. Rayworth* (Wis.), 120 N. W. 822.

A nonsuit should be granted only where all the facts proved and all reasonable deductions from them do not entitle the plaintiff to recover: *Dixon v. Bristol Sav. Bank*, 102 Ga. 461, 66 Am. St. Rep. 193, and notes, 31 S. E. 96.

The question of possession is immaterial where there has been an unauthorized or fraudulent delivery because those claiming under the grantee cannot be protected unless there has been ratification or the depository was the grantee's agent to procure delivery: *Dixon v. Bristol Sav. Bank*, 102 Ga. 461, 66 Am. St. Rep. 193, 31 S. E. 96.

ABBOTT v. SANDERS.

[80 Vt. 179, 66 Atl. 1032.]

CONVEYANCE in Consideration of Support, Relief in Equity Against the Violation of.—Equity will afford relief from a conveyance given for support on the nonperformance of the agreement to support. (p. 975.)

MORTGAGE, What Conveyances Treated as.—In Vermont a Conditional Deed is treated as a mortgage to secure the grantee's performance of the conditions contained in it. (p. 976.)

A CONVEYANCE for the Support of the Grantor is Treated as a Mortgage in Vermont, whatever the form in which the support is to be furnished, and the rights of the grantee may be foreclosed by a suit in equity. (p. 976.)

CONVEYANCE for Support, Suit to Foreclose, When not Defeated by Failure to Do Equity.—If a conveyance is made in consideration of the support by the grantee of the grantor, and the bill in a suit to foreclose sets up persistent and aggravated abuse of the complainant with intent to drive her from the premises without excuse or palliation, the suit will not fail because of a want of offer to do equity, though it appears that the defendants had expended money in discharge of a mortgage on the premises. (pp. 976, 977.)

Appeal by defendant from a decree overruling a demurrer adjudging a bill to be sufficient.

William H. Bliss, for the orator.

Davis & Russell, for the defendants.

¹⁸⁰ MUNSON, J. The bill sets up a conveyance of real and personal property from the oratrix to the defendant husband, conditioned that the grantee support the oratrix during her life; alleges a substantial breach of the condition; and prays for a decree declaring the defendant's rights forfeited, and their title and equity extinguished and foreclosed. The bill is demurred to.

The defendants contend that the case presented is one of forfeiture by breach of a condition subsequent, and that forfeitures will not be enforced by a court of equity. It is held, however, with substantial unanimity, that equity will afford relief from conveyances given for support, on non-performance of the agreement to support; although there is great disagreement as to the grounds and form of the relief: 13 Cyc. 710; 2 Pomeroy's Equitable Remedies, sec. 686, and notes; *Glocke v. Glocke*, 113 Wis. 303, 89 N. W. 118, 57 L. R. A. 458.

In many cases, in different jurisdictions, deeds given to secure the grantor's support have been annulled on general grounds of equity, without much attempt to refer the relief to any specific rule: *Peck v. Hoyt*, 39 Conn. 9; *Penfield v. Penfield*, 41 Conn. 474; *Jenkins v. Jenkins*, 3 T. B. Mon. 327; *Reeder v. Reeder*, 89 Ky. 529; *Patterson v. Patterson*, 81 Iowa, 626, 47 N. W. 768; *Dodge v. Dodge*, 92 Mich. 109, 52 N. W. 296; *Rexford v. Schofield*, 101 Mich. 480, 59 N. W. 837; *Wilfong v. Johnson*, 41 W. Va. 283, 23 S. E. 730. In Illinois the court rescinds the transaction, presuming, if necessary to the relief, that the conveyance was obtained with fraudulent intent: *Frazier v. Miller*, 16 Ill. 48; *Oard v. Oard*, 59 Ill. 46; *Cooper v. Gum*, 152 Ill. 471, 39 N. E. 267. In Oregon it is considered that rescission is not permissible, and the grantor's support is secured by making it a charge upon the property: *Watson v. Smith*, 7 Or. 448; *Patton v. Nixon*, 33 Or. 159. In Rhode Island a reconveyance is decreed, upon the theory that the deed creates a continuing obligation in the nature of a trust, and that the failure to support is a renunciation of the trust: *Grant v. Bell*, 26 R. I. 288, 58 Atl. 951. In Indiana the agreement to support is considered a condition ¹⁸¹ subsequent, the breach of which entitles the grantor to re-enter and maintain a suit to quiet the title: *Richter v. Richter*, 111 Ind. 456, 12 N. E. 698; *Cree v. Sherfy*, 138 Ind. 354, 37 N. E. 787. In Wisconsin it was formerly considered that this ground of relief was not tenable, but this view is repudiated in the recent case of *Glocke v. Glocke*, 113 Wis. 303, 89 N. W. 118, 57 L. R. A. 458. It

is said in that case that the property conveyed is held on condition subsequent; that upon a breach of the condition the title will revert, at the election of the grantor, without judicial aid; and that the grantor can have in equity "such appropriate relief as may be necessary to judicially establish his status as regards the property and quiet his title thereto."

The form that the equitable remedy will take in this state is determined by our holding regarding conditional deeds. With us, a conditional deed is treated as a mortgage to secure the grantee's performance of the condition contained in the deed: *Austin v. Downer*, 25 Vt. 558; *Ford v. Steele*, 54 Vt. 562; *Moulthrop v. Farmers' Mut. F. Ins. Co.*, 52 Vt. 123. In the case last cited the holder of an insurance policy gave a deed of the insured property with a condition that if the grantee failed to pay him a certain sum as provided in the condition, the deed should become null and void. The question was whether this avoided the insurance under the clause prohibiting alienation. The court could not see wherein this differed from the ordinary case of the conveyance of an absolute title with a mortgage back to secure a payment of purchase money, saying that here the defeasance was inserted in the deed of conveyance, while in the ordinary case of conveyance and mortgage the defeasance is inserted in the latter, but that in such a case both instruments are construed together as one and the same contract, effectuating the conveyance of a defeasible title to the purchaser. So the insured's deed was held an alienation of the property, avoiding the insurance.

The situation being the same as if the condition were omitted from the oratrix's deed and contained in another deed given back by the defendant husband, it is clear that the rights of the defendants may be foreclosed by bill. In this state, a conveyance conditioned for the support of the grantee is treated as a mortgage, whatever the form in which the support is to be furnished: *Austin v. Austin*, 9 Vt. 420; *Henry v. Tupper*, 29 Vt. 358; *Ottaquechee Sav. Bank v. Holt*, 58 Vt. 166, 1 Atl. 485.

¹⁸² It appears from the bill that this deed was for an expressed consideration of three hundred dollars, and that the defendant husband paid some over that amount in discharge of a mortgage on the premises. There is no further allegation regarding this, and it is claimed that the bill is demurrable for want of an offer to do equity. The bill sets up a persistent and aggravated abuse of the oratrix, alleges that

this was inflicted with intent to drive her from the premises, and discloses no fact or circumstance that can operate by way of excuse or palliation. The rules of equity do not permit any relief of the defendants on the case presented, and it was therefore unnecessary to aver a readiness to do equity.

Pro forma decree affirmed and cause remanded.

Deeds in Consideration of the Support of the Grantor: See Davis v. Davis, 81 Vt. 259, post, p. 1035, and note.

TUDOR v. TUDOR.

[80 Vt. 220, 67 Atl. 539.]

CONVEYANCES, Fraudulent are not Void, but Voidable.—A statute providing that all fraudulent conveyances of land shall be, as against a party whose right, debt or duty is attempted to be avoided, null and void, must be construed as making such conveyances voidable only. (p. 979.)

A FRAUDULENT CONVEYANCE is Good Between the Parties and Against the Grantor. (p. 979.)

CONVEYANCES—Void and Voidable Acts, Who may Take Advantage of.—Of a void act or deed every stranger may take advantage, but not of a voidable one. (p. 979.)

JUDGMENT AND DECREE, Persons not Parties not Affected by.—Where a conveyance is alleged to have been fraudulent as against the creditors of the grantor, and they have extended the property under execution, commenced a suit and obtained a decree for relief against the conveyance, but omitted to make the grantee of the original grantee a party, he is not affected by the decree, whether he is chargeable with notice of the fraud or not. (pp. 980, 981.)

EXECUTORS, When have a Power of Sale.—Under a devise to sell, executors have a common-law authority by which they can vest the legal title in the purchaser, and the purchaser under the power takes the estate in the same manner as if the power and the instrument executing it had been incorporated in one instrument. (p. 981.)

EXECUTORS, Foreign, Power of Sale, When Vested in.—If, by a will executed in another state, the executors are given power to sell real property, they may exercise the power in this state, though the will has not been admitted to probate here, for if it is subsequently admitted to probate in this state, it has the same effect as if originally proved and allowed in the same court, though letters testamentary are granted only in the primary jurisdiction. (pp. 981, 983.)

PROBATE OF FOREIGN WILL, Effect of by Relation.—If executors, acting under a power in a will made in another state, convey real property of the testator situate in this state before his will is admitted to probate here, this is a defective execution of the power, but the subsequent probate in this state relates back to the will and gives effect to the prior conveyance. (p. 983.)

Trespass for cutting timber. Judgment pro forma for the defendant, and the plaintiff excepted and appealed.

Batchelder & Bates, for the plaintiff.

Clarke C. Fitts, for the defendant.

221 WATSON, J. The action is trespass quare clausum fregit for cutting timber on lot No. 1, in the ninth range of lands in the town of Stratton.

Both parties claim title from Richard Perry, who conveyed the lot to Henry Z. Payne, March 1, 1865, by deed recorded. Payne conveyed to William W. Underwood by warranty deed dated July 21, 1866, and recorded. Underwood conveyed to Lucius Smith by warranty deed dated May 15, 1867, and recorded the eighth day of January following. Smith **222** conveyed to Samuel Bassett and Lot Bassett by warranty deed dated March 20, 1873, recorded July 9th, of the same year.

At the September term in 1870 of Windham county court, a judgment was recovered by certain creditors against Payne, for two thousand five hundred dollars damages and costs. Execution was issued thereon, and levy was made November 17, 1870, on the land in question; due proceedings were thereupon had and the land set off to the execution creditors.

These creditors brought their bill to clear the title, under the levy, from the cloud of the fraudulent conveyance, to the court of chancery in that county at the September term of 1872, against Payne and Underwood, containing allegations showing the above-mentioned conveyance from Payne to Underwood to have been fraudulent as to said creditors, and that the grantee participated in the fraud; also showing the judgment, execution, levy upon the land, and setoff as above stated; praying that Underwood be compelled to convey said land to the orators, and be perpetually enjoined from conveying the same to anyone else, and from asserting any right or title thereto. At that term of court the bill was taken as confessed against Payne, and at the following term, in April, 1873, upon hearing against Underwood, he having appeared and made answer, a decree was rendered against him in accordance with the prayer of the bill.

It is under the setoff on the execution, and this decree in chancery, that the defendant claims title.

The deed from Underwood to Lucius Smith purports to have been for a valuable consideration, and included other

lands. Smith was not made a party to the suit in chancery, and there is no finding as to whether, when he took his deed, he did or did not have notice that the conveyance to his grantor was in fraud of the rights of creditors.

The statute then in force, as now, provides that all fraudulent and deceitful conveyances of lands, etc., made or had to avoid any right, debt, or duty of any other person, shall, as against the party or parties only whose right, debt or duty is attempted to be avoided, their heirs, executors, administrators or assigns, be null and void. It is argued that by the terms of the statute Underwood had no title as against the execution creditors, and having no title could convey none to Smith; also that since the statute declares a conveyance in fraud of the ²²³ rights of creditors null and void, it is incumbent upon a party claiming to be an innocent purchaser for value to establish it.

True it is this statute uses the words "null and void," yet in construction they are given the sense of voidable merely. Such conveyances are good as between the parties, also as against the grantor: *Carpenter v. McClure*, 39 Vt. 9, 91 Am. Dec. 370. In stating the distinction between a thing void and one voidable, Bacon says: "A thing is void which was done against law at the very time of the doing it, and no person is bound by such act; but a thing is only voidable which is done by a person who ought not to have done it, but who nevertheless cannot avoid it himself after it is done." Again: "Of a void act or deed every stranger may take advantage, but not of a voidable one": Bacon's Abridgment, "Void and Voidable."

In *Anderson v. Roberts*, 18 Johns. 515, 9 Am. Dec. 235, the construction of the statute of New York, a transcript substantially from the 13th of Elizabeth, chapter 5, in which such fraudulent conveyances are declared to be "utterly void," was under consideration. Recognizing the above passage from Bacon as showing the true distinction, it is said that whenever the act done takes effect as to some purposes, and is void as to persons who have an interest in impeaching it, the act is not a nullity, and therefore in a legal sense, not utterly void, but merely voidable. It was held that the fraudulent grantee takes the entire interest of the fraudulent grantor, and that the deed is voidable at the instance of the creditor, not legally and strictly void. The same question has been considered at length by the court of last resort in Maine, and the same conclusion reached: *Andrews v. Marshall*, 43 Me. 272. To the same effect are

the decisions in Massachusetts: *Harvey v. Varney*, 98 Mass. 118; *Freeland v. Freeland*, 102 Mass. 475.

The state of Wisconsin has a statute to the effect that a money judgment, when docketed as provided by law, shall, for a period of ten years from the date of the rendition thereof, be a lien on the real property of the judgment debtor, except his homestead, in the county where the same is docketed. In *French Lumbering Co. v. Theriault*, 107 Wis. 627, 81 Am. St. Rep. 856, 83 N. W. 927, 51 L. R. A. 910, one question was whether any lien was created by a judgment, properly docketed in the county where real estate is located which the judgment debtor previously owned but before such docketing conveyed to another, if the conveyance ²²⁴ was void under the provisions of the statute of that state, whereby every conveyance or assignment of any estate or interest in lands made with intent to hinder, delay or defraud creditors, etc., "shall be void." It was contended that the word "void" as there used meant "absolutely void"; that as regarded the judgment creditor the title to the property attempted to be conveyed remained unaffected by the attempt; and that accordingly the judgment attached to and became a lien thereon. It was held that the term "void" in the statute means "voidable" only, and that a judgment against a fraudulent vendor of real property, docketed as specified by law, does not of itself create a lien on such property, because the conveyance vests in the fraudulent vendee the title of his vendor subject to the right of the defrauded creditors at their election to avoid it.

By a statute in this state passed in 1843, general assignments by debtors for the benefit of creditors "shall be null and void" as against creditors. Yet it was held that by the term "void" nothing more was intended than inoperative, or voidable: *Merrill v. Englesby*, 28 Vt. 150.

It follows that the conveyance from Payne to Underwood was not void but only voidable, and that thereby the legal title vested in the latter, subject to be divested by creditors of the grantor if they saw fit to call it in question. Its validity was not assailed by them until after the fraudulent grantee had conveyed the property to Smith, who was not made a party to the execution creditors' suit in chancery, and hence whether chargeable with notice of the fraud or not, he was not affected by the decree. Smith's title passed to his grantees, and the plaintiff here may stand upon it. It is a principle of law that nothing can be founded

upon a deed absolutely void, yet from those voidable only perfect rights or titles may flow: *Somes v. Brewer*, 2 Pick. 184, 13 Am. Dec. 406; *Crocker v. Bellangee*, 6 Wis. 645, 70 Am. Dec. 489.

Lot Bassett, one of the grantees in the plaintiff's chain of title, died prior to 1889, testate. At the time of his death he was a resident of the state of Massachusetts. Prior to the twenty-third day of July, 1889, his will was duly probated in that state. Elisha Bassett, Wm. O. Bassett, and John N. Bassett were named as executors in the will, and they were authorized by the will to sell all of the real estate of the deceased wherever situated. The executors qualified in Massachusetts before the 225 day last named. On that day they, by their deed properly executed, conveyed the property here in question, of which the testator died seised, to the plaintiff and one George S. Town. Two months later the deed was recorded. In March, 1897, the will was duly published and allowed as the last will and testament of Lot Bassett in the probate court for the district of Marlboro, in this state, the district in which the land in dispute is situated; but it does not appear that the executors named therein were qualified in this state. The defendant contends that since the will gave the executors only a naked power of sale, it was essential to the exercise of the power upon realty in this state that they qualify here.

Under the devise to sell, the executors had a common-law authority by which they could vest the legal estate in a purchaser, and the purchasers under that power took the estate from the testator by whom the power was created—not from the power itself—in the same manner as if the power and the instrument executing the power had been incorporated in one instrument: *Coke's Littleton*, 113a; 4 *Kent's Commentaries*, 337; *Duke of Marlborough v. Godolphin*, 2 Ves. Sr. 61, 21 Eng. Rul. Cas. 397; *Cook v. Duckenfield*, 2 Atk. 562; *Doe d. Wigan v. Jones*, 10 Barn. & C. 459; *Bradish v. Gibbs*, 3 Johns. Ch. 523; *Conklin v. Egerton's Admr.*, 21 Wend. 430; *Pratt v. Rice*, 7 Cush. 209. This same principle is recognized in *Ferre v. American Board of Commrs.*, 53 Vt. 162.

The fact that the land in controversy is situated in another state than that of the primary jurisdiction makes no difference in this respect, since by admitting the foreign will to probate in this state it had the same effect as if originally proved and allowed by the same court. Questions

involving local creditors or the expenses of ancillary administration do not arise. When the will was allowed, filed and recorded in the probate court in the district in which the real estate is situated, it was sufficient to operate upon the property (Vt. Stats. 2365-2365), notwithstanding letters testamentary had been granted only in the primary jurisdiction. The source of the executors' authority under the power was the same—not from the probate court, but from the owner of the estate who created the power.

In *Newton v. Bronson*, 13 N. Y. 587, 67 Am. Dec. 89, the action was brought against the defendant as executor of a will to compel specific ²²⁶ performance of a contract alleged to have been made by him as such executor, through his attorneys, for the sale and conveyance of lands situate in the state of Illinois. The testator died in the city of New York, owning the land in question, and his will was duly proved before the surrogate of the city and county of New York. The defendant and one other were named in the will as executors, but the defendant alone qualified and assumed to act. The testator by his will authorized and empowered the executors named therein, or such of them as should qualify and assume its execution, to contract for the sale of, and to grant, bargain, sell, and convey, etc., all or any part of the real estate whereof he should die seised. It was argued that the defendant's office of executor did not extend to the lands in Illinois, upon the principle that letters testamentary and of administration have no force beyond the jurisdiction in which they are granted; hence that he could not effectually perform the judgment of the court, not being able, as was insisted, to affect the title to land outside the state of the principal administration. It was held that he was the donee of a power at common law and under the statute; that although it was, by the will, made a condition to his acting under the power that he should qualify as executor, when he had performed that condition, he acted in conveying the land as the devisee of a power created by the owner of the estate, and not under an authority conferred by the surrogate; and that the plaintiff was entitled to specific performance of the contract.

In *Crusoe v. Butler*, 36 Miss. 150, the testator was a resident of the state of Alabama and died there, having at the time of his death title to land in the state of Mississippi, which was the land in controversy. The will was probated in the state of the domicile and the executor named in the

will there qualified. Later, but not until after the conveyance of the land by the executor, an authenticated copy of the probate of the will in the primary jurisdiction was admitted to probate and recorded in the proper court in the county and state where the land was situated. The will devised to the executors therein named or the survivor of them full power and authority, whenever they thought expedient, to bargain, sell and convey all and any of the testator's real estate, wherever the same might be situate, for the purposes specified.

²²⁷ One material question before the court was, whether it was necessary that letters testamentary should be granted to the executor in the state of the situs of the land upon admitting the will to record there. It was insisted that as no such letters were granted there, the executor was never invested with the authority to exercise the power to convey the lands conferred upon him by the will; hence that his deed was void. It was held that the will granted a power not appertaining to the subject matter of administration—a trust committed by the testator to the persons who should become his executors. That in such a case the executor derives his authority from the will, and not from letters testamentary; that while it was true that his character and capacity as executor must be established by proof of the will, yet when the will was probated there, and it was shown that he had taken upon himself the office of executor, the power to sell the land, which was independent of his appropriate functions as executor, became vested; that the only necessity for the grant of letters was to fix the person who was to execute the power granted by the will; and since that had been done by the proper court of the testator's domicile, it was unnecessary to obtain letters in the state where the land was situated. The same doctrine was laid down in *Apperson v. Bolton*, 29 Ark. 418, and in *Babcock v. Collins*, 60 Minn. 73, 51 Am. St. Rep. 503, 61 N. W. 1020.

Our statute provides that no will shall pass either real or personal estate, unless it is proved and allowed in the probate court, or by appeal in the county or supreme court: Vt. Stats. 2356. In the case before us, as before seen, the conveyance of the land by the executors was before the probate of the will in this state. This was a defective execution of the power, but as the estate passed by force of the will, the subsequent probate here related back and gave effect to the prior conveyance: *Ex parte Fuller*, Fed. Cas.

No. 5147, 2 Story, 327; *Crusoe v. Butler*, 36 Miss. 150; *Babcock v. Collins*, 60 Minn. 73, 51 Am. St. Rep. 503, 61 N. W. 1020.

The plaintiff therefore has a good title to the land in dispute, and upon the facts found he is entitled to recover.

Pro forma judgment reversed, and judgment for the plaintiff to recover the sum of one hundred and fifty dollars damages with interest since September, 1903, and costs.

Powers of Sales Given in Wills should receive a liberal construction in order to carry out the purpose and intent of the testator: *Matthews v. Capshaw*, 109 Tenn. 480, 97 Am. St. Rep. 854.

An Executor Under a Foreign Will who has duly qualified at the foreign domicile may, subject to the rights of local creditors, make a sale, under a power in the will, of land in Minnesota which becomes effectual when the will is admitted to probate in the courts of the latter state, if the admission of the will to probate in the foreign state conclusively establishes the will and entitles such executor to letters testamentary in Minnesota under then existing statutes. The admission of the will to probate by the court of the latter state relates back and perfects the sale made under the power: *Babcock v. Collins*, 60 Minn. 73, 51 Am. St. Rep. 503.

The Power of Executors Over Property Outside the State is discussed in the note to *Shinn's Estate*, 45 Am. St. Rep. 664.

TAFT v. TAFT.

[80 Vt. 256, 67 Atl. 703.]

ADULTERY may be Proved by Circumstantial Evidence both in civil and in criminal cases. (p. 985.)

ADULTERY, Evidence Sufficient to Establish.—The only general rule that can be laid down on the evidence necessary to establish adultery is, that the circumstances must be such as lead the guarded discretion of a reasonable and just man to the conclusion that the alleged act was committed. (p. 985.)

ADULTERY—Evidence Respecting Offense not Charged.—In a suit for divorce on the ground of adultery, evidence of occasions before or after those charged in the bill is admissible for the purpose of showing an adulterous disposition. (p. 985.)

EVIDENCE—Detectives, Testimony of.—The evidence of a private detective hired by a husband to watch his wife with a view of learning facts upon which to base a suit for divorce, where it does not appear that his pay does not depend on the successful result of his evidence, should be awarded a consideration like other testimony and treated by the same tests, and the fact that the person is a hired witness should be considered by the triers. (p. 986.)

CRIMINAL LAW.—The Uncorroborated Testimony of an Accomplice may sustain a conviction in Vermont. (p. 986.)

EVIDENCE.—The Testimony of a Private Detective is entitled to as much weight as that of an accomplice. (p. 986.)

ADULTERY, Evidence of is for the Trial Court.—The weight and the sufficiency of the evidence offered to prove adultery as a ground for divorce are for the trial court and will not be revised by the appellate court. (p. 986.)

Suit for divorce on the ground of adultery. The defendant appealed from a decree granting the decree sought.

Russell W. Taft and V. A. Bullard, for the petitionee.

C. G. Austin & Sons, for the petitioner.

257 TYLER, J. Petition for divorce for alleged adultery; petition sustained and bill granted; exceptions by petitionee for that the decree was based wholly upon circumstantial evidence, and that all the evidence produced by the petitioner did not warrant the decree.

1. That adultery may be proved by circumstantial evidence, both in civil and criminal cases, is well settled. The only general **258** rule that can be laid down upon the subject is, that the circumstances must be such as will lead the guarded discretion of a reasonable and just man to the conclusion that the alleged act was committed: 2 Greenleaf on Evidence, sec. 40. In 2 Bishop on Marriage and Divorce, 1357, this rule is given: "Though no witness testifies to seeing the adultery, if there are proven facts consistent with the theory of its commission and inconsistent with any other theory, and if they create in the minds of the triers the degree of affirmative belief required by law, that it was committed, the evidence will be adequate": Kizer on Marriage and Divorce, sec. 70. Bishop says, in volume 2, section 619, that when a criminal disposition by both parties and an opportunity to commit the act have been shown, adultery may be inferred: See State v. Brink, 68 Vt. 659, 35 Atl. 492.

In the present case the court found that adultery had been committed on two occasions, and evidence having been introduced tending to show other occasions when the parties were alone together in the room described, the court remarked that evidence as to other occasions was admissible, whether before or after the acts proved. We assume that from this evidence the court found an adulterous disposition, as it was admissible for that purpose.

2. It appears that all the evidence tending to show that the parties were in a certain room together on occasions came from persons who had been employed by the petitioner as private detectives. The rule as to the weight to be given to

the testimony of persons thus employed is well stated in *Blake v. Blake*, 70 Ill. 618: "The testimony of a private detective hired by the husband to watch his wife, with a view to learning facts upon which to base a suit for divorce, will be regarded with much suspicion, especially when it does not appear that his pay does not depend upon the successful effect of his evidence." The other cases cited in the petitionee's brief are of the same effect, though some of them say that only slight credibility should be given to such witnesses; others go to the extent of holding that a bill should not be granted upon the unsupported testimony of such persons. But the correct rule is that such testimony is to be weighed and considered like other testimony and tried by the same tests, and the fact that a person is a hired witness should be considered by the triers: 9 Am. & Eng. Ency. of Law, 412; 2 Greenleaf on Evidence, sec. 46n. It cannot be assumed that all the evidence was not fairly considered and weighed by the trial court.

259 It is held in this state that a conviction may be had in a criminal case upon the uncorroborated testimony of an accomplice: *State v. Potter*, 42 Vt. 495; *State v. Dana*, 59 Vt. 614, 10 Atl. 727. As a rule, the testimony of private detectives is entitled to as much weight as that of accomplices.

3. There was evidence tending to show adultery. That its weight and sufficiency were for the trial court and cannot be revised by this court has been repeatedly decided: *Kelton v. Leonard*, 54 Vt. 230; *Thayer v. Central Vt. R. Co.*, 60 Vt. 214, 13 Atl. 859; *Lewis v. Roby*, 79 Vt. 487, 118 Am. St. Rep. 984, 65 Atl. 524. The rule is stated in *Lindley v. Lindley*, 68 Vt. 421, 35 Atl. 349, that the measure of proof required is a preponderance of the testimony, weighing the presumption of innocence in favor of the party accused. That this case was tried in accordance with the rule we have no reason to question.

Decree affirmed.

In an Action for Divorce on the Ground of Adultery, the Proof must be clear, positive and satisfactory, and although presumptive evidence alone is sufficient to establish adulterous intercourse, the circumstances must lead to it, not only by fair inference, but as a necessary conclusion. Appearances equally capable of two interpretations, one an innocent one, will not justify the presumption of guilt: Burke v. Burke, 44 Kan. 307, 21 Am. St. Rep. 283. See, also, *Brooks v. Brooks*,

145 Mass. 574, 1 Am. St. Rep. 485; Toole v. Toole, 112 N. C. 152, 34 Am. St. Rep. 479.

Circumstantial Evidence is the subject of a note to State v. Hudson, 97 Am. St. Rep. 771.

Accomplice's Testimony is the subject of a note to Stone v. State, 98 Am. St. Rep. 158.

MASON v. WARD.

[80 Vt. 290, 67 Atl. 820.]

JUDGMENTS BY CONFESSION Without Antecedent Process have no basis other than the statute, and a full compliance with its provisions is necessary to their validity, and such provisions will be strictly construed. (p. 988.)

JUDGMENT BY CONFESSION Without the Consent of the Creditor.—A judgment by confession made without the request or consent of the creditor and entered at the instance of the debtor alone is not valid unless ratified by the creditor. (p. 988.)

JUDGMENTS BY CONFESSION—Specification to Support, Creditor cannot be Compelled to File.—A creditor cannot be compelled to file a specification in support of a judgment which his debtor desires to confess, but which the creditor has not agreed to accept, though the statute provides that a justice may accept and record the confession of a debt to the creditor made by the debtor personally, with or without antecedent process, as the parties shall agree, and render judgment upon such confession, but that the judgment shall not be rendered except upon a specification in writing filed with such justice setting forth the claim upon which the judgment is rendered. (p. 989.)

Petition for a writ of prohibition, to which demurrer was interposed.

Russell W. Taft, for the petitionee.

V. A. Bullard, for the petitioner.

292 MUNSON, J. The case is presented by a demurrer to a petition for a writ of prohibition. It appears that the defendant Ward, while confined in jail on a writ sued out by the petitioner and then pending in county court, applied to defendant Stearns, a justice of the peace, for leave to come before him and confess judgment on the petitioner's claim; that the justice took jurisdiction of this application, and ordered the petitioner to file a specification of his claim, and to be present at the taking of Ward's confession of indebtedness; that these orders were made without the knowledge or con-

sent of the petitioner, that he was unable to furnish a specification, and objected to doing it, and also objected to the entire proceeding; and that the justice now threatens to enforce his orders by proceedings for contempt.

The statute provides that "a justice may accept and record a confession of a debt to a creditor, made by a debtor personally, either with or without antecedent process, as the parties shall agree, and render judgment on such confession"; but that "such judgment shall not be rendered except upon a specification in writing filed with such justice, setting forth the claim upon which the judgment is rendered": Vt. Stats. 1048.

The defendants contend that the clause, "as the parties shall agree," applies only to the clause, "either with or without antecedent process"; that the right given the debtor to confess his indebtedness is not left dependent on the consent of the creditor; that the confession is authorized as the basis of a judgment, and is of no benefit to the debtor unless judgment is had; and that inasmuch as the judgment cannot be entered without a specification, the statute impliedly gives the magistrate the power necessary to procure the specification. We consider these views untenable.

Judgments on confession without antecedent process have no basis other than the statute, and a full compliance with the statute is necessary to their validity, and the provisions authorizing them are to be strictly construed: 11 Ency. of Pl. & Pr. 975; 23 Cyc. 669; 17 Am. & Eng. Ency. of Law, 765, and cases cited. A judgment based upon a confession made without the request or consent ²⁹³ of the creditor, and entered at the instance of the debtor alone, will have no validity unless the creditor ratifies or accepts it: 23 Cyc. 703; 17 Am. & Eng. Ency. of Law, 767; 11 Ency. of Pl. & Pr. 981, and cases cited.

We find no justification in the language of our statute for a construction that would make the proceeding compulsory. The effect of the provision regarding an agreement cannot be confined as defendants claim. If there is no agreement for a judgment without antecedent process, there is no basis for the judgment. If the judgment is to be by agreement, the agreement necessarily involves the amount of it. It is clear that the creditor could not be compelled to accept a judgment for less than he claimed, and it certainly was not intended to provide for the rendition of a judgment that would not be binding on the creditor. It is true that if the creditor files a specification of his claim, and the debtor confesses an in-

debtedness of that amount, the parties will have agreed on the judgment rendered; but this result cannot be reached by compelling the creditor to file a specification. No authority for this can be deduced from the clause requiring a specification before judgment. This clause assumes that a judgment has been agreed upon, and is designed merely to insure a statement of the cause of action to be merged in it.

It is said, however, that this construction of Vermont Statutes, 1048, will render inoperative Vermont Statutes, 1690. The section last named provides that if a debtor, before or after suit commenced, tenders to the creditor a confession of judgment before a justice for the amount of the debt and costs then accrued, and such tender is refused, the creditor shall not recover the costs made after such tender in procuring judgment for his debt. It is argued that "if the consent of the plaintiff is necessary before a judgment can be confessed, it would be impossible to procure a confession of judgment to tender." But what is here spoken of is not the tender of a judgment in being, or of anything having the force of a judgment, but an offer to give judgment, which may be refused, and which, if refused, leaves the judgment still to be obtained.

The provisions of Vermont Statutes, 1048 and 1690, were originally embodied in one section, and remained so until the revision of 1839, when they were given their present form. There was no provision in the earlier statute that made the rendition of the judgment ²⁹⁴ depend on the filing of a specification. What is called in the original act a confession of debt is there given the force of a judgment, for it is provided that on making a record thereof execution shall issue. The statute now provides in terms for the rendition of a judgment on the confession. The first part of the original section authorized judgments on confession, and directed the course to be taken when the confession of indebtedness was agreed to; and the last part prescribed the effect to be given to a tender of such a confession if it was refused. We find nothing in the statute as originally framed, or as it now stands, to indicate the legislative intent contended for by the defendants.

This disposes of the only ground on which the right to the writ is questioned.

Demurrer overruled, petition adjudged sufficient, and case held for further proceedings.

Judgments by Confession entered when no default has been taken, no declaration filed, no summons addressed or delivered to a proper

officer to serve, and when no appearance has been made by the plaintiff or defendant, are void: *Wilhelm v. Locklar*, 46 Fla. 575, 110 Am. St. Rep. 111. If the maker of a note, before suit thereon is filed, signs an answer entering his appearance and confessing judgment, a judgment rendered thereon, without service of process or other appearance, is void: *Aultman & Taylor Co. v. Meade*, 121 Ky. 241, 123 Am. St. Rep. 193. A *pro confesso* judgment taken against cotenants, by one of them ignoring a deed made by one of the defendants to another, does not divest the title made by the deed, nor prevent the grantee from claiming his share of the proceeds of the sale: *Shuler v. Murphy*, 91 Miss. 518, 124 Am. St. Rep. 708. For early decisions on the validity of judgments by confession, see the notes to *Lee v. Figg*, 99 Am. Dec. 275; *Chappel v. Chappel*, 64 Am. Dec. 501.

WRIGHT v. TEMPLETON.

[80 Vt. 358, 67 Atl. 817.]

ARRESTING OFFICER, Duty of.—On making an arrest, it is the duty of the officer to take defendant before the subscribing justice of the peace, as commanded in the warrant. (p. 991.)

PROCESS, Return of, Necessity for.—An officer cannot justify under returnable process unless he shows its return, whether in a civil case or a criminal prosecution. (pp. 991, 992.)

ARRESTING OFFICER, When Becomes a Trespasser Ab Initio. If an arresting officer, instead of taking a prisoner before the subscribing justice of the peace, as commanded by the warrant, takes him to another place for the purpose of conferring with the state's attorney as to what further to do with the prisoner, this is such an abuse of process as makes the officer a trespasser *ab initio*. (p. 992.)

Action of trespass for false imprisonment. At the trial the jury were asked to assess the damages only on the basis that defendant was a trespasser *ab initio*, and to answer the question whether it was reasonable and proper for the defendant, in the circumstances, to take the plaintiff to Montpelier and keep him there, instead of keeping him at Barre. The last question they answered in the affirmative and fixed the damages at three hundred and sixty dollars. The defendant excepted and appealed.

Senter & Senter, for the defendant.

George W. Wing and John W. Gordon, for the plaintiff.

360 WATSON, J. The defendant undertakes to justify under two warrants issued by a justice of the peace upon complaints of the state's attorney of the county charging criminal offenses. The warrants commanded the officer serving the same to apprehend the plaintiff and have him forth-

with before the subscribing justice at Barre. The plaintiff was arrested on the warrants by the defendant, a legally qualified deputy sheriff, at ³⁶¹ Groton about 9 o'clock in the evening of October 8, 1899, and taken to Barre, arriving there between the hours of 5 and 6 the next morning.

After a short stop in Barre, and without taking the plaintiff before the justice of the peace who issued the warrants, and without communicating with the state's attorney then at his home in Barre, the defendant took the plaintiff to Montpelier, and when there placed him in jail for safekeeping. Later in the forenoon warrants were issued against the plaintiff from the county court, then in session, on informations filed therein for the same offenses. These warrants were put into the defendant's hands by the state's attorney at Montpelier near 10 o'clock, with directions to notify the plaintiff that the proceedings before the justice were dropped, and then to arrest him on the new warrants. Thereupon the defendant let the plaintiff out of jail, notified him as directed by the state's attorney, and arrested him on the warrants issued by the county court. This was 10 o'clock or a little after, the plaintiff having been in jail not far from three hours.

The special question submitted to the jury, "Was it a reasonable and proper thing in point of fact for the defendant to do in the circumstances, to take the plaintiff to Montpelier and keep him there instead of keeping him at Barre?" was answered in the affirmative. This finding, however, is immaterial, since the record shows that the plaintiff was not taken to Montpelier for safekeeping until he could be taken by the defendant before the subscribing magistrate, as commanded in the warrants, but in fact was taken there so the defendant could confer with the state's attorney as to what further to do with the plaintiff. Whether the defendant had authority so to do is not a question of fact, but one of law.

On making the arrest it was the duty of the defendant to take the plaintiff before the subscribing justice of the peace as commanded in the warrants: 2 Hale's Pleas of the Crown, 112. In *Ellis v. Cleveland*, 54 Vt. 437, it was held that an officer could not justify under a returnable process, unless he show its return; for he is commanded to return the writ, and he shall not be protected by it without showing that he has paid due and full obedience to its commands. To the same effect is *Gibson v. Holmes*, 78 Vt. 110, 62 Atl. 11. True, in each of these cases the arrest was ³⁶² on civil process. Yet the same doctrine applies in case of a warrant in criminal

process. This was expressly held in *Tubbs v. Tukey*, 3 Cush. 438, 50 Am. Dec. 744.

The taking of the plaintiff to Montpelier for the purpose shown was such an abuse of process as made the defendant a trespasser ab initio. Consequently the fact that the plaintiff's subsequent discharge there from that arrest was by the direction of the state's attorney does not relieve the defendant from liability in this action.

Judgment affirmed.

The Duty of an Arresting Officer to take his prisoner before a magistrate promptly is discussed in *Diers v. Mallon*, 46 Neb. 121, 50 Am. St. Rep. 598; *Burk v. Howley*, 179 Pa. 539, 57 Am. St. Rep. 607; *Leger v. Warren*, 62 Ohio St. 500, 78 Am. St. Rep. 738.

Abuse of Process by Trespass Ab Initio is the subject of a note to *Barrett v. White*, 14 Am. Dec. 365. What is an abuse of lawful process and the liability therefor are discussed in the note to *Bradshaw v. Frazier*, 86 Am. St. Rep. 397.

What Amounts to False Imprisonment is the subject of a note to *Hebrew v. Pulis*, 118 Am. St. Rep. 719.

STATE v. SARGOOD.

[80 Vt. 412, 68 Atl. 51.]

RES JUDICATA.—A Judgment in a Criminal Case is generally admissible and conclusive evidence in another criminal case against the defendant as to any fact determined by the judgment. (p. 993.)

JUDGMENT OF CONVICTION, Facts of Which Evidence in Another Prosecution.—If, in a prosecution for attempt to poison certain persons, the state attempts to connect the accused with the offense of poisoning certain colts by showing the purposes and motives involving both offenses to be the same, the record of the conviction of the accused on the charge of poisoning the colts is admissible, and conclusive that he did poison them. (p. 993.)

NEW TRIAL—Newly Discovered Evidence—Evidence of a Person Released from Incompetency to Testify.—After his conviction an accused is not entitled to a new trial on the ground that since such conviction his wife has procured a divorce and has become competent to testify, and will testify in his favor. (pp. 993, 994.)

NEW TRIAL—Newly Discovered Evidence—Want of Diligence. A new trial will not be granted after conviction to permit the prisoner to offer testimony tending to discredit the testimony given by a witness at the trial of the charge, where the desirability of discrediting such testimony could not have been overlooked in the ordinary preparation of the defense. (p. 994.)

Information and conviction of attempting to poison Sanford Hicks and wife. There was a motion for a new trial on the

ground of newly discovered evidence. The defendant appealed.

James K. Batchelder and D. A. Guiltinan, for the respondent.

W. R. Daley, state's attorney, and O. M. Barber, for the state.

⁴¹³ MUNSON, J. The statement given in the opinion in *State v. Sargood*, 77 Vt. 80, 58 Atl. 971, will serve as a sufficient statement of the case now before us, both as regards the theory of the state and what its evidence tended to show. The offense charged in the first case was the poisoning of certain colts, and the offense charged here is an attempt to poison Sanford Hicks and his wife. The state claimed to connect the respondent with each offense by a motive and purpose which included both. The relation of the two cases is such that the decision in the former case sustaining the admissibility of evidence of an attempt to ⁴¹⁴ poison the Hickses is authority for now holding that evidence of the poisoning of the colts was admissible in this case.

The court received in evidence the record of the respondent's conviction on the charge of poisoning the colts; held, that it was conclusive proof of the fact, and excluded testimony offered by the respondent to show the contrary; to all of which the respondent excepted. These rulings were correct. With some exceptions not material here, a judgment in a criminal case is admissible and conclusive evidence in another criminal case against the same defendant as to any fact determined by the judgment: 1 *Greenleaf on Evidence*, sec. 537n; *Commonwealth v. Evans*, 101 Mass. 25; *Commonwealth v. Ellis*, 160 Mass. 165, 35 N. E. 773; *Mitchell v. State*, 140 Ala. 118, 103 Am. St. Rep. 17, and note, 37 South. 76. See *State v. Adams*, 72 Vt. 253, 82 Am. St. Rep. 937, 47 Atl. 779.

Judgment that the respondent take nothing by his exceptions.

The petition for a new trial is based in part upon the affidavit of the former wife of the respondent, who has procured a divorce since his conviction, and has thus become a competent witness. It is apparent that her evidence is not newly discovered in the proper sense of the term. It is evidence that the respondent knew of, but did not have because it was not available. If within the rules applicable in such cases, the respondent should have moved for a postponement of the trial

until the desired testimony could be made available. It needs but this suggestion to show that the case does not stand on any recognized ground of relief. The respondent did not have this evidence when tried because the law did not permit it. The granting of the petition on this ground would amount to a judicial extension of the remedy to all cases where an incompetent witness is made competent by legal proceedings or legislative enactment. In the only similar case of which we have knowledge, the application was denied: *Sawyer v. Merrill*, 10 Pick. 16.

The petition is also supported by the affidavit of a chemist regarding an experiment with, and analysis of, a mixture corresponding to the washing fluid given to Mrs. Hicks by Mrs. Eastman, which tends to discredit in some respects the case made by the state regarding the liquid claimed to have been put into the cups by the respondent. The evidence of the analysis ⁴¹⁵ made of that liquid at the state laboratory was received on the trial for poisoning the colts. The facts regarding the washing fluid were introduced by the respondent at the same trial. It was to be expected that the state chemist would testify, and he did testify, as to his analysis and its results, substantially the same on the second trial as on the first. The desirability of discrediting his testimony could not have been overlooked in the ordinary preparation of the defense. If counsel had concluded to undertake this, they could easily have been prepared with opposing testimony of the character disclosed by the affidavit before the trial commenced. A new trial cannot be granted on evidence of this character under these circumstances.

Petition dismissed.

Res Judicata in Criminal Proceedings is the subject of a note to *Mitchell v. State*, 103 Am. St. Rep. 19. It seems that a judgment in criminal proceedings does not support the plea of *res judicata* in a civil action: *Frierson v. Jenkins*, 72 S. C. 341, 110 Am. St. Rep. 608.

STATE v. SARGOOD.

[80 Vt. 415, 68 Atl. 49.]

AN INDICTMENT for Perjury need not, in Vermont, set forth by what court, magistrate or person the oath was administered to the accused. (p. 995.)

PERJURY.—Knowledge of the Materiality of the Testimony is not an essential to the crime of perjury. (p. 996.)

PERJURY.—A Statement may be Regarded as Material within the law applicable to perjury if it may properly influence the jury in reaching its conclusion. (p. 996.)

RES JUDICATA—Judgment in One Criminal Prosecution, When not Admissible in Another.—A judgment in a criminal prosecution is not admissible in a subsequent prosecution to establish the guilt or innocence of the accused, unless the measure of proof required in the previous case was as great as in that on trial. (p. 997.)

RES JUDICATA—Judgment in One Criminal Prosecution, When not Admissible in a Subsequent Prosecution for Perjury.—If on a prosecution for committing an alleged crime, the accused, notwithstanding his testimony in his own behalf given as a witness for himself, is convicted and is subsequently placed on trial for perjury alleged to have been committed by him in giving such testimony, the record of his former conviction is not admissible against him to prove his commission of the crime and his consequent guilt of perjury, because his conviction on the former trial might have been sustained on the uncorroborated testimony of one witness, whereas he cannot be convicted of perjury on the uncorroborated testimony of a single witness. (p. 997.)

Batchelder & Bates and D. A. Guiltinan, for the respondent.

W. R. Daley, state's attorney, and O. M. Barber, for the state.

419 MUNSON, J. This is an indictment for perjury alleged to have been committed on an inquiry before the grand jury regarding the poisoning of certain colts, and upon the trial in county court of an indictment charging the respondent with poisoning them. The respondent demurred to the indictment, showing for cause of demurrer that in neither of the counts is it set forth by what court, magistrate or person the oath to the respondent was administered on the occasion when the crime is alleged to have been committed. The indictment follows the statutory form, and the statutory form is sufficient in this particular: State v. Camley, 67 Vt. 322, 31 Atl. 840. This being the only point made in support of the demurrer in the court below, the other matters now suggested will not be considered: State v. Schoolcraft, 72 Vt. 223, 47 Atl. 786.

It is claimed that the court erred in permitting the jury to base a conviction upon certain statements made to the grand

jury, inasmuch as it did not appear that the respondent knew what person or matter was being investigated, and so could not understand what statements had bearing or weight. We are referred to no authority, and have seen none, that treats knowledge of the materiality as an element of the crime.

It is objected that the court erred in instructing the jury that certain statements were material to the issue. It is clear that ⁴²⁰ all of them were statements that might properly have influenced the jury in reaching its conclusion, and this was sufficient: 2 Bishop's Criminal Law, 3d ed., sec. 998.

It is charged that the respondent committed perjury in testifying on his trial for poisoning the colts that he did not poison them. The court held that the record of his conviction in that case was conclusive proof against him in this case that he did poison them. The respondent insists that this was error.

It has been repeatedly held that the determination of an issue of fact in a criminal case is conclusive thereof in a subsequent criminal proceeding between the same parties: 24 Am. & Eng. Ency. of Law, 2d ed., 831; *Mitchell v. State*, 140 Ala. 118, 103 Am. St. Rep. 17, and note, 37 South. 86. The rule is commonly stated without recognizing any exception, but is to be taken with some limitations.

The few cases bearing upon the precise question before us are reviewed by Mr. Freeman in the note above cited. It has been held that a prior acquittal of an offense is a conclusive adjudication in the respondent's favor upon a subsequent trial for perjury committed in swearing to his innocence: *United States v. Butler*, 38 Fed. 498; *Petit v. Commonwealth*, 22 Ky. Law Rep. 262; *Cooper v. Commonwealth*, 106 Ky. 909, 90 Am. St. Rep. 275, 51 S. W. 789, 59 S. W. 524, 45 L. R. A. 216. There was a dissenting opinion in the case last cited, and there seems to be substantial ground for questioning these decisions. The reasoning amounts to this: The respondent procures an acquittal by his own perjury, and that acquittal is conclusive evidence that he did not commit perjury. But if the adjudication is not to be held conclusive in the respondent's favor, the ordinary rule of mutuality would require that it be not held conclusive against him. This may not follow, however, when the holding is placed upon the ground that the acquittal was procured by the respondent's fraud. It has been held in other cases that an acquittal is not an adjudication that the respondent did not commit perjury in denying his guilt: *State v. Caywood*, 96 Iowa, 367, 65 N. W. 385; *Hutcherson v. State*, 33 Tex. Cr. 67, 24 S. W. 908. It is said

in the case last cited, but without stating the grounds of the conclusion, that such evidence is not admissible to show either the guilt or the innocence of a defendant.

The rule under consideration does not apply unless the measure of proof required in the adjudged case was as great as that required in the case on trial: *Riker v. Hooper*, 35 Vt. 457, 82 Am. Dec. 646. This alone will ordinarily prevent the application of the ⁴²¹ rule when one case is civil and the other criminal: *Freeman on Judgments*, sec. 319a. Nor does the doctrine apply when the rules which determine the instruments of proof are different: 1 *Greenleaf on Evidence*, sec. 537. The fact that a conviction may have been obtained by the testimony of the plaintiff is one of the reasons given for excluding proof of it in a civil action where the plaintiff cannot testify: *Quinn v. Quinn*, 16 Vt. 426; *Robinson v. Wilson*, 22 Vt. 35, 52 Am. Dec. 77; *Steel v. Cazeaux*, 8 Mart. 318, 13 Am. Dec. 288. A difference of requirement regarding the instruments of proof is equally controlling where both cases are civil: *Stephen's Digest of Evidence*, art. 41, (d). We see no reason why this distinction should not be recognized when both cases are criminal. Whatever the amount of evidence ordinarily adduced, there is no rule that requires more than the evidence of a single witness in criminal cases generally. There can be no conviction of perjury on the uncorroborated testimony of a single witness. An application of the rule in cases like this might result in convictions upon less evidence than the law requires. This serves to distinguish cases of perjury from criminal cases generally, and renders the doctrine of *res judicata* inapplicable.

Exceptions sustained, judgment and sentence reversed, and cause remanded.

Indictments for Perjury are discussed in the note to *Moore v. State*, 124 Am. St. Rep. 654.

Res Judicata in Criminal Proceedings is the subject of a note to *Mitchell v. State*, 103 Am. St. Rep. 19. See further on this subject the recent cases of *Frierson v. Jenkins*, 72 S. C. 341, 110 Am. St. Rep. 608; *State v. Sargood*, 80 Vt. 412, ante, p. 992.

STATE v. PEET.

[80 Vt. 449, 68 Atl. 661.]

PRACTICE.—A General Demurrer to Each Count by enumeration amounts to a separate demurrer to every count. (p. 1000.)

INTERSTATE COMMERCE and the Police Power.—When the subjects upon which the power is to be exercised are local and limited in their nature or sphere of operation, the state may prescribe rules until Congress intervenes; but when they are national in character and require uniformity of regulation, affecting all the states alike, the power of Congress is exclusive, and its nonaction is tantamount to a declaration that all commerce within its control shall remain free of the burdens imposed by state legislation. (p. 1001.)

INTERSTATE COMMERCE.—Regulations of the Secretary of Agriculture under authority conferred on him by an act of Congress and not inconsistent with its provisions have the force of law. (p. 1001.)

INTERSTATE COMMERCE.—Construction of Regulation.—The rule that the exclusion of one subject or thing is the inclusion of others applies to regulations of interstate commerce prescribed by the secretary of agriculture. (p. 1002.)

INTERSTATE COMMERCE.—Action of Congress, When Conclusive.—Articles recognized by Congress as subjects of interstate commerce cannot be held to be otherwise. (p. 1002.)

INTERSTATE COMMERCE.—Commerce Among the States Comprehends intercourse for the purposes of trade in any and all of its forms, including transportation, purchase, sale and exchange of commodities between citizens of different states, and the power of regulation conferred upon Congress is without limitation. (p. 1003.)

INTERSTATE COMMERCE.—To Regulate Commerce is to Prescribe the Rules by which it shall be governed—that is, the conditions upon which it shall be conducted; to determine how far it shall be free and untrammelled, how far it shall be subject to duties and other exactions, and how far it shall be prohibited. (p. 1003.)

INTERSTATE COMMERCE.—Right of State to Forbid Sale or Shipment of Animals not so Immature as to Fall Within Federal Regulation.—The secretary of agriculture, having by his regulations formulated pursuant to authority conferred on him by act of Congress, required the condemnation of the carcasses of certain animals not three weeks old when killed, it is beyond the power of the state to forbid the sale or shipment of carcasses of such animals on the ground that they were less than four weeks of age and did not weigh fifty pounds. (p. 1006.)

INTERSTATE COMMERCE, Regulations Imposed by and the Police Power.—Whatever may be the extent of the police power respecting the domestic order, morals, health or safety, it cannot be exercised over a subject confided exclusively to the commercial power of Congress. (pp. 1006, 1007.)

CRIMINAL STATUTES, Construction of, When Restricted to the State.—A statute is considered as not intended to have an extra-territorial effect with respect to general words used therein, unless they clearly indicate a different intent. (p. 1007.)

A CRIMINAL STATUTE must be Construed as Applying Only to Acts Within the State.—A statute making it unlawful to sell designated articles must be considered as applying only to their sale within the state. (p. 1007.)

CONSTITUTIONAL LAW—Severability of a Statute.—A statute making it unlawful to sell certain articles or to ship them without the state, though invalid with respect to such shipments, because of its attempted interference with interstate commerce, may be treated as severable and sustained, to the extent of making unlawful sales within the state. (pp. 1007, 1008.)

INFORMATION, When Construed as Applying to Acts Within the State.—If an information charges that the accused, at a designated county within the state, did then and there keep, with intent to sell, certain designated articles, it will not be construed as charging an intent to sell beyond the state. When the offense charged is a misdemeanor, if time and place be added to the first act alleged, it shall be deemed to be connected with all the facts subsequently alleged. (p. 1008.)

Information charging in fourteen counts violations of the statute of Vermont prohibiting the sale of diseased animals and meats. A demurrer to the several counts was overruled pro forma. The defendant appealed.

The act of Congress relied upon was approved June 30, 1906, and, so far as material, is as follows:

“That for the purpose of preventing the use in interstate or foreign commerce, as hereinafter provided, of meat and meat food products which are unsound, unhealthful, unwholesome, or otherwise unfit for human food, the secretary of agriculture, at his discretion, may cause to be made, by inspectors appointed for that purpose, an examination and inspection of all cattle, sheep, swine, and goats before they shall be allowed to enter into any slaughtering, packing, meat-canning, rendering, or similar establishment, in which they are to be slaughtered and the meat and meat food products thereof are to be used in interstate or foreign commerce”; and that all diseased animals found on such inspection shall be set apart and slaughtered separately, etc. “And said secretary of agriculture shall, from time to time, make such rules and regulations as are necessary for the efficient execution of the provisions of this act, and all inspections and examinations made under this act shall be such and made in such manner as described in the rules and regulations prescribed by said secretary of agriculture not inconsistent with the provisions of this act. . . . That the provisions of this act requiring inspection to be made by the secretary of agriculture shall not apply to animals slaughtered by any farmer on the farm and sold and transported as interstate or foreign commerce, nor to retail butchers and retail dealers in meat and meat food products, supplying their customers: Provided, that if any person shall sell or offer for sale or transportation for interstate or foreign commerce any meat or meat food products which are diseased,

unsound, unhealthful, unwholesome, or otherwise unfit for human food, knowing that such meat food products are intended for human consumption, he shall be guilty of a misdemeanor, . . . : Provided also, that the secretary of agriculture is authorized to maintain the inspection in this act provided for at any slaughtering, meat-canning, salting, packing, rendering, or similar establishment notwithstanding this exception, and that the persons operating the same may be retail butchers and retail dealers or farmers; and where the secretary of agriculture shall establish such inspection, then the provisions of this act shall apply notwithstanding this exception."

V. A. Bullard and Cowles & Moulton, for the respondent.

Alfred L. Sherman, state's attorney, for the state.

453 WATSON, J. The information as amended contains fourteen counts, in Nos. 1, 3, 4, 7, 8, 9, 10 and additional counts 1 and 2 of which the respondent is charged with keeping, with intent to ship out of this state for food purposes, the flesh of calves which were less than four weeks old, and in Nos. 2, 5, and 6 of which he is charged with keeping with intent to ship out of this state, for food purposes, the flesh of calves which weighed less than fifty pounds each, dressed weight, when killed, and in Nos. 11 and 12 of which he is charged with keeping with **454** intent to sell, for food purposes, the flesh of calves which were less than four weeks old. The demurrers are general: one to the second, fifth, and sixth counts by enumeration, and one to all the other original counts by enumeration; and by agreement the latter demurrer is treated as in like manner covering the first and second additional counts. This, in effect, is the same as a separate demurrer to every count: *Darling v. Clement*, 69 Vt. 292, 37 Atl. 779.

The law upon which the information is based reads: "A person who sells or offers to sell or keeps with intent to sell for food purposes, or ships out of the state, or keeps with intent to ship out of this state, for food purposes, the flesh of any animal or fowl which died or was killed when diseased, or the flesh of a calf which was less than four weeks old or weighed less than fifty pounds, dressed weight, when killed, shall be imprisoned," etc.: Laws of 1906, No. 182, sec. 1.

This statute is challenged as in conflict with article 1, section 8, of the federal constitution, which provides: "The Congress shall have power . . . to regulate commerce with foreign

nations and among the several states, and with the Indian tribes." On the other hand, it is contended on the part of the state that the act, in purpose and result, is to prevent the dealing in meats, for food purposes, which are unwholesome and unfit for human consumption—hence to protect the health and morals of the community, which is within the police power of the state. It will be observed that the validity of the statute as applied to the flesh of animals and fowls which died or were killed when diseased is not here involved. We are called upon to distinguish between the power of Congress to regulate commerce between the states and the so-called police power of the state, only with reference to those features of the statute a violation of which is charged in the information.

Although sometimes difficult of application to the case in hand, the law is well settled that when the subjects upon which the power is to be exerted are local and limited in their nature or sphere of operation, the states may prescribe regulations until Congress intervenes and assumes control of them; yet when they are national in character and require uniformity of regulation affecting all the states alike, the power of Congress is exclusive. And the nonaction of Congress is tantamount to a declaration that all commerce within its exclusive control shall remain free ⁴⁵⁵ from burdens imposed by state legislation: *Cooley v. Board of Wardens*, 12 How. 299, 13 L. ed. 996; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. Rep. 826, 29 L. ed. 158; *Pittsburg & S. Coal Co. v. Bates*, 156 U. S. 577, 15 Sup. Ct. Rep. 415, 39 L. ed. 538; *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681.

It is argued that the state has power to prohibit the exportation to another state of anything which is not an article of commerce as, in this case, the flesh of calves which were less than four weeks old, or which weighed less than fifty pounds, dressed weight, when killed, because unwholesome for human food. The question then arises whether such meat, for the purpose named, is an article of interstate commerce, and whether it is within the power of a state legislature to declare it otherwise.

On July 25, 1906, for the purpose of preventing the use in interstate or foreign commerce of meat and meat food products which are unsound, unhealthful, unwholesome or otherwise unfit for human food, under the authority conferred upon him by the act of Congress approved June 30, 1906, the secretary of agriculture issued regulations, "for the inspection, reinspection, examination, supervision, disposition, and method and manner of handling of live cattle, sheep, swine,

and goats and the carcasses and meat food products of cattle, sheep, swine, and goats."

Under Regulation 15, it is provided (X): "Carcasses of animals too immature to produce wholesome meat, all unborn and stillborn animals, also carcasses of calves, pigs, kids, and lambs under three weeks of age, shall be condemned."

Since these regulations were prescribed by the secretary of agriculture under authority of the act of Congress before referred to, and are not inconsistent with the provisions of that act, they have the force of law: *Nye v. Daniels*, 75 Vt. 81, 53 Atl. 81.

Under the general rule here applicable that the exclusion of one subject or thing is the inclusion of all other things, when the federal regulations excluded from use in interstate commerce, as too immature to produce wholesome meat, the carcasses of calves under three weeks of age, they by implication authorized such use to be made of the carcasses of calves above the age of exclusion, thereby recognizing them as articles of commerce; and since dressed weight is not there mentioned, it is not made a controlling element. Articles recognized by Congress ⁴⁵⁶ as subjects of interstate commerce cannot be held to be otherwise. In *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681, 34 L. ed. 128, the court, speaking through Mr. Chief Justice Fuller, said: "Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character; although, at the same time, if directly dangerous in themselves, the state may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a state the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of people of a state, represented in the state legislature, the power to regulate commercial intercourse between the states, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect union which the constitution was adopted to create": See, also, *License Cases*, 5 How. 504, 12 L. ed. 256; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 Sup. Ct. Rep. 757, 43 L. ed. 49;

Austin v. Tennessee, 179 U. S. 343, 21 Sup. Ct. Rep. 132, 45 L. ed. 224.

As has many times been held, commerce among the states comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities between the citizens of different states; and the power to regulate, conferred upon Congress by the commercial clause, is one without limitation. To regulate commerce is to prescribe the rules by which it shall be governed—that is, the conditions upon which it shall be conducted; to determine how far it shall be free and untrammelled, how far it shall be subject to duties and other exactions, and how far it shall be prohibited: *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. Rep. 826, 29 L. ed. 158.

The purpose of a statute, in whatever language it may be framed, must be determined by its natural and reasonable effect: *Henderson v. Wickham*, 92 U. S. 259, 23 L. ed. 543; *Reid v. Colorado*, 187 U. S. 137, 23 L. ed. 92, 47 L. ed. 108. Viewed by this rule, the purpose of the statute in question, as far as it is applicable ⁴⁵⁷ to this branch of the case, is plain. To keep with intent to ship out of this state, for food purposes, the flesh of a calf within the specified age or weight is made criminally punishable, the natural and reasonable effect of which is to prohibit, for the purposes named, intercourse with another state for the purpose of trade in such meat. Yet that class of commerce which admits and requires uniformity of regulation, affecting all the states alike, includes the transportation, purchase, sale and exchange of commodities. Clearly by those provisions of the statute the state legislature seeks to interfere directly with the freedom of interstate commerce, which is an encroachment upon the exclusive power of Congress: *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Hannibal & St. Joseph R. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Hall v. DeCuir*, 95 U. S. 485, 24 L. ed. 547; *County of Mobile v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Walling v. Michigan*, 116 U. S. 446, 6 Sup. Ct. Rep. 454, 29 L. ed. 691; *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. Rep. 475, 29 L. ed. 715; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. Rep. 1091, 29 L. ed. 257; *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. Rep. 592, 30 L. ed. 694; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. Rep. 465, 43 L. ed. 702; *Caldwell v. North Carolina*, 187 U. S. 622, 23 Sup. Ct. Rep. 229, 47 L. ed. 336; *State v. Pratt*, 59 Vt.

590, 9 Atl. 556; *Vermont & Can. R. R. Co. v. Central Vermont R. R. Co.*, 63 Vt. 1, 21 Atl. 262, 731, 10 L. R. A. 562.

Some of the cases here cited will be more particularly noticed. *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678, involved the constitutionality of a statute of Maryland requiring the importer of foreign articles to take out a license before he should be permitted to sell his imported goods. It was held that the right to sell was connected, as an inseparable incident, with the law permitting importation; that any penalty inflicted on the importer for selling the articles in his character of importer was in opposition to the act of Congress authorizing importation; and that any charge on the introduction and incorporation of the articles into and with the mass of property in the country was hostile to the power given to Congress to regulate commerce. In answer to the contention that this construction of the power to regulate commerce would abridge the acknowledged power of a state to tax its own citizens, or their property within its territory, the court, through Mr. Chief Justice Marshall, said: "We admit this power to be sacred; but cannot admit that it may be used so as to obstruct the free course of a power given to Congress. We cannot admit that it may be used so as to obstruct or defeat the power to ⁴⁵⁸ regulate commerce. . . . If the states may tax all persons and property found on their territory, what shall restrain them from taxing goods in their transit through the state from one port to another, for the purpose of re-exportation? The laws of trade authorize this operation, and general convenience requires it. Or what should restrain a state from taxing any article passing through it from one state to another, for the purpose of traffic, or from taxing the transportation of articles passing from the state itself to another state, for commercial purposes? These cases are all within the sovereign power of taxation, but would obviously derange the measures of Congress to regulate commerce, and affect materially the purpose for which that power was given."

In *Hannibal & St. Joseph R. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527, a statute of Missouri directly prohibited the introduction into the state of all Texas, Mexican, or Indian cattle during eight months of each year, without any distinction between such as might be diseased and such as were not, and made any person who should bring in such cattle in violation of these provisions liable for all damages sustained on account of disease communicated by them. The suit was to recover such damages. The single question

was, whether the statute was in conflict with the commerce clause of the federal constitution. It was held to be a plain regulation of interstate commerce; a regulation extending to prohibition; that whatever may be the power of a state over commerce which is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations; that power over one is given by the constitution to Congress in the same words as it is given over the other, and in both cases it is necessarily exclusive.

In *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. Rep. 592, 30 L. ed. 694, the court had before it the question whether it is competent for a state to levy a tax or impose any other restriction upon the citizens or inhabitants of other states, for selling or seeking to sell their goods in such state before they are introduced therein. It was held not to be within the power of a state; for to tax the sale of such goods, or the offer to sell them, before they are brought into the state is clearly a tax on interstate commerce itself.

⁴⁵⁹ In *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. Rep. 475, 29 L. ed. 715, the real question was, whether logs intended for exportation to another state and partly prepared for that purpose by being deposited at the place of shipment were subject to taxation like other property in the state. It was held that the logs were not exports, nor in process of exportation, until they were committed to the common carrier for transportation out of the state to the state of their destination or had started on their ultimate passage to that state; that until then it was reasonable to regard them as not only within the state of their origin, but as a part of the general mass of property there and liable to taxation, if not taxed by reason of their being intended for exportation. The court, through Mr. Justice Bradley, said: "Of course they cannot be taxed as exports; that is to say, they cannot be taxed by reason or because of their exportation or intended exportation; for that would amount to laying a duty on exports, and would be a plain infraction of the constitution, which prohibits any state, without the consent of Congress, from laying any imposts or duties on imports or exports; and although it has been decided (*Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382) that this clause relates to imports from and exports to foreign countries, yet, when such imposts or duties are laid on imports or exports from one state to another, it cannot be doubted that such an imposition would be a regulation

of commerce among the states and, therefore, void as an invasion of the exclusive powers of Congress."

In *Caldwell v. North Carolina*, 187 U. S. 622, 23 Sup. Ct. Rep. 229, 47 L. ed. 336, the plaintiff in error was convicted in the state court for a violation of an ordinance requiring a license fee from persons engaged in selling and delivering picture frames or pictures. As an employé of a foreign corporation of Illinois, he went to the state of North Carolina for the purpose of delivering certain pictures and frames for which contracts of sale had previously been made by other employés of the corporation, who had preceded him there. The sender of the goods in the former state was the consignee in the latter. The court of last resort in North Carolina, affirming the conviction in the lower court, put its decision on the ground that there was a distinction between a case where the goods were shipped by the seller in one state direct to the purchasers in another, as in *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. Rep. 829, 38 L. ed. 719, where it was held that the tax imposed ⁴⁶⁰ was upon interstate commerce, and a case where the goods were not shipped direct to the purchasers, but to the vendor, and by his agent then delivered to the purchasers. It was held by the federal supreme court that this difference did not deprive the transaction of its character as interstate commerce. Mr. Justice Shiras, speaking for the court, said: "It would seem evident that, if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to state taxation. The same could be said if the vendor himself, or by a personal agent, had carried and delivered the goods to the purchaser. That the articles were sent as freight by rail, and were received at the railroad station by an agent who delivered them to the respective purchasers, in no wise changes the character of the commerce as interstate."

Moreover, the statutory provisions under consideration are not within the police power of the state. Whatever may be the extent of that power respecting domestic order, morals, health, and safety, it cannot be exercised over a subject confided exclusively to the commercial power of Congress: *Hannibal & St. Joseph R. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527. To the same effect is the case of *Henderson v. Wickham*, 92 U. S. 259, 23 L. ed. 543. There the court, speaking through Mr. Justice Miller, said it was clear, from the nature of our complex form of government, that whenever the statute of a state invades the domain of legislation

which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the states.

We hold, therefore, that so much of the act of 1906 as makes it punishable to keep with intent to ship out of this state, for food purposes, the flesh of a calf which was less than four weeks old or weighed less than fifty pounds, dressed weight, when killed, is in conflict with the commerce clause of the constitution of the United States and void. It follows that all counts in the information are insufficient, except the eleventh and twelfth, which will now be considered.

These two counts are for keeping with intent to sell for food purposes the flesh of a number of calves less than four weeks old. The statute does not say "with intent to sell" in this state, but only "with intent to sell for food purposes,"⁴⁶¹ without saying where. The counts follow the statute in this regard. No contention is made but that the state has full and exclusive control over its purely domestic commerce; and the line of distinction between such commerce and that which is protected by the commerce clause of the federal constitution we have no occasion now to consider.

The respondent says that if the statute read, "with intent to sell in this state," no question could be made; but that, taking this part of the statute in connection with the prohibition of shipping out of the state, it is clear that the sale anywhere, whether within or without the state, is forbidden, and that therefore the cases applicable to the other branch of the case are controlling here. But the statute is to be construed as not intended to have extraterritorial effect, but only an intraterritorial effect. This is the rule for construing statutes in this respect which use general words, unless they clearly indicate a different intent, which this statute does not: *In re Hickok's Estate*, 78 Vt. 259, 62 Atl. 724; *Colquhoun v. Heddon*, L. R. 25 Q. B. D. 129; *Black's Construction and Interpretation of Laws*, 91; 2 *Sutherland's Statutory Construction*, 2d ed., sec. 573. The statute means, therefore, the same as though it read, "with intent to sell in this state." As the respondent concedes that with this construction the validity of the statute in this respect cannot be questioned, it requires no further consideration.

That the statute is severable and may be held unconstitutional to the extent before indicated without invalidating that portion on which these two counts are based, there can be no

doubt. The cases of *State v. Scampini*, 77 Vt. 92, 59 Atl. 201, and *State v. Abraham*, 78 Vt. 53, 61 Atl. 766, are full authority.

It is said, however, that these counts are bad, in that the place of the intended sale is not laid within this state. The eleventh count alleges that the respondent, "of Shelburne in said county of Chittenden, on the tenth day of March, 1907, did then and there keep with intent to sell," etc. The twelfth count is the same in form. Had the words "then and there" been inserted immediately following the word "intent," the allegation of time and place would have been with sufficient certainty and in the form usually adopted in allegations of connected acts. Yet in contemplation of law the allegation is so made; for when the offense charged is a misdemeanor, if time and place be added to the first act alleged, it shall be deemed to be connected ⁴⁶² with all the facts subsequently alleged: *State v. Scampini*, above cited.

The pro forma judgment of the county court as to all the counts except the eleventh and twelfth is reversed, the demurrer sustained, and the counts adjudged insufficient. As to the eleventh and twelfth counts the pro forma judgment of the county court is affirmed. Cause remanded.

Tyler, J., dissents, holding that the enactment of No. 182, Acts of 1906, was within the proper exercise by the legislature of the police power of the state.

The Statute of New York Prohibiting any person from having, or offering for sale, any adulterated drug or food, and declaring that an article must be deemed adulterated if it is colored, coated, polished or powdered, whereby a defect is concealed, or it is made to appear better than it really is, or of greater value, is constitutional, though applied to articles imported from a foreign country: *Crossman v. Lurman*, 171 N. Y. 329, 98 Am. St. Rep. 599. And a statute making it criminal to bring into the state sheep infected with contagious diseases is not an attempt to regulate interstate commerce but a reasonable exercise of the police power: *Patrick v. State*, 17 Wyo. 260, 129 Am. St. Rep. 1109. To the same effect see *State v. Asbell*, 74 Kan. 397, 121 Am. St. Rep. 345. But a statute prohibiting the importation of docked-tailed horses is in violation of the commerce clause of the federal constitution: *Stubbs v. People*, 40 Colo. 414, 122 Am. St. Rep. 1068.

DUNLEVY v. FENTON.

[80 Vt. 505, 68 Atl. 651.]

PRACTICE.—A Special Demurrer has only the force of a general demurrer as to the pleadings prior to the one specially challenged. (p. 1010.)

PLEADING—Argumentative Allegations, When Good as Against a General Demurrer.—A plea that the plaintiff by her deed released the defendant argumentatively alleges the delivery of the deed, and is hence good against a general demurrer. (p. 1010.)

PLEADING.—The Plea of Confession and Avoidance must impliedly admit that the allegations sought to be avoided are true. (p. 1011.)

PLEADING.—A Special Plea amounting to a general issue is bad. (p. 1011.)

PLEADING.—A Pleading Which Sets Up in Reply a different contract from the one alleged is bad, because it is an argumentative denial of what the adverse pleader must prove to sustain his claim. (p. 1011.)

PLEADING.—Replication.—To a plea that the plaintiff by her deed released the defendant from the cause sued upon, a replication that the plaintiff made the supposed deed and release pleaded by the defendant is not sufficient to give color. (p. 1011.)

ESCROW—Unauthorized Delivery.—When a deed is deposited with a third person to be delivered to the grantee only upon performance of some condition precedent, and the depository delivers it without such performance, there is in law no delivery, and the deed does not take effect. (p. 1012.)

Assumpsit for breach of promise to marry. There was a special demurrer to the plaintiff's replication to the defendant's special sixth plea, which was overruled, and the replication held sufficient. The defendant thereupon excepted and appealed.

Gibson & Waterman, R. C. Bacon and J. K. Batchelder, for the defendant.

Butler & Moloney and H. G. Barber, for the plaintiff.

507 MUNSON, J. The plea alleges in substance that the plaintiff by her deed in writing under her hand and seal released and discharged the defendant from the cause of action sued upon, and covenanted and agreed that at the next succeeding term the suit should be entered "settled and discontinued," and makes profert of said deed.

The replication alleges in substance that the plaintiff made said supposed deed of release and delivered it to one Garceau, on condition and in consideration that the defendant then promised that he would make and deliver to the plaintiff a like deed of release discharging the plaintiff to the same

extent, and would deliver to the plaintiff the pleas prepared in the case, and would leave five hundred dollars with Garceau for the plaintiff by a time stated, and that both parties should treat such agreement as strictly confidential; and alleges further that the parties were to meet at Garceau's office at the time stated, and that Garceau was then to deliver said money to the plaintiff and said supposed deed of release to the defendant, but that ⁵⁰⁸ said deed was not to be of any force until defendant had fully complied with every condition of said agreement; and alleges further that the terms of said agreement were made public by defendant, that said pleas were not delivered to the plaintiff but were filed in court, and that neither the defendant's release nor said sum of money was delivered to the plaintiff; that plaintiff was at Garceau's office at the time named, and was then informed by Garceau that the defendant had not left said money as agreed, and that plaintiff waited some time without the defendant appearing, and then demanded of Garceau the return of her said supposed deed of release, but that Garceau refused to return it, and afterward delivered it to defendant's attorneys against her protest, and that the supposed deed pleaded by defendant is not her deed of release; concluding with a verification.

The replication is demurred to, and special causes of demurrer are assigned, which are, in substance, that it does not answer the plea, either by a general form of denial or by a denial of any single material fact; that it advances new matter, and thereby sets forth a contract different from that stated in the plea, and so amounts to the general issue; and that it does not confess and avoid any material allegation of the plea.

The plaintiff claims that the plea is defective in that it fails to allege a delivery of the deed of release; and that if it be held that a delivery of the deed is sufficiently alleged, the plea is double, in that it sets up a release of the cause of action and a covenant to discontinue the suit; and that inasmuch as the plea is bad, it is sufficiently answered by the replication, even though that be defective. The demurrer reaches all the pleadings, but has the force of a general demurrer only, as applied to pleadings prior to the one demurred to. So it reaches only substantial defects in the plea, and if a delivery of the release is argumentatively alleged, the plea is sufficient, for argumentativeness and duplicity are but defects of form. We think a delivery of the deed of release is argumentatively alleged. The allegation is not that

the plaintiff made a deed releasing the defendant, but that by her deed she released him, which implies a delivery. So the plea is sufficient, and if the replication stands, it must be upon its merits.

The plaintiff argues that the replication is a proper plea of confession and avoidance; that the matters set up in avoidance ⁵⁰⁹ were not coincident with the execution of the release, but occurred after its execution, and so constitute no impeachment of its original validity; that the release became inoperative by reason of these subsequent occurrences, and that matters of avoidance thus arising may be specially pleaded.

It should be noticed at the outset that the matters set up as occurring subsequently to the execution of the release are not matters that arose independently of the contract as the replication alleges it to have been made. These subsequent occurrences, as alleged, were merely breaches of an agreement under which the deed of release was made and deposited. The replication alleges a delivery to a third person to be held for delivery to the defendant when certain conditions were complied with, and a possession wrongfully obtained without such compliance, and avers in conclusion that such supposed deed of release is not the plaintiff's deed.

A plea of confession and avoidance must at least give color to the matter to which it is applied; that is, it must so far confess the matter adversely alleged as to give the opposite party an apparent right—it must contain at least an implied admission that the allegations to be avoided are true: *Dunklee v. Goodenough*, 65 Vt. 257, 26 Atl. 988; *Baker v. Sherman*, 75 Vt. 88, 53 Atl. 330. It follows that a plea of confession and avoidance which in effect denies the existence of the claim it opposes is defective. The plea rests upon the confession, for if there is no such adverse claim, there is nothing requiring new matter in avoidance. Connected with this rule, and largely depending upon it, is the doctrine that a special plea amounting to the general issue is bad: 1 Chitty, 526. A plea which sets up in reply a different contract from the one alleged is bad for this reason. It is an argumentative denial of what the adverse pleader must prove to sustain his claim: *Kimball v. Boston etc. R. R. Co.*, 55 Vt. 95; *Hayselden v. Staff*, 5 Ad. & E. 153.

The allegation of the replication that the plaintiff made the supposed deed of release pleaded by the defendant is not sufficient to give color. The plaintiff's brief proceeds upon the theory that the deed of release went into effect and was made inoperative by subsequent occurrences, but the allega-

tions of the replication show that the deed never became operative. The replication sets forth a contract which led to the preparation of a deed of release, but the contract as set forth is entirely ⁵¹⁰ inconsistent with the existence of the release as the defendant claims it. When a deed is deposited with a third person to be delivered to the grantee only upon the performance of some condition precedent, and the depository delivers it without the performance of the condition, there is no delivery in law, and the deed is without effect: *Stiles v. Brown*, 16 Vt. 563. We hold the replication insufficient on both the grounds considered.

Judgment reversed, demurrer overruled as to the plea and plea adjudged sufficient, demurrer sustained as to the replication and that adjudged insufficient, and cause remanded.

Escrows are discussed at length in the note to *Abbott v. Sanders*, ante, p. 974.

FURRY'S ADMINISTRATOR v. GENERAL ACCIDENT INSURANCE COMPANY.

[80 Vt. 526, 68 Atl. 655.]

INSURANCE AGAINST ACCIDENT.—An Exception of Uncertain Import must be Construed most strongly against the insurer. (pp. 1014, 1015.)

INSURANCE AGAINST ACCIDENT.—An Exception Containing a Plain, Simple and Unambiguous Provision pointing clearly to a just and practicable criterion is not to be so construed as to deprive the insurer of the protection for which it stipulates. (p. 1015.)

INSURANCE AGAINST ACCIDENT—Injury While Under the Influence of an Intoxicant.—If a policy insuring against accident limits the amount of the liability when a loss was "while under the influence of any intoxicant or narcotic," a finding that the assured was not under the influence of intoxicating liquor, "so as to prevent him from being fairly able to take care of himself," does not entitle him to recover, except to the extent to which the policy authorized recovery while under the influence of an intoxicant. (p. 1015.)

Assumpsit on an accident insurance policy. Judgment for the recovery of the larger sum mentioned in the policy. The defendant excepted and appealed.

E. H. O'Brien and Charles L. Howe, for the plaintiff.

Butler & Moloney, for the defendant.

⁵²⁷ MUNSON, J. Plaintiff's intestate was insured in the defendant company under a contract which limited the company's liability to one-fifth of the amount otherwise payable, if the loss was "from exposure to obvious risk or injury or obvious danger." or "while under the influence of any intoxicant or narcotic." It is found that "the accident did not occur from exposure to obvious risk or injury or obvious danger." This is conclusive as to the first exception, unless it can be said as matter of law that walking on a railroad track necessarily is in itself such an exposure, as to which we do not find it necessary to inquire. The findings bearing upon the second exception are with reference to some intoxicant or narcotic, without determining which. For brevity, we shall speak of the case as one of intoxication.

It is found that during the evening preceding his injury the insured was more or less under the influence of some intoxicant or narcotic. Between 11 and 12 o'clock he went to a hall where a fair was being held, and his condition was then ⁵²⁸ such as to justify the managers in preventing his entrance. He was last seen in the village between 12 and 1 o'clock, and his actions and conversation at that time indicated that he was "getting sobered off." Soon after this he went to the railroad yard, lighted his lantern and started south on the track. Several persons saw him as he started, and watched him for some distance. His gait was somewhat unsteady, but he was walking between the rails. It was about a mile and a half to the place where he was injured, and in this distance there were two bridges without any planking on the ties. He was found early in the morning, sitting a few feet west of the track. His left foot had been cut off just above the ankle, and was lying inside the rail. The trains passed Danby that night at 12:49 and 1:32.

The concluding finding is that at the time the accident occurred the insured was not under the influence of intoxicating liquor "so as to prevent him from being fairly able to take care of himself." This leaves him under the influence of liquor to some extent, and measures the extent of the influence by the advance made in the recovery of his faculties. It is saying in effect that the influence of the liquor had so far passed away that he had become fairly able to take care of himself. The effect of the finding must depend upon the force given to the word "fairly." It is evident that the word is not used here in the sense of "fully," but rather in the sense of "measurably" or "reasonably": See Century Dictionary. The clause containing it certainly cannot be

construed as a finding that the insured had regained the normal use of his faculties. The word, although capable of other uses, is ordinarily used as a word of limitation. In *Warner v. Arctic Ice Co.*, 74 Me. 475, there was a question regarding the phrase "fairly merchantable quality," and the court considered that the word "fairly" was well adapted to convey the idea of mediocrity in quality, or something just above it.

The only case we know of where the words in question were used is *Manufacturers' Accident Indemnity Co. v. Dorgan*, 58 Fed. 945, 7 C. C. A. 581, 22 L. R. A. 620. This case was submitted with an instruction which contained the expression "fairly able to take care of himself prudently and properly," but the objection to the instruction and the evidence in the case were not such as required a consideration of this language, and nothing was said regarding it. We find nothing in the other cases brought to our attention that bears ⁵²⁰ upon the precise question presented. In the cases cited below, although there was evidence of drinking or of conduct that might indicate it, and varying comments of the reviewing court, there was in each instance a distinct finding of the triers that the insured was not, at the time of the accident, in the condition described in the exception—with no report of instructions limiting its effect: *Fidelity & Casualty Co. v. Chambers*, 93 Va. 138, 24 S. E. 896, 40 L. R. A. 432; *Travelers' Ins. Co. v. Harvey*, 82 Va. 949, 5 S. E. 553; *Prader v. National Masonic Accident Assn.*, 95 Iowa, 149, 63 N. W. 601; *Sutherland v. Standard etc. Ins. Co.*, 87 Iowa, 505, 54 N. W. 453.

The exception under consideration is one that materially affects the risk. It is manifestly intended to require the insured to so limit his use of liquor that he will retain "full control over his faculties of mind and body": *Shader v. Railway Passengers' Assur. Co.*, 3 Hun, 424; *Standard etc. Ins. Co. v. Jones*, 94 Ala. 434, 10 South. 530. It is considered by no means unreasonable that the company should require that the insured be under no exciting influence that may affect his self-possession or judgment in the exercise of the faculties essential to his safety: *Shader v. Railway Passengers' Assur. Co.*, 66 N. Y. 441, 23 Am. Rep. 65; *Campbell v. Fidelity & Casualty Co.*, 109 Ky. 661, 60 S. W. 492.

If the plaintiff's intestate had not recovered the full use of the mental and physical powers available for his protection when in normal condition, he was still "under the influence" of liquor within the meaning of the exception. It

is doubtless true that an exception of uncertain import is to be construed most strongly against the company. But a plain, simple and unambiguous provision, which points clearly to a just and practicable criterion, is not to be so construed as to deprive the company of the protection for which it stipulates. If it be conceded that there may be a recovery notwithstanding some impairment of the faculties from the immediate effect of drink, it is difficult to see upon what theory the courts can fix the limit that shall bar recovery.

Judgment reversed, and judgment for the plaintiff for the smaller sum.

Under a Policy of Life Insurance conditioned to be void if death should occur "while the insured was, or in consequence of his having been, under the influence of intoxicating drink," it has been held that if he was under the influence of intoxicating drinks when he died the policy was avoided whether or not the intoxication was the cause proximate or remote of the death: *Shader v. Railway Passengers' Assur. Co.*, 66 N. Y. 441, 23 Am. Rep. 65. For subsequent cases on this question, see *Hogins v. Supreme Council*, 76 Cal. 109, 9 Am. St. Rep. 173; *Newman v. Covenant Mut. Ins. Assn.*, 76 Iowa, 56, 14 Am. St. Rep. 196; *Chambers v. Northwestern Mut. Life Ins. Co.*, 64 Minn. 495, 58 Am. St. Rep. 549.

START v. TUPPER.

[81 Vt. 19, 69 Atl. 151.]

BANKING—Indorsers—Check, Effect of Delaying and Presenting.—The considerations on which the holder of a check drawn without funds is permitted to excuse his neglect as against the drawer are not applicable to an indorser. (p. 1016.)

BANKING—Indorser of Check, Release of by Failure to Promptly Present for Payment.—An indorser's liability is impliedly conditioned on the prompt presentment of the check for payment, and the failure to so present releases him from liability, though presentment in due course would have been unavailing. (p. 1017.)

BANKING—Indorser of Check, What Necessary to Liability of Where There has been a Failure to Promptly Present for Payment In default of presentment and notice, an indorser of a check can be charged only by proof that he knew when he passed the check that there were or would be no funds in the bank to meet it. (p. 1017.)

Assumpsit against the indorser of a check. The defendant, having offered no evidence, moved for a verdict. The motion was overruled and he excepted. The plaintiff then moved for a verdict on the ground that the defendant had

not been damaged by the plaintiff's neglect to seasonably present the check for payment. The motion was granted and a verdict for the plaintiff directed accordingly. The defendant excepted and appealed.

Tupper & Start, for the defendant.

Lee S. Tillitson, for the plaintiff.

²⁰ MUNSON, J. On the 22d of August, 1906, the defendant, the payee of the check in suit, delivered it to the plaintiff, duly indorsed, in payment of a pre-existing indebtedness of less amount and received the difference in cash. The check was dated August 20th, and was drawn on a bank in Melrose, Massachusetts. The plaintiff held it six days before forwarding it for collection. It was presented and protested for want of funds September 4th. August 24th was the last day on which payment would have been made. The case states that the defendant is sued as indorser.

Most of the facts, including those above recited, were shown by an agreed statement. The evidence before the jury was with reference to what "the usual commercial way now in use" required of the bank through which the check was forwarded, and when the check would have been presented for payment if it had been received by the collecting bank on the 23d ²¹ of August, and been forwarded in the way required. Several exceptions were taken to the admission and rejection of testimony. The defendant rested without offering evidence and moved for a verdict, and his motion was overruled on the ground that the defendant was not damaged by the plaintiff's neglect, inasmuch as the check would not have been paid if forwarded in due course. The plaintiff then moved for a verdict, on the ground indicated, and a verdict was ordered accordingly, to which the defendant excepted.

It is not necessary to consider the exceptions relating to the evidence. The agreed statement shows a failure to forward in due course, and this is decisive of the case presented. The consideration on which the holder of a check drawn without funds is permitted to excuse his neglect as against the drawer are not applicable to an indorser. The drawer is presumed to know the insufficiency of the fund, while the indorser is entitled to rely on its sufficiency. The drawer is the one primarily liable, and prompt presentment and notice of nonpayment may enable the indorser to secure himself.

The indorser's liability is impliedly conditioned on this being done, and a failure therein will discharge him, even though presentment in due course would have been unavailing. In default of presentment and notice, an indorser can be charged only by affirmative proof that he knew when he passed the check that there were or would be no funds in the bank to meet it: Daniel on Negotiable Instruments, secs. 1587, 1596, 1646; Humphries v. Bicknell, Litt. 297; Carroll v. Sweet, 128 N. Y. 19, 27 N. E. 763, 13 L. R. A. 43. See Nash v. Harrington, 2 Aik. 9, 16 Am. Dec. 672.

Judgment reversed and cause remanded.

To Charge an Indorser of a Check it must be presented by the indorsee within a reasonable time; what is a reasonable time depends upon the facts and circumstances of each particular case: First Nat. Bank of Wymore v. Miller, 37 Neb. 500, 40 Am. St. Rep. 499. See, also, Gifford v. Hardell, 88 Wis. 538, 43 Am. St. Rep. 925; Gordon v. Levine, 197 Mass. 263, 125 Am. St. Rep. 361; First Nat. Bank of Detroit v. Currie, 147 Mich. 72, 118 Am. St. Rep. 537; Morris v. Eufaula Nat. Bank, 122 Ala. 580, 82 Am. St. Rep. 95.

The Payee of a Check is Relieved from the Necessity of Making Presentation and demand if the drawee has no deposit in the bank: Culver v. Marks, 122 Ind. 544, 17 Am. St. Rep. 377.

STATE v. SARTWELL.

[81 Vt. 22, 69 Atl. 151.]

MARRIAGE Within a Prohibited Time After Divorce, Effect of.—If the statute makes it unlawful for a party to marry within three years after the granting of a divorce, and imposes a penalty for so doing, a marriage contracted within such time is absolutely void. (p. 1018.)

Prosecution for bigamy. The information charged that in April, 1891, E. Caswell and his wife, Vina, were divorced, and on April 31, 1892, she intermarried with Albert Sartwell; that on April 5, 1898, said Albert Sartwell intermarried with the defendant, Julia Sartwell, the said Vina being still alive; and on March 30, 1907, Albert Sartwell, being still living, the defendant was joined in marriage with one Bert Blake, and thereby committed the crime of bigamy. The information was demurred to, the demurrer overruled, and the defendant excepted.

Frank E. Miles, for the respondent.

Edwin A. Cook, state's attorney, for the state.

23 WATSON, J. The sole question presented in argument is, whether the marriage of Vina Rouse to Albert Sartwell in this state within three years after Vina's former husband had been granted a divorce from her in this state was void or only voidable. It is contended that inasmuch as the statute (Vt. Stats. 2703, 2704) does not in terms declare such a marriage void, and goes no further than to make it unlawful for a libelee to marry a person other than the libelant for three years from the time the divorce is granted, unless the libelant dies, and imposing a penalty on the transgressing party, the marriage is of force till annulled or dissolved by a decree for that purpose. The same provisions of law, however, were before this court and construed in *Ovitt v. Smith*, 68 Vt. 35, 33 Atl. 769, 35 L. R. A. 223. There the petitioner sought an annulment of such a marriage. On full consideration of the question the marriage was held to be void. The same construction was in effect again declared in *State v. Shattuck*, 69 Vt. 403, 60 Am. St. Rep. 936, 38 Atl. 81, 40 L. R. A. 428, where the respondent was charged with adultery and the same question raised. But since the marriage there in question was solemnized in another state and there legal, it was not affected by the restriction. We are not disposed to depart from the construction given in these two cases.

The pro forma judgment is affirmed and cause remanded.

A Marriage Contracted after the entry of the decree nisi and before the final decree of divorce is illegal and void: Commonwealth v. Stevens, 196 Mass. 280, 124 Am. St. Rep. 555. And it has been held that under a statute prohibiting and declaring null marriages between persons who are divorced for adultery and their accomplices therein, a marriage between one who has been divorced for adultery and the accomplice therein with knowledge of the marriage is absolutely void and without civil effects: *Succession of Gabisso*, 119 La. 704, 121 Am. St. Rep. 529.

As to What Marriages are Void, see the note to *State v. Lowell*, 79 Am. St. Rep. 361; as to the effect of a void marriage, see the note to *Deeds v. Strobe*, 96 Am. St. Rep. 267; and as to presumptions in favor of the validity of marriages, see the note to *Pittinger v. Pittinger*, 89 Am. St. Rep. 198.

**McDUFFEE'S ADMINISTRATRIX v. BOSTON AND
MAINE RAILROAD.**

[81 Vt. 52, 69 Atl. 124.]

RAILROAD, What Sufficient Evidence to Show That Decedent was in the Service of and that It Operated Specified Tracks and Appliances.—Where, in an action against a designated railroad corporation, the attorneys for both parties and the witnesses at the trial speak of the railroad and the railroad company and the railroad track and water-tank and spout, this language must be understood as relating to the defendant corporation and as constituting evidence that it operated the water-spout in question, and that the person spoken of as injured by it was in the employ of the defendant. (pp. 1021, 1022.)

RAILWAY CORPORATION—Negligence in Maintaining Water-tank Where It Might Injure Employés.—If a railway corporation maintained a water-tank and spout so that the latter, when raised to its highest position, was so near the car that it would hit a man of ordinary height if he stood on the top of a car, a foot or more one side of the running-board, and a man on such top signaling a train was forced to dodge the spout to avoid being hit by it, and this dangerous structure could have been reasonably avoided, the railway company was guilty of negligence and liable for the injuries inflicted on one of its employés in the discharge of his duties, so struck and fatally injured by such spout. (p. 1022.)

RAILWAY CORPORATIONS—Evidence that a Water-tank and Spout Might have been Placed in a Position Less Dangerous to Employés, What Sufficient.—In an action to recover for injuries suffered by a brakeman by being struck by the spout of a water-tank, where there is no evidence tending to show but that such tank and spout were placed at a reasonably safe distance from the water-tank, yet if the evidence offered and received shows the construction, general surroundings and location of the spout, it becomes necessary and proper for the court to submit to the jury, for them to say from all the evidence, whether it was negligence on the part of the defendant to maintain the spout where it was at the time of the injury. (pp. 1022, 1023.)

RAILWAYS, Ordinary Risk Assumed by Employés, What is not. The risk arising from the maintaining of the spout of a water-tank in a position where it will injure an employé in the discharge of his duty is not an ordinary risk, and its employés do not assume such risk unless they know of and comprehend the danger, or, in the circumstances of the case, must be taken to have known and comprehended it. (p. 1023.)

RAILWAY CORPORATIONS—Risk, Extraordinary, When Assumed by Employés.—An extraordinary risk is assumed by an employé of a railroad corporation if it is one which he had an opportunity to ascertain, and had in fact ascertained and comprehended its dangerous character, and afterward continued in the service. (p. 1023.)

RAILROAD CORPORATIONS—Extraordinary Risk, Burden of Proving that Employé did not Know and Comprehend.—If the spout of a water-tank was maintained in such a position that it might inflict injury on a brakeman in the discharge of his duties on the top of a train of cars, and he is injured thereby, and an action is brought to recover for such injury, the burden rests upon the plaintiff to prove that such employé did not know and comprehend the danger. (p. 1023.)

RAILWAY CORPORATION—Dangerous Spout on or so Near Track, What Sufficient Evidence that Brakeman did not Know of or Comprehend Danger from.—Though the spout of a water-tank was maintained in such a position at a railroad track that it might inflict injury on a brakeman in the discharge of his duty on the top of a train, he will not be held to have known of and assumed the risk, if he had passed along this part of the road only twice before the accident, and his duties did not require him to measure or inspect the spout or ascertain its distance from the top of the car. (p. 1024.)

RAILWAYS—Contributory Negligence of Brakeman on Top of a Car, When not Inferable.—Though a brakeman on the top of a car, in the discharge of his duties, does not remain on the center or running board nor keep his eyes directed toward the front, he is not to be held guilty as a matter of law when struck by a projecting water-spout which would not have struck him had he been at the time on such board and which he might have seen had he been looking toward the front instead of toward the rear of his train. (p. 1024.)

RAILWAYS—Negligence of a Fellow-servant, When not Involved.—In an action to recover for injuries received by a brakeman through coming in contact with the spout of a water-tank while on top of a train of cars, in the discharge of his duty, the injury cannot be held to have resulted from the negligence of a fellow-servant in leaving the spout in a dangerous position, when the evidence received tends to show that the injury was due to the negligent maintenance of the tank and spout, and not in any other way. (p. 1025.)

JURY TRIAL—Directing a Verdict.—If there is evidence supporting the claim of the plaintiff, the court will not direct a verdict for the defendant. (p. 1025.)

EVIDENCE that Death Resulted from Accident and Injury, What Sufficient.—If the evidence tends to show that a brakeman was struck by a water-spout projecting above the top of a car on which he was discharging his duties, and that on the same afternoon he complained of his head aching and of feeling bad, and such complaint continued for a couple of days, though he remained in the discharge of his duties until, on the second day, he became critically ill, and in less than twelve hours died, and the medical witnesses testified that in their opinion the injury probably caused the death, is sufficient to sustain a verdict to the same effect. (p. 1026.)

PLEADING in Suit to Recover for Personal Injuries—Variance, When Immaterial.—If, in an action to recover for the death of a brakeman alleged to be due to the negligence of the defendant railway company in maintaining the spout of a water-tank, the plaintiff avers that the decedent was walking when he received his injury, and the evidence tends to show that he was signaling a train, the variance is immaterial. (p. 1026.)

RAILWAY CORPORATIONS—Duty of Employé to Discover Dangers.—An employé of a railway corporation, in the discharge of his duties, is not required to exercise diligence to discover dangers which are the result of his employer's negligence. (p. 1026.)

APPEAL AND ERROR—Immaterial Variance.—If a variance is alleged to have existed between the complaint and the evidence, and the party relying on such variance fails to show wherein it was material, the appellate court will not assume its materiality and that the trial court erred in refusing an instruction based thereon. (p. 1026.)

PRACTICE, Right to have the Plaintiff Elect upon Which Ground He will Rely.—If the plaintiff is entitled to recover upon both grounds of his complaint, it is not error to refuse to compel him to elect upon which he will rely. (p. 1027.)

JURY TRIAL—Improper Argument.—If counsel for the plaintiff, in his argument before the jury, persists in urging that a presumption should be indulged against the defendant, because it did not offer evidence on some question necessary to the establishment of the plaintiff's claim, and the burden of proof is not on the defendant, but on the plaintiff, this is prejudicial misconduct, on account of which a judgment in favor of the plaintiff may be reversed. (p. 1028.)

Action on the case brought by the surviving mother and administratrix of the estate of Homer A. McDuffee, deceased, to recover for negligence alleged to have caused the injury and death of the decedent. Verdict and judgment for the plaintiff. In the trial court many questions were presented respecting the evidence and the instructions given and refused, the general nature of which and the questions arising thereon sufficiently appear in the opinion of the court.

Young & Young, for the defendant.

Harland B. Howe, Edwin A. Cook and Herbert W. Hovey, for the plaintiff.

67 MILES, J. The defendant in its brief assigns five grounds of error, the first of which is that the court below erred in overruling its motion for a verdict. This ground is divided into several subdivisions denoted by the capital letters of the alphabet, beginning with "A" and ending with "F," inclusive. Under division "A" the question arises whether there was any evidence in the case tending to prove that the plaintiff's intestate was in the service of the defendant at the time of the accident. If there was any such evidence, it is to be found on pages 7 to 36 of the exceptions, inclusive.

From an examination of that evidence we are convinced that there was testimony that some person or corporation operated the water-tank and spout in question to supply water for engines running through Lyndonville to Newport upon a line of railroad operated by such person or corporation, which ran past a station at Newport, along the east side thereof, having tracks and a bridge known as the "Boston and Maine tracks" and the "Boston and Maine bridge"; that on the opposite side of those tracks from the station, and near to them, was the water-spout from which the plaintiff claims that the intestate received a fatal injury from which he afterward died, and that at the time of his injury he was the servant of the person operating that spout.

There was no positive testimony in the case which in terms stated that the defendant was the person or corporation operating the road or employing the intestate; but such person or

corporation is mentioned by the attorneys of both parties, as well as by their witnesses, all the way through the trial as "*the* railroad" or as "*the* railroad Co.," and not as *a* railroad or *a* railroad Co. The natural meaning of the expression used would indicate that they were referring to some railroad company then under consideration or discussion, and not generally to any ⁶⁸ railroad company. The only railroad company then under discussion was the defendant. This being so, the jury had a right to understand that when the witnesses and parties spoke of "*the* railroad company," they meant the defendant. The evidence, therefore, had a tendency to prove that the defendant operated the water-spout in question and that McDuffee was its employé.

This holding disposes of defendant's ninth, tenth and eleventh grounds stated in its motion for a verdict and its fifth, sixth, seventh and thirty-third requests to charge.

Under division "B," the question is raised whether there was any evidence of negligence on the part of the defendant. The evidence upon this point tended to show that the water-spout when raised to its highest position was so near the car that it would have hit a man of ordinary height if he stood upon the top of it, a foot or more to one side of the running or center board, and that a man on top of the car signaling a train was forced to dodge the spout in order to avoid being hit by it. If such a dangerous structure could have been reasonably avoided, it was the duty of the defendant to have done so, and to have placed this water-spout at a reasonably safe distance from the track, so as not to endanger its servants who worked on its trains: *Morrisette v. Canadian P. R.*, 74 Vt. 232, 52 Atl. 520; *Choctaw etc. R. R. v. McDade*, 191 U. S. 64, 24 Sup. Ct. Rep. 24, 48 L. ed. 96; *Union Pac. Ry. Co. v. O'Brien*, 161 U. S. 451, 16 Sup. Ct. Rep. 618, 40 L. ed. 766; *Johnson v. St. Paul M. etc. Ry. Co.*, 43 Minn. 53, 44 N. W. 884; 41 Am. & Eng. R. R. Cas. 293; *Allen v. Burlington etc. R. R. Co.*, 57 Iowa, 623, 11 N. W. 614, 5 Am. & Eng. R. R. Cas. 620; *Chicago & I. R. Co. v. Russell*, 91 Ill. 298, 33 Am. Rep. 54. The foregoing cases rest upon the well-established principle that it is the duty of the master to furnish a reasonably safe place in which the servant is to perform his duties. The defendant, however, contends that there is no evidence tending to show but that the tank and spout were placed at a reasonably safe distance from the railroad track, in that the plaintiff has failed to produce any evidence tending to show that it could have been maintained at a safer distance at that place and have been reasonably useful for the purpose for which it was con-

structed. Assuming, but not deciding, that it was necessary for the plaintiff to show that the tank and spout could have been constructed and maintained in a safer manner at that place, the fact that the case discloses evidence showing the construction, general surroundings and location of the spout made it necessary ⁶⁹ and proper for the court below to submit it to the jury, for them to say from all that evidence whether it was negligence on the part of the defendant to maintain it where and as it was at the time of the injury. That was the legitimate and proper evidence from which that fact was to be determined, and the defendant's argument upon this point is not supported by the facts.

Under this division the defendant discusses its requests, numbers 1, 2, 9, 10, 11, 12 and 13. No useful purpose can be served in disposing of these requests separately or with any great particularity. It is enough to say that we think they were complied with so far as they were justified by the evidence and required by the issues legitimately raised in the case.

Under division "C" the question is raised whether the risk was assumed by McDuffee. If it was one of the ordinary risks incident to his employment, it was assumed when he entered the service of the defendant; and if it was an extraordinary one and which he had had an opportunity to ascertain and had in fact ascertained and comprehended its dangerous character, and continued in the defendant's service after ascertaining that fact, he also assumed that risk; but we think that risk was not an ordinary one which he assumed upon entering the defendant's service. It can well be said of this danger as it was said of a similar structure, in the case of Choctaw etc. R. R. v. McDade, 191 U. S. 64, 24 Sup. Ct. Rep. 24, 48 L. ed. 96: "Its maintenance under the circumstances was negligence upon the part of the railroad company." Existing as it did through the wrong of the defendant, it was an extraordinary risk, and the intestate did not assume it unless he knew and comprehended the danger, or in the circumstances of the case will be taken to have known and comprehended it: Dunbar v. Central Vermont R. Co., 79 Vt. 474, 65 Atl. 528; Shattuck's Admr. v. Central Vermont R. Co., 79 Vt. 469, 65 Atl. 529. The burden of proving that McDuffee did not know and comprehend the danger rested upon the plaintiff, and unless there was evidence in the case tending to prove that fact, the verdict should have been directed: Dunbar v. Central Vermont R. Co., 79 Vt. 474, 65 Atl. 528.

We think there was evidence tending to prove that fact. McDuffee had never been over this road north of Lyndonville to Newport but twice before the accident, and there was no evidence in the case that he had ever before passed this tank ⁷⁰ and water-spout, which was so near that it was dangerous, and yet so far away that the danger was not obvious without measurement or careful inspection. It was in its nature a trap: *Morrisette v. Canadian P. R. Co.*, 74 Vt. 232, 52 Atl. 520. The defendant lays much stress upon the fact that the spout was open and plain to be seen for quite a long distance before reaching it; but this is not the controlling fact. While the tank and spout could be plainly seen, the danger could not, and herein lay the mischief. Its apparent safety lulled the servant into fancied security, while the danger could be discovered only too late to be avoided. McDuffee's business was such that it did not require him to measure or inspect the spout and ascertain its distance from the top of a car, and therefore the natural inference would be that he did not do so. These facts, therefore, would be evidence tending to prove that he knew nothing of its danger; and if he had gone past it on his two previous trips, having passed it safely on those trips, he had no occasion to measure or inspect it, but had the right to rely on the presumption that the defendant had performed its duty and had provided a safe place for him in which to perform his services.

Under this division the defendant's attorneys discuss the eighth request. We think that request was fully complied with so far as it stated the law upon that subject.

Under division "D" the question is raised whether McDuffee was guilty of contributory negligence.

The ground upon which the defendant claims that McDuffee was guilty of contributory negligence is, that he was not looking in the direction in which the cars were moving at the time of his injury, and because he stood at one side of the running or center board on the top of his car. There were no facts or circumstances in the case from which it could be said that, as matter of law, McDuffee was required to look in the direction in which the car was moving to discover dangers such as this was. While the evidence in the case tends to show that the running or center board is placed upon the car for the convenience of the brakeman, it does not show that it is there as a limitation of the place to which the brakeman is confined in the performance of his duties which call him to the top of the car; but, on the contrary, it tends to show that some of his duties call him outside of that limit, especially in sig-

naling trains, as appears ⁷¹ in the testimony of one witness, at least, who was forced to dodge this spout in passing it when signaling the train to avoid being struck by it. The motion for a verdict upon this ground was properly overruled.

Requests 3, 4, 14, 15, 16, 17 and 18, which were based upon the same question as that raised in division "D," were complied with by the court below as far as the facts in the case and the law warrant.

Under division "E" the defendant claims that there can be no recovery, because the accident was the result of the neglect of a fellow-servant who last used the spout. This position is not well taken, for the evidence does not support it. The plaintiff relies wholly upon the neglect of the defendant in maintaining the tank and spout as they were maintained, and her evidence tends to show that the injury was the result of their negligent maintenance and not in their use. No question of fellow-servant was raised in the case, and no error was committed by the court below in refusing to direct a verdict upon this ground.

Under division "F" the question is raised whether there was sufficient evidence to support a finding that the death of McDuffee was the result of the alleged accident. Upon this point the defendant has brought to the attention of the court a large part of the evidence given by the medical experts, and asks the court to weigh the same, and, if in their judgment it is found to be insufficient to support a finding that death resulted from the alleged injury, to direct a verdict for the defendant on that ground. The rule that if there is evidence supporting the claim of the plaintiff the court will not direct a verdict for the defendant is so firmly established in this state by repeated decisions that the citation of authorities is unnecessary. In this case there was evidence tending to prove that death resulted from the alleged injury. It shows that on the afternoon of the accident, and not long after it occurred, McDuffee complained to the plaintiff of a severe pain in his side, and said "his side felt queer, funny, funny feeling in his side." On his return trip to Lyndonville the afternoon of the accident, and not long after it, McDuffee said to a fellow-trainman that he "felt rotten." The medical witnesses, who were found by the court to be qualified as experts, testified in substance ⁷² that, in their opinion, the injury probably caused the death of McDuffee, and Dr. Allen, in answer to the hypothetical question, testified: "Assuming those facts, he received the injury when he fell upon the car." The injury referred

to in Dr. Allen's answer above was the injury which caused the death of McDuffee.

From this testimony of the experts, in connection with the evidence upon which they base their opinion, it cannot be successfully maintained that there was no evidence tending to prove that McDuffee's death resulted from the alleged injury received at the water-spout.

The charge of the court fairly complied with the defendant's requests 24, 25, 26, 27 and 28, so far as they stated the law, and no error is found upon this point.

2. The second ground of error assigned by the defendant is based upon the court's refusal to charge as requested in its thirty-four separate requests. We have already considered and disposed of all of them, except requests 30, 31 and 32, in our treatment of the defendant's first ground of error. Request 30 related to an alleged variance in counts 1, 2, 3, 4, 5, 7, 8, 9 and 10, in that in those counts it was alleged that the deceased was walking when he received the injury, while the evidence was that he was standing still when he received it. The defendant's counsel argue that the court should have charged in this respect as requested, because the variance was material; that it was material because, if McDuffee was doing nothing and was standing still, he had greater reason to be looking out for danger than he would have had if he was engaged in any duty requiring his attention to be given to other matters. A full answer to this argument is, that the evidence does not warrant the assumption that he was doing nothing but standing still, for the witness, Belle Villeneuve, testified that McDuffee was signaling the train at the time of the injury; besides, he was not required to exercise diligence to discover dangers which were the result of the defendant's negligence. The variance claimed by the defendant, at most, was only an immaterial difference and therefore not a variance; for a variance means material ⁷³ difference: *State v. Briggs*, 1 Aik. 226; *Skinner v. Grant*, 12 Vt. 456.

Requests 31 and 32 related to a variance in counts 7 and 8, and as the defendant has not pointed out in what respect such alleged variance is material, and as we are unable to discover any materiality in such alleged variance, we cannot assume that it was error for the court below to refuse to instruct the jury as requested. What the court said in *Dano v. Sessions*, 65 Vt. 79, 26 Atl. 585, may well be said here: "The exceptions must show that the particular variance relied upon was pointed out to, and passed upon by, the county court. To

the same effect is *Morey v. King*, 49 Vt. 304, and *Holdridge v. Holdridge's Estate*, 53 Vt. 546.

3. The third ground of error assigned is based upon the charge of the court, and is divided into several subdivisions denoted by the capital letters of the alphabet, beginning with "A" and ending with "I," inclusive. We deem it unnecessary to enter into a discussion of the various refinements called to our attention in these numerous exceptions to the charge of the court below, as we think the court below correctly and fully stated the law as applied to the facts of this case, and that in this respect there was no error, nor was there any error in the court's refusal to require the plaintiff to elect upon which count she would rely, for she was entitled to recover upon both: *Ranney v. St. Johnsbury etc. R. Co.*, 64 Vt. 277, 24 Atl. 1053.

4. The fourth ground of error alleged relates to the admission and exclusion of evidence. Several exceptions were taken to the admission and exclusion of evidence during the trial, but as the defendant discusses in its brief only one exception, we direct our attention only to that one. That exception related to a hypothetical question put to Dr. Allen. The exception was based upon the assumption that there was no evidence laying a foundation for such a question. In the earlier part of our opinion we have pointed out that there was such evidence ⁷⁴ showing that McDuffee did receive such injury at Newport as the question assumes, and therefore there was no error in overruling the objection and admitting the answer.

5. The fifth alleged ground of error was to the argument of counsel for the plaintiff. In opening he referred to what the defendant might and could have proved by evidence peculiarly in its possession, to which counsel for the defendant objected. The court cautioned him about the advisability of following that line of argument, and after a little discussion concerning the propriety of such an argument, he said: "If I hadn't thought it was a legitimate line of argument I wouldn't press it, but I feel strongly that it is." The court thereupon permitted him to proceed and, subject to the defendant's exception, he said: "What do you say, does any presumption arise to them in regard to that, gentlemen—that is all I want to say. Here is the defendant, here is the plaintiff—what do you say if he had been up there at a previous time by that water-spout or where he could have seen that water-spout and its dangers to a man on top of a car, doesn't it lie within their power to prove it?" The argument was clearly improper. The defendant had introduced no evidence in the case, but had rested

when the plaintiff rested, and went to the jury on the case made by the plaintiff, as it had a right to do. When it did so, no adverse presumption arose because of its omission to introduce any evidence on the trial. It is only when a party has introduced evidence upon an issue raised in the case by his own evidence that a presumption arises against him for a failure to produce evidence peculiarly within his knowledge and possession. If, then, the argument was harmful, the judgment should be reversed. The argument was, in substance, that McDuffee did not know of this danger, because he had never been past the spout in question, and as evidence of that fact was peculiarly within the knowledge and possession of the defendant, and as it had not shown the contrary, their omission to do so was evidence that the intestate had not been there, and therefore did not know that this danger existed. The burden was upon the plaintiff to show that her intestate did not know of the existence of the danger: *Dunbar v. Central Vermont R. Co.*, 79 Vt. 474, 65 Atl. 528. Counsel ⁷⁵ attempted to establish this important fact by arguing a matter not in the case, but which would strike the mind of an ordinary jury as being a strong piece of evidence tending to show that the intestate did not on any former occasion go past this spout, and so did not know of the danger. For aught we know, the jury may have found upon this argument alone that the intestate did not know of this danger. We think it was harmful, and for that reason the judgment below ought to be reversed. As this holding sends the case back for a new trial, we do not consider the other exceptions to counsel's argument, believing that what we have already said will be sufficient caution to counsel in this case to restrain them from exceeding the legitimate bounds of temperate argument in their treatment of the case at a future trial.

Judgment reversed and remanded.

On the Liability of a Railway Company for injuries to its employés by coming in contact with structures erected near the track, see McLeod v. New York etc. R. R. Co., 191 Mass. 389, 114 Am. St. Rep. 628; *Leach v. Oregon Short Line R. R. Co.*, 29 Utah, 285, 110 Am. St. Rep. 708; *Murray v. Boston etc. R. R.*, 72 N. H. 32, 101 Am. St. Rep. 660. A railway employé in charge of the tanks and pumps of the company at a station is not liable to a brakeman injured by a water-pipe placed too near passing trains, if the offending employé is merely a subordinate who has had nothing to do with constructing or placing the fixtures of the plant, and at most has merely failed to take affirmative action to remedy the dangerous condition after his attention has been directed to it: *Dudley v. Illinois Cent. Ry. Co.*, 127 Ky. 221, 128 Am. St. Rep. 335.

JENNESS v. SIMPSON.

[81 Vt. 109, 69 Atl. 646.]

PLEADING LAW of Another State, What an Insufficient Averment of.—A statement in a complaint that, at a designated time, it was the law of a specified state that a husband and wife might legally contract with each other, is a statement of a conclusion of law, and insufficient. (p. 1030.)

PLEADING.—In Pleading the Law of Another State or Foreign Country, so much of such law as is material must be set forth by the pleader that the court may judge of its effect. (p. 1030.)

APPEAL AND ERROR.—Questions not shown by the record to have been presented and passed upon in the lower court will not be considered by the appellate tribunal. (p. 1030.)

Action on the case for alienating the affections of the plaintiff's wife. There was a plea of the general issue, and there were also two special pleas in bar. A special demurrer to the first special plea was overruled, and the defendant excepted.

The special plea so demurred to alleged a written contract made in the state of South Dakota between the plaintiff and his wife, acknowledging full satisfaction "of any and all differences in law or equity existing between him" and his wife, and wherein the plaintiff agreed that "this contract is made with the express understanding that no steps shall be taken in law or equity in any form against" such wife or the defendant.

A second cause of demurrer assigned was that the language in the plea, "that it was then the law of said state that the force and effect of said contract was and is to deprive this plaintiff of all right of action against this defendant in respect to the matters and things alleged in this case," states a conclusion of law.

E. A. Cook, J. W. Redmond and W. W. Reirden, for the defendant.

Harland B. Howe and Herbert W. Hovey, for the plaintiff.

111 WATSON, J. The demurrer is special, assigning two causes: First, "that the language in said plea: 'And the defendant avers that on September 24, 1906, for a long time previous thereto, ever since and now, it was and is the law of said state of South Dakota that a husband and his wife may legally contract with each other in the manner set forth in said contract,' is a conclusion of law." The second assignment, like the first, points to the allegation of the effect of the law of that state, and is with the same degree of particularity.

It is said that since the law of another state is regarded and treated in pleading as a matter of fact to be alleged and proved

like any other fact, the conclusion of the pleader respecting it is one of fact and not "a conclusion of law," as stated in the assignments, and it being a matter of form, the demurrant should be held strictly to the objection made. But without considering whether the defect is one of form merely, we think the ¹¹² demurrant's characterization is not an erroneous one. When the law of a sister state is properly set forth in the pleading as a fact, then a question of law arises thereon as to the legal effect. Here without setting forth the law, the pleader makes an averment of his conclusion of the legal effect, which is a conclusion of law: *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132. See, also, *McLeod v. Connecticut & Pass. R. R. Co.*, 58 Vt. 727, 6 Atl. 648.

It is a rule of pleading established beyond question that so much of the law of another state, or foreign country, as is material to the case must be set forth by the party complaining or defending under it, that the court may judge of its effect. Since the second plea is not a compliance with this rule, it is insufficient: *Herring v. Selding*, 2 Aik. 12; *Peck v. Hibbard*, 26 Vt. 698, 62 Am. Dec. 605; *McLeod v. Connecticut & Pass. R. R. Co.*, 58 Vt. 727, 6 Atl. 648.

The plaintiff further contends that this plea is defective in that it professes to answer the whole declaration, whereas it does not answer the trespasses and grievances committed after the date of the alleged release. But this question does not appear of record to have been raised or passed upon below; and since this court sits only in error, the question is not here.

Judgment reversed, demurrer to the second plea sustained, the second plea adjudged insufficient, and cause remanded.

Statutes of Another State must be pleaded and proved as any other fact. The courts will not take judicial notice of them: *Schultz v. Howard*, 63 Minn. 196, 56 Am. St. Rep. 470. See, also, *Myers v. Chicago etc. Ry. Co.*, 69 Minn. 476, 65 Am. St. Rep. 579; *Murtey v. Allen*, 71 Vt. 377, 76 Am. St. Rep. 779; *Crandall v. Great Northern Ry. Co.*, 83 Minn. 190, 85 Am. St. Rep. 458.

EAGAN v. CENTRAL VERMONT RAILWAY COMPANY.

[81 Vt. 141, 69 Atl. 732.]

RAILWAYS—Waters, Damage from, When Deemed to be from an Act of God and not Recoverable for.—Damages due to an extraordinary flood, higher than had ever been known before, and in which the waters flowing through a stream were increased nearly forty-fold, must be deemed due to an act of God, and the railway corporation is not liable therefor, though it had dammed up the stream and turned it through a culvert sufficient for them in their ordinary volume and also for ordinary high water. (p. 1033.)

RAILWAYS, When not Liable for Damages Due to an Insufficient Culvert.—The fact that many years before the reconstruction of a culvert there was a flood for which the old culvert was insufficient does not necessarily make the railway company answerable for damages due to a subsequent flood, though the reconstructed culvert was of less capacity than the original, if both floods were of extraordinary character. (p. 1034.)

Action on the case for negligence. Verdict and judgment for the plaintiff; the defendant excepted.

C. S. Palmer and Plumley & Plumley, for the defendant.

Lenter & Lenter, for the plaintiff.

¹⁴² WATSON, J. The plaintiff seeks to recover damages sustained by him on the fifteenth day of June, 1902, by the alleged reason of an insufficient culvert through a high railroad fill or embankment, and over the Eagan brook, so called, in the town of Middlesex, whereby the water of the brook was obstructed and ¹⁴³ thrown back upon his land and buildings, totally destroying some and injuring other of his property.

It appears that in the construction of the roadbed of the Vermont Central Railroad (the defendant's grantors) about the year 1848, a deep fill or embankment approximately eight hundred and eighty-five feet long and from sixteen to twenty-five feet high was made across the valley through which the stream in question flows, a few rods south of where the plaintiff subsequently built his mill. The stream is about five miles long, runs southerly through a valley with precipitous banks, drains an area of about twelve square miles of hilly and mountainous country, is liable to very sudden rise of water by reason of the topography of the country which it drains, and empties into the Winooski river about one hundred and fifty rods southerly of this embankment; that when the embankment was made an under-grade pass was built near the west end for the public highway, and some distance farther east a stone culvert was made spanning the Eagan brook. The plaintiff's evidence tended to show that when made the culvert was of certain dimensions, but that in 1893 it had become so

out of repair that it was torn down and a new one built having less capacity. It further appeared that at the time in question the plaintiff was in possession of the premises where the damage occurred northerly and up the hill from the culvert under a lease for ninety-nine years, had built a saw and grist mill and other buildings thereon some thirty or forty rods from the embankment, and had a large quantity of lumber piled on the land near and alongside of the stream; that soon after the heavy rains began on the night in question the water came down the stream in such large quantities that the culvert was of insufficient capacity for it to pass through, by reason whereof the water was dammed up, and overflowed the plaintiff's lands and premises to a great depth, the pressure being so great as later to cause the embankment to give way, etc., resulting in the great damage to the plaintiff's property.

At the close of all the evidence the defendant moved that a verdict be directed in its favor, for that, among other things, the undisputed evidence showed the rainfall and the flood caused thereby in the Eagan brook at the time in question were unprecedented, and that the damages suffered by the plaintiff were the result of an act of God and not of any negligence of the defendant. ¹⁴⁴ The case will be considered on the exception to the overruling of the motion on this ground.

From the undisputed evidence it appears that in the evening of June 15th, in the territory of the watershed of the Eagan brook, the rain fell in torrents—a cloud-burst—by reason whereof the volume of water running in that stream was so increased as not only to overflow its banks, but to spread out and run in currents on and over adjoining fields and meadows, some of which were washed away, leaving a bed of gravel and boulders, and some were covered with sand, gravel and boulders washed thereon, the boulders varying in size from small ones to those three or four feet across; that the public highway running parallel with the brook was washed away in many places, some of which for many rods became and hitherto has been the principal channel of the stream. Most, if not all, of the bridges over the stream were carried away, and in some instances their abutments also. Many trees, varying in size from small to large ones, were uprooted, and large stones were moved from their beds and together carried downstream a greater or less distance. The evidence does not show the amount of water usually running in that brook, but some idea regarding it is gathered from the evidence showing that about the time of the trial in the lower court (which began April 30th and lasted nine or ten days), by measurements

made, the amount of water was found to be twenty square feet—that is, equivalent to a stream twenty feet wide and one foot deep. The uncontradicted evidence showed that by measurements made “of the opening to the high-water traces” about one hundred and eight rods, and at other places farther up the stream from the defendant’s culvert, the volume of water running at the time of the flood in question was thirty-nine and one-half times that amount. The evidence given by witnesses living in that general locality was nearly all to the same effect, that they never before saw it rain so hard, nor a flood there of such magnitude. One witness, eighty years old, who had lived in that vicinity for forty years, testified to remembering the flood in October, 1869, and that the water was then higher in Eagan brook than he ever saw it before or since. There was no evidence, however, that he saw it at the time in controversy. Another witness called by plaintiff gave evidence in effect that he had lived just easterly of where the plaintiff’s ¹⁴⁵ mill was—his land adjoined that leased by plaintiff—for forty-seven years, saw the flood of 1869, also the one of June 15, 1902; that in each instance the water from that stream spread out on his land above the railroad fill, though more on the latter occasion. But when asked which of the two floods was the larger in that vicinity, he answered, “I can’t tell—it would be hard telling, I think.” The testimony of all other witnesses giving evidence in comparison shows that on the occasion in 1902 the water was higher and the resulting damages greater than in 1869.

We think it clear that the damages suffered by the plaintiff were proximately due, directly and exclusively, to natural causes without human intervention, which could not have been prevented by any amount of foresight, pains and care reasonably to be expected; in other words, the sole proximate cause of the injury was an act of God for which the defendant is not responsible: *Forward v. Pittard*, 1 Term Rep. 27, 1 Eng. Rul. Cas. 216; *Nugent v. Smith*, 1 C. P. D. 19, 423, 1 Eng. Rul. Cas. 218; *Pittsburg, Fort Wayne & Chicago Ry. Co. v. Gilleland*, 56 Pa. 445, 94 Am. Dec. 98; *Baltimore & Ohio R. R. Co. v. Sulphur Springs Independent School District*, 96 Pa. 65, 42 Am. Rep. 529. The last two cases cited are much in point. In the former the plaintiff alleged that the former proprietors of the railroad, in order to support their roadbed over a small run near the premises of the plaintiff, constructed a culvert which was insufficient to give a free outlet to all the water of the run in time of heavy floods, of which the defendant had notice; by reason whereof in times of heavy rains and

floods the waters were stopped and backed up, to the injury of the plaintiff's premises. In reversing the judgment below for the plaintiff, the court said: "The stream, though small, must find vent, or overflow the adjacent land and undermine the railroad. Its size, the character of its channel, and the declivity of the circumjacent territory which forms the watershed, indicated the probable quantity of water to be passed through. Proper engineering skill should observe these circumstances, and supply the means of avoiding the injury which would result from locking up the natural flow, or obstructing its passage so as to cause a reflux in times of ordinary high water. Beyond this, prudent circumspection cannot be expected to look, and there is therefore no ¹⁴⁶ liability for extraordinary floods, those unexpected visitations whose comings are not foreshadowed by the usual course of nature, and must be laid to the account of Providence, whose dealings, though they may afflict, wrong no one." The doctrine there laid down was followed in the later case cited, where the action was to recover damages to a schoolhouse caused by the bursting of a culvert constructed by the railroad company, and in which it was held that a railroad company in constructing its road and works is bound to bring to their execution the engineering knowledge and skill ordinarily known and practiced in such works; but that there is no liability on the part of a railroad company for not constructing a culvert so as to pass extraordinary floods. To the same effect is *Emery v. Raleigh & Gaston R. R. Co.*, 102 N. C. 209, 11 Am. St. Rep. 727, 9 S. E. 139.

The fact that the evidence shows that in the fall of 1869 there was a storm which so raised the stream that the original culvert was insufficient for the water to pass through, and that the land in question now leased by the plaintiff was then flooded, can make no difference with the result. For the undisputed evidence shows the flood at that time to have been of the same extraordinary character; consequently the incapacity of the culvert on that occasion had no tendency to show that the culvert built in 1893 was insufficient in times of ordinary high water, and though constructed with knowledge of the extraordinary high water in 1869, nothing more was required: *Norris v. Savannah etc. Ry. Co.*, 23 Fla. 182, 11 Am. St. Rep. 355, 1 South. 475.

It follows that a verdict should have been directed for the defendant on the ground named. Our determination of this question is such as to render consideration of the other questions raised unnecessary.

Judgment reversed, and judgment for the defendant to recover its costs.

The Liability of a Railroad Company for interfering, by the construction of its roadbeds or embankments, with the flow of waters to the injury of adjoining proprietors, is discussed in the note to Mizell v. McGowan, 85 Am. St. Rep. 707. See, also, the recent case of Davenport v. Norfolk etc. R. R. Co., 148 N. C. 287, 128 Am. St. Rep. 599. The failure of a railroad company to make culverts in its embankments of sufficient capacity to permit the overflow water from an adjacent river to rise and fall with the stream is negligence, creating a liability to property owners thereby injured: Uhl v. Ohio River R. R. Co., 56 W. Va. 495, 107 Am. St. Rep. 968.

DAVIS v. DAVIS.

[81 Vt. 259, 69 Atl. 876.]

MORTGAGE of a Homestead Executed by the Husband Alone, followed by a foreclosure to which the wife was a party, does not affect the homestead interest. (pp. 1037, 1038.)

A CONVEYANCE for the Support of the Grantor amounts to a mortgage only. (p. 1038.)

HOMESTEAD, Subrogation to Claim Against.—The mere fact that money was furnished and used to satisfy a claim secured by a homestead does not entitle the party furnishing it to subrogation to such claim. (p. 1038.)

SUBROGATION.—It is Essential to the Right of Subrogation that the person making the payment be one who is under some obligation requiring it, or that he should have some interest to be affected by it. (p. 1038.)

SUBROGATION.—Payment by a stranger at the request of the debtor does not entitle the payer to subrogation, unless there was an understanding to that effect. (p. 1038.)

DECREE Taken for Want of Answer, to What must be Restricted.—Where, in a suit to foreclose a mortgage, the defendant's wife does not answer, she has the right to assume that the decree will be limited, as against her, to petitioner's rights as stated in his bill. (pp. 1038, 1039.)

HOMESTEAD RIGHTS, When not Barred by a Foreclosure.—The foreclosure of a mortgage signed by the husband alone and purporting "to bar all equity of redemption in the premises" does not affect the wife's homestead rights, though she was a party to it, because the decree of foreclosure relates only to such rights and interests as are inferior to the mortgage foreclosed, and not to such as are superior. (p. 1039.)

HOMESTEAD RIGHTS Where There are Two Mortgages, One of Which was Paramount to Them and the Other was not.—If, in a suit to establish homestead rights, it appears that the defendant holds two mortgages, one of which is paramount to the homestead interests and the other is not, the complainants cannot be granted any relief, for the reason that the mortgagee has the right to hold the whole property until his mortgage, which is paramount to the homestead rights, has been redeemed from. (p. 1039.)

A MORTGAGEE cannot be Compelled to Rely upon a Portion of the Mortgaged Property, though it is amply secured. (p. 1039.)

George L. Hunt, for the oratrices.

Herbert W. Blake, for the defendant.

262 MUNSON, J. The oratrices are the wife and minor children of the defendant George W. Davis, and the bill is brought to secure a homestead right in certain premises which Joseph French, the father of the oratrix Addie, conveyed to the defendant George in 1886, by a deed conditioned to secure the grantor's support. It is alleged and admitted that from the receipt of this conveyance until February, 1906, the property was kept by the defendant George as his homestead, and occupied as such by himself and his family, and that the oratrix Addie has ever since continued to live on the premises with her children, claiming a homestead right therein.

In December, 1890, the defendant George Davis and his wife, the oratrix Addie, executed a mortgage of the premises to one Alvin Bartlett. In 1897 W. H. Silsby, the guardian of Joseph French, being duly licensed to sell the real estate of his ward, agreed with Davis to deed him French's interest in the premises on the payment of three hundred and fifty dollars, and placed a deed thereof in the hands of Porter H. Dale, his attorney, to be delivered to Davis on the receipt of that sum. Davis failed to make the payment, and the deed remained in Dale's hands. In June, 1899, Davis gave Silsby a writing, by which he agreed to pay him three hundred and fifty dollars in settlement of French's claim, in installments of ten dollars a month. Prior to September 14, 1900, installments aggregating one hundred and twenty dollars were received by Dale and forwarded to Silsby.

Silsby afterward pressed Davis for further payments on this agreement, and Davis then arranged with Dale to pay the balance of the claim and take a mortgage to secure the sum advanced. March 25, 1901, Dale caused Silsby's deed to Davis to be recorded, paid Silsby two hundred and fifty-six dollars in settlement, and took Davis' note for that amount, and a mortgage securing the same signed by Davis alone. Dale subsequently assigned this mortgage to one Sweeney, who also became the owner of the Bartlett mortgage. In August, 1902, Sweeney brought a petition of foreclosure on both the mortgages, making the oratrix Addie a party defendant with her husband; and she appeared by solicitor, but **263** made no answer, and a decree of foreclosure covering both the mortgages

was taken against both defendants at the March term, 1903; and this became absolute April 8, 1904.

Sweeney conveyed the premises to the defendant Edward E. Davis by a deed dated April 29, 1904, in which the usual covenant of warranty was limited by adding the words "against all persons claiming by, through or under me." The defendant Edward took this deed at the request of defendant George, and the property was conveyed to George on the following day by a deed conditioned for the payment of six hundred and thirty-five dollars. The defendants claim that the homestead is properly holden for the payment of the entire sum.

The defendants argue the case as made by bill and demurrer, by bill and answer, and by bill, answer and findings; but a consideration of the case as finally presented will dispose of all the questions raised.

In *Martin v. Harrington*, 73 Vt. 193, 87 Am. St. Rep. 704, 50 Atl. 1074, after a full consideration of *Whiteman v. Field*, 53 Vt. 554, the case of *Abell v. Lothrop*, 47 Vt. 375, was declared to be undoubted law. In the case thus referred to the husband had mortgaged the premises by his sole deed to secure an indebtedness then created, and the mortgage had been foreclosed and a writ of possession taken out. The bill was brought in the names of the husband and his wife and minor children, and alleged a homestead interest in the premises, and prayed for the appointment of commissioners to set out the homestead. It was held that the title to the property remained as if no mortgage had been executed, and that the orators were entitled to relief. In *Martin v. Harrington*, 73 Vt. 193, 87 Am. St. Rep. 704, 50 Atl. 1074, the occupancy of the premises as a homestead had continued, but the wife had died leaving no children, and it was claimed that the mortgage became operative at her death, but the court held otherwise. The bill in this case alleges that the defendant George left his dwelling-house in February, 1906, and has since lived away from the premises and his family, but the defendant denies this in his answer, and alleges that he procured the property after the foreclosure to save a home for himself and his wife and children. So no question of the abandonment of the homestead or the acquirement of a new one is presented, and the case is squarely within ²⁰⁴ the facts of *Abell v. Lothrop*, 47 Vt. 375. The oratrix Addie had a good defense to the foreclosure suit as against this mortgage, unless the mortgage was sustainable on some special ground.

It is argued that the French demand was for the purchase money, and therefore superior to the homestead right, and

that Dale's payment of this demand entitled him to the benefit of French's security. It is clear that the relations of Davis and French under the conditional deed were those of mortgagor and mortgagee, and that the support secured to the grantor was the consideration for his conveyance of the title: *Abbott v. Saunders*, 80 Vt. 179, ante, p. 974, 66 Atl. 1032, 13 L. R. A., N. S., 725. But the mere fact that the money was furnished and used to satisfy a claim secured on the homestead did not entitle Dale to the benefit of that security: *Guy v. DuUprey*, 16 Cal. 195, 76 Am. Dec. 518. It is essential to a right of subrogation independent of agreement that the person making the payment be one who is under some obligation regarding it, or who has some interest to be protected by it. Payment by a stranger at the request of the debtor will not entitle the payer to subrogation unless there was an understanding to that effect: *See National Bank of Royalton v. Cushing*, 53 Vt. 321. Dale had no connection with the debt or the property, but he acted on Davis' request. It is not necessary to inquire regarding the effect of such a request as against the wife. There is no finding that there was any agreement concerning the prior security, and the facts reported indicate that there was none. It is found that Davis arranged with Dale "to pay the balance of said three hundred and fifty dollars to Silsby and take a mortgage to secure the sum so advanced," and it is to be presumed that the mortgage Dale accepted was the one for which he had arranged. The deed was drawn to be signed by Davis alone, and contains the following recitals: Being "the same premises conveyed to me the said George W. Davis by deed from Joseph French, . . . the conditions in which are discharged in a deed from W. H. Silsby guardian, . . . and the same premises occupied by me as a homestead for more than fifteen years last past." This recital, taken in connection with Dale's knowledge of the situation and his contemporaneous filing of the Silsby deed, clearly imports a reliance upon the sole conveyance of Davis.

²⁶⁵ We do not find it necessary to consider the application for a rehearing presented by the supplemental bill. The decree is erroneous on its face. It is not in accordance with the pleadings as therein stated. The petition sets up two mortgages of property described in both as the homestead, the first of which is alleged to have been signed by Davis and his wife, and the last by Davis, and contains no allegations making the last a charge upon the homestead; and the decree states that there was no answer. The defendant Addie had a right to assume that the decree would be limited, as against her, to the

petitioner's rights as stated. The allegations of the petition did not put her homestead right in issue as regards the second mortgage, and she had no defense as against the first; so she had no need to answer. The fact that she appeared affords no support to the decree. Her homestead right was paramount to her husband's mortgage, and could not be extinguished by its foreclosure. The foreclosure clause barring "all equity of redemption in the premises" relates only to such rights and interests as are inferior to the mortgage foreclosed, and not to such as are superior: *Buzzell v. Still*, 63 Vt. 490, 25 Am. St. Rep. 1777, 22 Atl. 619; *Lewis v. Smith*, 9 N. Y. 502, 61 Am. Dec. 706; *Strobe v. Downer*, 13 Wis. 10, 80 Am. Dec. 709.

The oratrices are not entitled to have the homestead set out. The Bartlett claim was secured on the entire property, and Bartlett's assignee is entitled to hold it all until redeemed. A mortgagee cannot be compelled to rely upon a portion of the mortgaged premises, even though it be ample security. To compel this would be to set up and enforce a contract not made by the parties: *Bailey v. Warner*, 28 Vt. 87.

Decree reversed and cause remanded, with mandate that the decree of foreclosure be set aside as regards the second mortgage, and that an accounting be had separating the sums due on the two mortgages, and that the decree be so altered as to permit the oratrices to redeem by paying the sum due on the first mortgage, and that in other respects the decree be affirmed; costs of the foreclosure suit and of this proceeding to be determined below.

The Doctrine of Subrogation is the subject of a note to *American Bonding Co. v. National etc. Bank*, 99 Am. St. Rep. 474.

The Effect of a Conveyance or Mortgage of a homestead by one of the spouses only is the subject of a note to *Jerde v. Furbush*, 95 Am. St. Rep. 909. The general rule is that conveyance of a homestead by the husband or wife alone is a nullity: *Silander v. Gronna*, 15 N. D. 552, 125 Am. St. Rep. 616, and cases cited in the cross reference note thereto; *Weatherington v. Smith*, 77 Neb. 363, 124 Am. St. Rep. 855.

CONVEYANCES IN CONSIDERATION OF SUPPORT OF GRAN- TOR BY GRANTEE.

I. General Statement, 1040.

II. Mortgages, Agreement to Support Construed as.

- a. Equitable Mortgages, or Liens in the Nature of Mortgages, 1041.
- b. Trust, 1043.
- c. Condition Subsequent, 1044.
- d. Covenant, 1046.

III. Breach of Agreement.

- a. What Constitutes a Breach, 1048.
- b. Waiver of Breach by Grantor, 1050.
- c. Breach Caused by Acts of Third Persons, 1051.

IV. Relief.**a. Nature and Kinds.**

1. Damages, 1051.
2. Specific Performance, 1052.
3. Rescission.

A. By Re-entry, 1053.

B. By Courts, 1053.

b. Grounds of Relief.

1. Fraud, Undue Influence and Incapacity, 1054.
2. Failure of Consideration, 1055.

V. Rights of Third Persons.

a. Creditors of Grantor, 1056.

b. Purchasers, 1056.

c. Heirs of Grantee, 1056.

I. General Statement.

Conveyances of real estate to secure the future support of the grantor are frequent causes of litigation, and there is a lack of uniformity in the construction by the courts of the terms used in conveyances of this character. When the question is raised by the grantor, because of the failure of the grantee to perform his obligations, courts of equity will always give relief in some form, and generally it matters little whether the agreement to support is in the deed or the subject of a separate instrument, since it will be enforced as a part of the instrument of conveyance; and even when the promise is a mere oral one, if it can be shown that the giving of the promise was the consideration for the grant, it is in most instances treated as a clause in the deed. The reason for this attitude of the courts is that such conveyances are made only in cases where the grantor reposed great trust and confidence in the grantee, and the relation of the parties is of such a fiduciary nature that all the incidents of the transaction require careful scrutiny, in order to protect a helpless and unsuspecting party from imposition; and since such grants are most frequently made by persons who are aged and infirm, mentally as well as physically, courts have such a protective interest in them as in cases of infants and persons who are non compos mentis.

Courts of law, also, lend their aid to correct abuses growing out of such transactions, when it is possible to do so without violating to a too great extent the well-established rules of construction and procedure, and in some jurisdictions they seem to almost rob equity of its prerogatives in the liberality of their construction of such instruments. In this note we shall not treat of the attitude of these courts in construing such agreements as conditions subsequent, but refer the reader, for a more complete discussion on that subject, to a note to *Cross v. Carson*, 44 Am. Dec. 743; and for further consideration of the subject of frauds, see the note to *McArthur v. Johnson*, 93 Am. Dec. 597. It will be seen, from the very nature of the case, that a grantee's signature is not necessary to impose upon him the obligations set forth in a deed, if he enters upon the property as owner under the instrument of conveyance, as he will be estopped from denying its cov-

enants: *Spaulding v. Hallenbeck*, 35 N. Y. 204; *Helms v. Helms*, 135 N. C. 164, 47 S. E. 415.

II. Mortgages, Agreement to Support Construed as.

a. **Equitable Mortgages, or Liens in the Nature of a Mortgage.**—Deeds of this character are sometimes treated as mortgages, or liens and charges on the premises conveyed in the nature of a mortgage, to secure the performance of the grantee's agreement to support the grantor in the manner provided by the contract. In such cases the courts take the position that such a transaction, so far as its nature and effect are concerned, is in no way different from the conveyance of an absolute title with a mortgage back to secure the payment of the purchase money. The defeasance is read into the deed, and since in the case of a conveyance with a mortgage back, the deed and mortgage must necessarily be construed together, the necessity for two separate instruments is not apparent, when one may serve the purposes of both.

In Vermont it does not matter in what form the support of the grantor is to be furnished, as a conveyance for such a purpose is always construed as a mortgage: *Austin v. Austin*, 9 Vt. 420; *Henry v. Tupper*, 29 Vt. 358; *Ottaquechee Sav. Bk. v. Holt*, 58 Vt. 166, 1 Atl. 485; *Abbott v. Saunders*, 80 Vt. 179, ante, p. 974, 66 Atl. 1032, 13 L. R. A., N. S., 725; *Davis v. Davis*, 81 Vt. 259, ante, p. 1035, 69 Atl. 876.

In a Minnesota case the grantor and his wife conveyed property to a son in law by a warranty deed containing the following agreements: "That said party of the first part, for and in consideration of the sum of one dollar, and other good and valuable considerations to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, . . . for himself, his heirs and assigns, hereby agrees, in consideration of this conveyance to him, to board the grantors, and both of them, during their lives, and to clothe them as well as they have been accustomed to be clothed, and to give them such care and attendance as their welfare, care and comfort may require during life, and provide and pay such medical attendance for them during life as may be necessary, and to take care of them and provide for them in all respects as a son should of a father, having respect to their condition and previous mode of life, and also to pay such first parties, and the survivor of them, during life, the sum of seventy (70) dollars annually on the first day of November of each year." In construing this agreement the court said: "Here the party agreed, in consideration of the conveyance, to perform certain things. From this document it appears that it was the intention of the parties to make the transfer of the premises to the grantee absolute only when the conditions contained therein should be performed, and that there should be reserved to the grantors a lien or charge upon the land for the purpose of securing the performance of these conditions. As held in *Doescher v. Spratt*, 61 Minn. 326, 63 N. W. 736, it was

not necessary that an independent instrument be executed in the form of a mortgage. The transfer of the property and the defeasance could be embodied in one instrument, and, such being the case, the instrument recorded carried notice of its contents to all subsequent purchasers": *Childs v. Rue*, 84 Minn. 323, 87 N. W. 918.

Even when it is not so expressed in the deed, if the real consideration for a conveyance is an agreement by the grantee to support the grantor, the agreement will operate to create a lien upon the premises conveyed: *Hiatt v. Parker*, 29 Kan. 765; *Chase v. Peck*, 2 N. Y. 581; *Watson v. Smith*, 7 Or. 448; *Hilgar v. Miller*, 42 Or. 552, 72 Pac. 319; *Ames v. Moore (Or.)*, 101 Pac. 769; and a mere oral promise is sufficient to create a lien: *Scott's Heirs v. Scott*, 3 B. Mon. 2; *Patton v. Nixon*, 33 Or. 159, 52 Pac. 1048. The court, in the last case cited, gave, as the reason for its decision, that "to reach a different conclusion would be equivalent to holding that a confiding mother, very aged and quite feeble, unaccustomed to the methods of transacting business, might deprive herself of every particle of her property by conveying it to her daughter in consideration of the latter's previous promise to furnish her a home, and support her in her declining days, and that thereupon the grantee may deny that any agreement was entered into as a result of such promise, and turn the plaintiff out upon the charity of the public, a result which would clearly be a denial of justice, and must necessarily shock the conscience of those who believe that right should prevail."

Kentucky courts take the same position as those of Vermont, in construing such agreements as liens on the premises conveyed. In that state a grantor has a statutory lien to secure the payment of the purchase money, and the grantee's agreement to support the grantor is looked upon as a part of the consideration for the grant. In a recent case—*Webster v. Cadwallader (Ky.)*, 118 S. W. 327—the court, in deciding that an equitable mortgage was created by such an agreement, said: "The deed represented a deferred payment for the purchase of the land. . . . When the consideration is shown in the conveyance not to have been paid, a lien exists for its payment." To the same effect, *Gallion's Admr. v. Moberly*, 9 Ky. Law Rep. 149.

In *Price v. Hobbs*, 47 Md. 359, the court said of the lien so created: "Such lien or charge was in the nature of an equitable mortgage; but the contract did not, like a legal mortgage, divest the legal title and seisin under the deed. . . . That this contract constituted a lien or charge upon the land has been expressly adjudicated, as appears from the case of *Ringgold v. Bryan*, 3 Md. Ch. 488."

A deed in which there appeared the expression, "and for the further consideration of the support during the natural life of the party of the first part by the party of the second part," where it was expressly stipulated that the land conveyed should "stand good for the support of" the grantor, was construed as a charge or lien: *Helms v. Helms*, 135 N. C. 164, 47 S. E. 415, affirmed in 137 N. C. 206, 49 S. E. 110; *Laxton v. Tilley*, 66 N. C. 327; but the same court ruled, in a case where the grantor was to "have support out of the land," that these

words created a charge upon the rents and profits: *Gray v. West*, 93 N. C. 442, 53 Am. Rep. 462; and the same construction was placed upon the words, "provided he maintain his mother during life comfortably": *Misenheimer v. Sifford*, 94 N. C. 592.

Such an agreement is an "obligation in the nature of a mortgage, . . . a lien upon the premises": *Hurley v. McCallister*, 19 S. D. 381, 103 N. W. 644; *Van Horn v. Mercer*, 29 Ind. App. 277, 64 N. E. 531; *Copeland v. Copeland*, 89 Ind. 29; *Lewis v. Wilcox*, 131 Iowa, 268, 108 N. W. 536; *Webster v. Cadwallader* (Ky.), 118 Ill. 329; *Wilder v. Whrttemore*, 15 Mass. 262; *Stehle v. Stehle*, 39 App. Div. 440, 57 N. Y. Supp. 201; *McNeely v. McNeely*, 82 N. C. 183; *Outland v. Outland*, 119 N. C. 138, 23 S. E. 972; *Allen v. Allen*, 121 N. C. 328, 28 S. E. 513; *Pownal v. Taylor*, 10 Leigh (Va.), 172, 34 Am. Dec. 725; *Watkins v. Williams*, 123 N. C. 170, 31 S. E. 388; *Chase v. Peck*, 21 N. Y. 581; *Mayer v. Swift*, 73 Tex. 367, 11 S. W. 378.

In *Copeland v. Copeland*, 89 Ind. 29, the wife had joined in a conveyance of property by her husband, the consideration for the grant being the promise of the grantee to support the grantors. Some time later the grantors were divorced and the grantee refused to perform the covenants of the conveyance. The relinquishment of her inchoate right of dower was sufficient consideration for grantee's promises, and her interest thereby became a vested one. There was no personal liability, but her support was a lien or charge upon the land in the nature of a mortgage.

b. Trust.—To constitute a trust, there must be legal title in the trustee and a sufficient equitable title in some other person, known as the beneficiary or *cestui que trust*, to vest in the latter the right to enforce the execution of the trust. In *Pownal v. Taylor*, 10 Leigh (Va.), 172, 34 Am. Dec. 725, there was a provision in a deed that in consideration of the conveyance, the grantee would support the grantor, and that the property should be bound therefor, "into whosoever hands" it might come. The court decided that this provision merely meant that the property should be and remain charged with the support of the grantor, as a security for the performance of the covenant. "It was a charge, not a condition. It was a declaration of a beneficial interest or a trust, which might be enforced in equity, but which was perfectly consistent with the existence of the fee in the grantee. The distinction is well understood between a declaration of use and a condition. A feoffment, *ea intentione*, does not make a condition, unless an express re-entry be limited. It creates a trust or confidence." In this case no other construction was possible, since there was also a provision for the support of a third person, and the beneficial interest of such third person would have been defeated by the grantor's subsequent re-entry.

In a Rhode Island case, which cites and follows the rule laid down in the Virginia decisions, the court said: "Conveyances of this kind create a continuing obligation on the part of the grantee, in the nature of a trust, for which a remedy at law on the contract is neither adequate nor reasonable. This is clearly stated in *Wampler v. Wamp-*

ler, 30 Gratt. 454, quoted in *Lowman v. Crawford*, 99 Va. 688, 40 S. E. 17, as follows: 'Must the grantors bring their suit every six months or twelve months for a failure upon the part of the grantee to supply them with food and clothing? And in the meantime, having conveyed their all to the grantee, having deprived themselves of the means of support, must they suffer and starve until by suits at law and executions they could compel the grantee to supply them with the means of support?' While such contracts are not often in form a trust, they are usually in fact a trust. One under the stress of infirmity or age surrenders his property to another, for relief from care and anxiety, and receives in return an assurance of support. The result, so far as the donor is concerned, would be no different if he had made an express deed of trust. The parties do not contemplate a mere contract, but an obligation binding in conscience as well as in law. The arrangement rests in confidence on the part of the grantor. It would, indeed, be a hard rule, when the feeble party has fully performed his part of the contract in the hope of security and quiet, to require him to spend the remainder of his life in lawsuits to compel performance by the other party. Even the remedy in equity by a decree for specific performance might require repeated applications to the court. We think it is much more consonant with the principles of equity to treat this as an implied trust, renounced by the donee, than to treat it as a mere contract": *Grant v. Bell*, 26 R. I. 288, 58 Atl. 951; *Penfield v. Penfield*, 41 Conn. 474; *Cooper v. Gum*, 152 Ill. 471, 39 N. E. 267; *McClelland v. McClelland*, 176 Ill. 83, 51 N. E. 559; *Lane v. Lane*, 106 Ky. 530, 50 S. W. 857; *Reid v. Burns*, 13 Ohio St. 49; *Pownal v. Taylor*, 10 Leigh (Va.), 172, 34 Am. Dec. 725.

Several Michigan decisions favor this construction. In *Woolcott v. Woolcott*, 133 Mich. 643, 95 N. W. 740, it was said: "The conveyance in question should be declared a trust to secure the performance of these obligations, and, in case of their nonperformance, this trust should end": *Chadwick v. Chadwick*, 59 Mich. 87, 26 N. W. 283; *Cornell v. Whitney*, 132 Mich. 300, 93 N. W. 614.

c. Condition Subsequent.—Though courts generally do not favor conditions subsequent in deeds of conveyance, yet this particular class of cases, involving an agreement by grantee to support grantor, is, in many jurisdictions, made an exception to the general rule, and although the obligations in form rest in covenant, they are construed to rest in condition; or, in other words, the conveyance made under such circumstances is not absolute, and the title to the property conveyed may be divested from the grantee and revested in the grantor, upon breach of the condition subsequent. The reasons for this exception are, "to protect the weak, to prevent the realization of contemplated frauds, of unconscionable bargains, and, generally, of administering justice between man and man": *Glocke v. Glocke*, 113 Wis. 303, 89 N. W. 118, 57 L. R. A. 458; *Knutson v. Bostrak*, 99 Wis. 469, 75 N. W. 156. In the case cited the court said: "Equity deals

with the situation the same as with any other where a reversion of title has taken place by re-entry, or its equivalent, for condition broken. It establishes the title to the property in accordance with the facts, and clears away all apparently interfering writings and records, giving such other relief as may be necessary to fully accomplish that end. . . . True, neither the deed nor the mortgage states in express terms that the estate is granted, upon condition, but the word 'condition' is not necessary for the creation of an estate upon condition, if it plainly appears from the words used that the intent of the parties was to create an estate of that description": *Richter v. Richter*, 111 Ind. 456, 12 N. E. 698; *Gilchrist v. Foxen*, 95 Wis. 428, 70 N. W. 585; *Stilwell v. Knapper*, 69 Ind. 558, 35 Am. Rep. 240; *Watters v. Bredin*, 70 Pa. 235; *Knutson v. Bostrak*, 99 Wis. 469, 75 N. W. 156.

Although the grantee gives, in consideration for the deed, a bond obligating him to support the grantor, and secures the bond by a mortgage on the premises, the grantor is not compelled to rely upon the latter security. Since all the instruments are construed together (*Uecker v. Zuercher* (Tex. Civ. App.), 118 S. W. 149), and if the agreement to support is the consideration for the conveyance, the transfer will be considered as a conveyance upon condition subsequent, and the grantor, upon breach thereof, is revested with title by re-entry, or its equivalent: *Sewall v. Henry*, 9 Ala. 24; *Fellows v. Kress*, 5 Blackf. (Ind.) 536; *Watkins v. Gregory*, 6 Blackf. 113; *Hefner v. Yount*, 8 Blackf. 455; *Leach v. Leach*, 4 Ind. 628, 58 Am. Dec. 642; *Wanner v. Wanner*, 115 Wis. 196, 91 N. W. 671. "The very fact that the grantor has reserved no other effectual remedy for a breach of the terms upon which the conveyance was made persuades us to the conclusion that the agreements written in the mortgage must be construed as though they were incorporated in the deed as expressive of the conditions upon which it was made. Regarding the stipulations in the mortgage as the terms upon which the conveyance was made, the deed becomes a grant, reserving to the grantor the support and maintenance specified, or, in default of the grantee, it authorizes the grantor to re-enter for condition broken": *Richter v. Richter*, 111 Ind. 456, 12 N. E. 698.

In *Ebert v. Gildemeister*, 106 Minn. 83, 118 N. W. 155, there was nothing in the case to show that the deed contained a re-entry clause, yet the court set aside the deed and contract for the failure of the grantee to furnish support to the grantor; and in a New York case where the grantor had, by a quitclaim deed, conveyed lands to the grantee, "his heirs and assigns forever, to have and to hold . . . in trust" to secure the grantor's support, the court declared that the property was conveyed in fee simple upon condition, and the grantee, having complied with the terms of the agreement, was entitled to the land, upon the grantor's death, freed from any charge: *Mott v. Richtmeyr*, 57 N. Y. 49.

When a deed and contract are made the subject matter of separate instruments, and it appears that they are parts of a single transac-

tion, a stipulation for avoidance in the contract has the same effect as though it appeared in the deed, but it is styled a defeasance and not a condition subsequent: *Epperson v. Epperson*, 108 Va. 471, 62 S. E. 341; *Strothers v. Woodeox* (Iowa), 121 N. W. 51.

In the cases below, the agreement is treated as a condition subsequent, either expressed or implied: *Lewis v. Lewis*, 74 Conn. 630, 92 Am. St. Rep. 240, 51 Atl. 854; *Jones v. Williams*, 132 Ga. 782, 64 S. E. 1081; *Frazier v. Miller*, 16 Ill. 48; *Oard v. Oard*, 59 Ill. 46; *Jones v. Neely*, 72 Ill. 449; *Gallaher v. Herbert*, 117 Ill. 160, 7 N. E. 511; *Van Horn v. Mercer*, 29 Ind. App. 277, 64 N. E. 531; *Risley v. McNiece*, 71 Ind. 434; *Copeland v. Copeland*, 89 Ind. 29; *Cree v. Sherfy*, 138 Ind. 354, 37 N. E. 787; *Caudill v. Lemaster*, 26 Ky. Law. Rep. 1010, 82 S. W. 1009; *Osgood v. Abbott*, 58 Me. 73; *Jenks v. Walton*, 64 Me. 97; *Rowell v. Jewett*, 69 Me. 293; *Hubbard v. Hubbard*, 97 Mass. 188, 93 Am. Dec. 75; *Dana v. Dana*, 185 Mass. 156, 70 N. E. 49; *Woolcott v. Woolcott*, 133 Mich. 643, 95 N. W. 740; *Minneapolis Thresh. Mach. Co. v. Hanson*, 101 Minn. 260, 48 Am. St. Rep. 623, 112 N. W. 217; *Messersmith v. Messersmith*, 22 Mo. 369; *Studdard v. Wells*, 120 Mo. 25, 25 S. W. 201; *Anderson v. Gaines*, 156 Mo. 664, 57 S. W. 726; *Whitton v. Whitton*, 38 N. H. 127, 75 Am. Dec. 163; *Bethlehem v. Annis*, 40 N. H. 34, 77 Am. Dec. 700; *Spaulding v. Hallenbeck* (N. Y.), 39 Barb. 79; *Allen v. Allen*, 121 N. C. 328, 28 S. E. 513; *Helms v. Helms*, 135 N. C. 164, 47 S. E. 415; *Harwood v. Shoe*, 141 N. C. 161, 53 S. E. 616; *Hurley v. McCallister*, 19 S. D. 381, 103 N. W. 644; *Elliott v. Elliott* (Tex. Civ. App.), 109 S. W. 215; affirmed in 109 S. W. 1142; *White v. Bailey*, 65 W. Va. 573, 64 S. E. 1019; *Mash v. Bloom*, 133 Wis. 646, 114 N. W. 457, 14 L. R. A., N. S., 1187.

d. Covenant.—Although the general and well-established rule that courts do not favor conditions is not always strictly followed in construing conveyances of the character under discussion, some jurisdictions make no exception of such cases, and even though a forfeiture be provided for, if it is possible for the condition to be performed, these courts will so order; or, in the event the grantee has put it beyond his power to fulfill the condition, compensation in damages will be decreed. But, as has been said, “forfeitures have always been odious in the law, and courts of law, circumscribed as their jurisdiction is, struggle against them”: *Stehle v. Stehle*, 39 App. Div. 440, 57 N. Y. Supp. 201. In the case cited, the agreement for support was treated as a covenant, and the amount assessed by the court as sufficient to fulfill its purpose was declared a lien upon the property conveyed.

In Missouri, the question whether such terms should be construed as creating a covenant or condition was raised in the case of a deed containing agreements that the grantees should pay the taxes on the land and support the grantors “during their natural lifetime, and at their death” such grantee “shall have possession.” The court said: “It took effect as a conveyance upon its delivery, for there is nothing in it in the nature of a condition precedent. This is clear. The question then arises whether the deed conveyed the land upon a condition subsequent. . . . It is a familiar rule, often asserted in the

books, that conditions subsequent are not favored in the law, because they have the effect, in case of breach, to defeat vested estates; and, when relied to work a forfeiture, they must be created by express terms, or by clear implication. . . . It is also true that the question whether a clause in a deed is a condition or a covenant is one of intent, to be gathered from the whole instrument by following out the object and spirit of the deed or contract. . . . No apt or appropriate words to create a condition are used; nor is there any clause of forfeiture or of re-entry or of reverter. We are unable to find anything in this deed, whether we treat it as a gift or as made for a money consideration, which will justify us in saying it is a deed upon condition subsequent." The court decided that the terms in question created a covenant only, and that there was a life estate reserved to the grantors: *Studdard v. Wells*, 120 Mo. 25, 25 S. W. 201. The same rule of construction was followed in *Spaulding v. Hallenbeck*, 39 Barb. (N. Y.) 79.

In reviewing a decree by which a deed was annulled, the Missouri supreme court said in a later case: "The promise of even an insolvent man to render a valuable service is a sufficient consideration to support a deed, and, if the deed is given in consideration of the promise, the estate conveyed vests in the grantee. The title is not held in abeyance until the performance of the promise, nor divested for a nonperformance. . . . When they choose to make the performance of the promise itself the consideration, the grantor's only remedy is a suit for the breach of the covenant. The learned chancellor who tried this case had the parties before him, heard the evidence, and doubtless knew a great deal more about it than we do, and we have no doubt but that, freed from the technical restraints of the law, as a matter of somewhat untrammelled arbitration, the decree as rendered is the wisest and most just disposition that could be made of the controversy, preventing further strife and trouble, and saving both parties from the evil consequences of an improvident contract. Still we cannot approve of it without violating those rules of equity jurisprudence which, though technical, are found by long experience to accomplish the greatest justice in their general application to the affairs of mankind": *Anderson v. Gaines*, 156 Mo. 664, 57 S. W. 726.

Courts of law cannot vary the rules of construction to meet cases of hardship and injustice, however remediless they may be: *Ayer v. Emery*, 14 Allen, 67; *Robinson v. Robinson*, 9 Gray (Mass.), 447, 69 Am. Dec. 301. *Keltner v. Keltner*, 6 B. Mon. (Ky.) 40, where the agreement to support was only a part of the consideration, follows the same rule, as do also *Elliott v. Elliott* (Tex. Civ. App.), 109 S. W. 215, affirmed 109 S. W. 1142; *Crim v. Holsberry*, 42 W. Va. 667, 26 S. E. 314. But where the grantee, in addition to supporting the grantor, was to pay the latter's debts out of two thousand five hundred dollars, which was stated in the deed to be a part of the consideration, and to pay him any part of the sum left over, the court treated this covenant as a charge or lien in the nature

of a mortgage: *Campau v. Chene*, 1 Mich. 400; *Ayer v. Emery*, 14 Allen, 67; *Buffalow v. Buffalow*, 22 N. C. 241; *Laxton v. Tilley*, 66 N. C. 327; *McNeely v. McNeely*, 82 N. C. 183; *Gray v. West*, 93 N. C. 442, 53 Am. Rep. 462; *Outland v. Outland*, 118 N. C. 138, 23 S. E. 972; *Allen v. Allen*, 121 N. C. 328, 28 S. E. 513; *Helms v. Helms*, 135 N. C. 164, 47 S. E. 415; *Pownal v. Taylor*, 10 Leigh (Va.), 172, 34 Am. Dec. 725.

The following cases support the principle of construing such provisions as covenants, rather than conditions: *Lindsay v. Lindsay*, 62 Ga. 546; *McCardle v. Kennedy*, 92 Ga. 198, 44 Am. St. Rep. 85, 17 S. E. 1001; *Jones v. Williams*, 132 Ga. 782, 64 S. E. 1081; *McWhorter v. Heltzell*, 124 Ind. 129, 24 N. E. 743.

III. Breach of Agreement.

a. **What Constitutes a Breach.**—A grantor is entitled to the full measure of the support provided for in the deed; anything less is technically a breach, although it will not be so construed by the courts, unless the nonperformance of the terms of the agreement are of such a serious nature as to render the thing received substantially different from that which is called for in the deed: *Selby v. Hutchinson*, 9 Ill. 319; *Weintz v. Hofner*, 78 Ill. 27; *Pittinger v. Pittinger*, 208 Ill. 582, 70 N. E. 699; *Lewis v. Wilcox*, 131 Iowa, 268, 108 N. W. 536; *Keister v. Cubine*, 101 Va. 768, 45 S. E. 285.

Unless provided for in the deed, forcing the grantors to take their meals at the same table with grantee's family and allowing them no privacy in their home life is a breach; for not to consider such treatment as a breach would make it possible for the grantors to be brought in contact with a stranger holding under the grantee, and no matter how disagreeable his character, habits or manner might be, they could not complain of failing to get what they intended to secure to themselves by their contract: *Hubbard v. Hubbard*, 12 Allen, 586. Cruel and inhuman treatment of such a nature as to prevent the grantors from living in the house conveyed, as was intended, is a breach, notwithstanding the fact that food and clothing in sufficient quantities were furnished: *Dodge v. Dodge*, 92 Mich. 109, 52 N. W. 296.

Refusal to furnish the maintenance and support, except at a certain place, when nothing was said in the instrument of conveyance as to where it should be furnished, was construed as a failure to perform; but in requiring the grantee to support the grantors at a different place, the court would not suffer them to put the grantee to a needless expense: *Rowell v. Jewett*, 69 Me. 293; *Pettee v. Case*, 2 Allen, 546; *Wilder v. Whittemore*, 15 Mass. 262. In *Holt v. Holt*, 32 Ky. Law Rep. 544, 106 S. W. 811, the court said: "The terms of the deed did not require that the vendor should be supported and maintained at a particular place or in any particular house. It was the duty of the vendees to support and maintain him wherever he chose to reside within the bounds of reason. . . . The vendees obligated themselves 'to see after and take care of' and to furnish their parent all that he needed as long as he lived; and this consideration

could not be fulfilled in the spirit of throwing a bone to a dog. . . . The aged father was not required to stay with his sons if they made it unpleasant for him so to do. He had the right to reside where he could be welcome and made comfortable."

In a Michigan case "it was urged that the father, mother and daughter could not get along with complainants [grantors], because of their idiosyncrasies; but these were well known, and children who contract for the care, ease, comfort and convenience of aged parents, with the full knowledge of their infirmities, cannot be heard to plead these infirmities as an excuse for a failure to carry out the contract, especially upon a record which so abounds with evidences of bad faith and overreaching as does this record": *Rexford v. Schofield*, 101 Mich. 480, 59 N. W. 837.

An Iowa court construed such a contract to bind the grantee to give the grantor such care and attention as her age and infirmities demand for her comfort. "She was advanced in age and in ill-health. She required, not only physical comforts, but gentleness, indulgence, and friendly words of encouragement, which not only filial duties demand that a son should bestow upon a mother, but common humanity demands one human being shall extend to another afflicted as plaintiff was. Defendant, in failing to care for his mother in accord with this requirement of filial duty and of humanity, violated the contract, through failing to render the very consideration of the deed": *Patterson v. Patterson*, 81 Iowa, 626, 47 N. W. 768.

When the grantee leaves the premises soon after entering into the agreement, even though he be so ordered by the grantor, an old and childish person, his failure to comply with the terms of his contract is a breach: *Richter v. Richter*, 111 Ind. 456, 12 N. E. 698; or if he dies and his widow and heirs fail to make provision for the grantor, it is a breach: *Cree v. Sherfy*, 138 Ind. 354, 37 N. E. 787.

Although harsh words and abusive conduct are generally looked upon as violations of the terms of the contract, especially in cases where the grantee forces the grantor to leave the premises, upon and out of which the support should come, the act of forcibly pushing one of the grantors from the house, when unaccompanied by any controversy as to the right to possession, was not construed by the court as a breach in *Dearborn v. Dearborn*, 9 N. H. 117; and when the contract explicitly provided for special accommodations in the house conveyed, the removal of a surviving grantor was justification for the grantee's refusal to furnish the support elsewhere: *Dwellely v. Dwellely*, 143 Mass. 509, 10 N. E. 468.

It will be seen from the foregoing references that the question as to what constitutes a breach depends upon the attitude of the particular court, some being very liberal in their efforts to protect the helpless grantor from the consequences of his misplaced confidence, while others follow strictly the established rules of construction, even though by so doing hardships are entailed in this class of cases. Since the helpless and unfortunate are generally supposed to receive a greater meed of sympathy and protection from courts, the more

liberal construction of such contracts as conditions, mortgages and trusts, would seem to be justified by the general theory as to the province of courts in general, and such an attitude meets with the approval of conscience and good sense.

b. Waiver of Breach by Grantor.—Ordinarily, the grantor's continuing to receive benefits under the contract, after knowledge of a breach, waives it: *Chalker v. Chalker*, 1 Conn. 79, 6 Am. Dec. 206; *Hubbard v. Hubbard*, 97 Mass. 188, 93 Am. Dec. 75; *Hurley v. McCallister*, 19 S. D. 381, 103 N. W. 644. In the Massachusetts case cited, the wife's rights were waived by the acts of her husband, although she did not consent thereto. Her signing the deed was looked upon as a mere relinquishment of her dower interest, and not as the act of a grantor: *Hubbard v. Hubbard*, 97 Mass. 188, 93 Am. Dec. 75; *Copeland v. Copeland*, 89 Ind. 29.

Failure of grantor to demand the performance of the contract was construed as a waiver in *Risley v. McNiece*, 71 Ind. 434; *Webster v. Cadwallader* (Ky.), 118 S. W. 327; *Pettee v. Case*, 2 Allen, 546; *Rowell v. Jewett*, 69 Me. 293; *Whitton v. Whitton*, 38 N. H. 127, 75 Am. Dec. 163; but in *Cree v. Sherfy*, 138 Ind. 354, 37 N. E. 787, demand was considered unnecessary: *Tuttle v. Burgett's Admr.*, 53 Ohio St. 498, 53 Am. St. Rep. 649, 42 N. E. 427, 30 L. R. A. 214.

Where the breach is the grantor's fault, he waives his rights by reason thereof: *Jones v. Williams*, 132 Ga. 782, 64 S. E. 1081; *Keltner v. Keltner*, 6 B. Mon. (Ky.) 40; *Woolcott v. Woolcott*, 133 Mich. 643, 95 N. W. 740; as when he left the place where the support was to have been furnished: *Lewis v. Lewis*, 74 Conn. 630, 92 Am. St. Rep. 240, 51 Atl. 854; *Dwelley v. Dwelley*, 143 Mass. 509, 10 N. E. 468; *Scott v. Scott*, 89 Wis. 93, 61 N. W. 286.

Suit for damages for a breach is also a waiver: *McWhorter v. Heltzell*, 124 Ind. 129, 24 N. E. 743; but subsequent breaches are not affected by his election to sue for damages for former failure to perform: *Mash v. Bloom*, 136 Wis. 646, 114 N. W. 457, 14 L. R. A., N. S., 1187.

Not every case of reception of portions of what is due, such as food, clothing, shelter, etc., will amount to a waiver. In *Rowell v. Jewett*, 69 Me. 293, the grantor had, through her love for a son, put up with much abuse and accepted without complaint some small supplies, in the hope of better treatment. The court said: "We do not think that a course of neglect and unkindness, persisted in until the heart of a mother is alienated from her son to the point of leaving him and taking refuge elsewhere, should be regarded as in any part condoned by the fact that, while the process of alienation was going on, the mother received some of the supplies which it was the duty of the son not merely to furnish, but to accompany with the kindness which civilization is apt to teach even coarse and brutal men to manifest to their parents. The testimony of Lowell Wheeler and others indicates a course of vulgar and profane abuse, of such a description that it is no wonder the mother should declare that she had rather call upon the town than on such a son to supply her

wants." The unfortunate parent's silence, under such circumstances, cannot be used against her without violating every sense of decency and fairness: *Frost v. Butler*, 7 Me. 225, 22 Am. Dec. 199. It is seldom that parents will give up their struggle to retain a child's affections without the most extreme efforts, and it is unconscionable that these efforts should be used against them to the extent that they may be forced to become public charges. This sort of contract is one into which they enter with their eyes blinded by love and their faculties dulled by age, and for these reasons they should not be looked upon as having dealt at arm's-length with the grantee. They are not on their guard when entering into such agreements, and should not be so considered.

c. **Breach Caused by the Acts of Third Persons.**—"It is a general rule of law that if a party by his contract charge himself with an obligation possible to be performed, he must make it good unless its performance is rendered impossible by the act of God, the law, or the other party." An exception to this rule exists in cases where the grantee, under contract to provide for the grantor, is prevented from doing so by a third person who happens to be an heir of the grantor. The reason for the exception is, that a person will not be permitted to profit by the nonperformance of a thing which he, by his own act, rendered impossible of performance: *Harwood v. Shoe*, 141 N. C. 151, 53 S. E. 616.

IV. Relief.

a. Nature and Kinds.

1. **Damages.**—In most cases where the question of damages has been raised in actions for breach of contract for support of the grantor by the grantee, the courts have not favored that form of relief. As was said in one case: Damages for the failure to keep such an agreement are "always speculative and conjectural. Life may be shorter or longer than anticipated. The party's physical health may become more feeble or more robust than anticipated, or his mind may become impaired, etc. These changes of conditions may render the damages asserted very excessive, or grossly inadequate. For these reasons, the party aggrieved should be forced to resort to such measure of compensation only in the absence of a more certain measure. If a more certain measure is at hand, the party aggrieved should, at his election, be permitted to resort to it": *Reeder v. Reeder*, 89 Ky. 529, 12 S. W. 1063.

In *Anderson v. Gaines*, 156 Mo. 664, 57 S. W. 726, although the court took the position that damages afforded the only relief under the appeal as presented to it, the suggestion was offered that the grantors' plea would meet with better results if they would base their claim for relief upon some other theory.

As may be seen in reading the subdivision "Grounds of Relief," fraud, undue influence, and failure of consideration are some of the theories adopted by courts to avoid being limited to the giving of mere damages for breaches of such contracts. In Georgia, however,

an action for damages seems to be the only way to get relief, unless the evidence to sustain some one of the grounds mentioned is very strong, or there is proof of the insolvency of the grantee: *Lindsay v. Lindsay*, 62 Ga. 546; *McCardle v. Kennedy*, 92 Ga. 198, 44 Am. St. Rep. 85, 17 S. E. 1001.

If the aggrieved party so desires, he may rely upon a claim for damages in any jurisdiction: *Hemstreet v. Wheeler*, 100 Iowa, 282, 69 N. W. 518; *Claffin v. Claffin*, 102 Iowa, 744, 71 N. W. 210; *Allen v. Allen*, 121 N. C. 328, 28 S. E. 513; *Helms v. Helms*, 135 N. C. 164, 47 S. E. 415; *Stehle v. Stehle*, 49 App. Div. 440, 57 N. Y. Supp. 201; *Elliott v. Elliott* (Tex. Civ. App.), 109 S. W. 215, affirmed in 109 S. W. 1142.

When nothing but the payment of money is contracted for, the remedy in damages is adequate: *Gallaher v. Herbert*, 117 Ill. 160, 7 N. E. 511. And when the grantee has been prevented, by his death, from carrying out his agreement, if he complied with its terms during his life, an action for damages is the proper relief: *Seymour v. Belding*, 83 Ill. 222; *Campbell v. Potter*, 147 Ill. 576, 35 N. E. 364; *Stebbins v. Petty*, 209 Ill. 291, 101 Am. St. Rep. 243, 70 N. E. 673; *Crim v. Holsberry*, 42 W. Va. 667, 26 S. E. 314.

2. Specific Performance.

In some instances courts decree that the contract shall be enforced, when such a course may be pursued without jeopardizing the grantor's interests, but there is a strong disapproval of this form of relief manifested in some jurisdictions, for the reason that it leaves the grantor at the mercy of the grantee, where the latter may be disposed to resort to methods that will cause delay. They take the position that it is inequitable to put the grantor in such a position that he may be caused suffering and want through the delays and inconveniences of litigation, for he may have to starve while learning by litigation the difficulty of a contract of this kind: *Dreisbach v. Serfass*, 126 Pa. 32, 17 Atl. 513, 3 L. R. A. 836. Yet, this course is sometimes adopted in preference to relief in damages: *Keltner v. Keltner*, 6 B. Mon. 40; *Elliott v. Elliott* (Tex. Civ. App.), 109 S. W. 215, affirmed in 109 S. W. 1142.

A demand of possession is equivalent to a re-entry: *Clark v. Holton*, 57 Ind. 564; *Ellis v. Elkhart Car Works Co.*, 97 Ind. 247; *Elkhart Car Works Co. v. Ellis*, 113 Ind. 215, 15 N. E. 249. In a case where the grantor went upon the land and, in the presence of two witnesses, informed the grantee that she had come to make an entry for breaches of the conditions of the deed, "what she said and did at that time was sufficient for that purpose," and the entry was sufficient as to the whole, though made on only one of the parcels embraced in the conveyance: *Rowell v. Jewett*, 69 Me. 293; *Jenks v. Walton*, 64 Me. 97. Formal re-entry, however, is unnecessary where the grantor continues in unquestioned occupation of the land: *Moore v. Wingate*, 53 Mo. 398; *Dreisbach v. Serfass*, 126 Pa. 32, 17 Atl. 513, 3 L. R. A. 836.

3. Rescission.

A. By Re-entry.—Rescission by the grantor, for breach of a condition of the conveyance, can be accomplished only by a re-entry upon the premises, or its equivalent. A breach does not operate, ipso facto, to revest the estate in the grantor. The title does not, by reason of the breach, become void; it is voidable at the election of the grantor, and he must show, by his acts, that he considers the title as having revested in him: *Lewis v. Lewis*, 74 Conn. 630, 92 Am. St. Rep. 240, 51 Atl. 854; *Jones v. Williams*, 132 Ga. 782, 64 S. E. 1081; *Van Horn v. Mercer*, 29 Ind. App. 277, 64 N. E. 531; *Risley v. McNiece*, 71 Ind. 434; *Copeland v. Copeland*, 89 Ind. 29; *Richter v. Richter*, 111 Ind. 456, 12 N. E. 698; *Lindsay v. Glass*, 119 Ind. 304, 21 N. E. 897; *Cree v. Sherfy*, 138 Ind. 354, 37 N. E. 787; *Caudill v. Lemaster*, 26 Ky. Law Rep. 1010, 82 S. W. 1009; *Osgood v. Abbott*, 58 Me. 73; *Jenks v. Walton*, 64 Me. 97; *Rowell v. Jewett*, 69 Me. 293; *Hubbard v. Hubbard*, 12 Allen, 586; *Hubbard v. Hubbard*, 97 Mass. 188, 93 Am. Dec. 75; *Dana v. Dana*, 185 Mass. 156, 70 N. E. 49; *Woolcott v. Woolcott*, 133 Mich. 643, 95 N. W. 740; *Minneapolis Thresh. Mach. Co. v. Hanson*, 101 Minn. 260, 48 Am. St. Rep. 623, 112 N. W. 217; *Messersmith v. Messersmith*, 22 Mo. 369; *Moore v. Wingate*, 53 Mo. 398; *Eastman v. Batchelder*, 36 N. H. 141, 72 Am. Dec. 295; *Whitton v. Whitton*, 38 N. H. 127; *Bethlehem v. Annis*, 40 N. H. 34, 77 Am. Dec. 700; *Jackson v. Topping*, 1 Wend. 388, 19 Am. Dec. 515; *Harwood v. Shoe*, 141 N. C. 161, 53 S. E. 616; *Hurley v. McCallister*, 19 S. D. 381, 103 N. W. 644; *White v. Bailey*, 65 W. Va. 573, 64 S. E. 1019.

B. By Courts.—Courts of equity will freely rescind conveyances by parents to their children upon breach of the condition to support: *Cooper v. Gum*, 152 Ill. 471, 39 N. E. 267; *McClelland v. McClelland*, 176 Ill. 83, 51 N. E. 559; *Fabrice v. Von der Brelie*, 190 Ill. 460, 60 N. E. 835; *Hensan v. Cooksey*, 237 Ill. 620, 127 Am. St. Rep. 345, 86 N. E. 1107; *Buffalow v. Buffalow*, 22 N. C. 241; *Wilfong v. Johnson*, 41 W. Va. 283, 23 S. E. 730; *Goldsmith v. Goldsmith*, 46 W. Va. 426, 33 S. E. 266.

"If the rescission of the contract cannot be referred to any other head of equity jurisdiction, it would be proper to presume that it was made in the first instance with a fraudulent intent": *Frazier v. Miller*, 16 Ill. 48; *Oard v. Oard*, 59 Ill. 46; *Cooper v. Gum*, 152 Ill. 471, 39 N. E. 267; *Fahey v. Fahey*, 43 Colo. 354, 127 Am. St. Rep. 118, 96 Pac. 251, 18 L. R. A., N. S., 1147; *Strong v. Lawrence*, 53 Iowa, 55, 12 N. W. 74; *Talbott v. Bedford*, 21 Ky. Law Rep. 897, 53 S. W. 294; *Sidensparker v. Sidensparker*, 52 Me. 481, 83 Am. Dec. 527; *Rexford v. Schofield*, 101 Mich. 480, 59 N. W. 837; *Reid v. Burns*, 13 Ohio St. 49; *Tuttle v. Burgett's Admr.*, 53 Ohio, 498, 53 Am. St. Rep. 649, 42 N. E. 427, 30 L. R. A. 214.

If it appears that the grantor did not understand the nature or legal effect of his act, by reason of age and lack of understanding of business methods, the conveyance may be set aside on the ground

of mental incapacity or undue influence, for the law looks with suspicion upon voluntary transfers of property by persons mentally and physically infirm, when made to those having the custody of them: *Davis v. Calvert*, 18 Ky. Law Rep. 975, 38 S. W. 884; *Talbott v. Bedford*, 21 Ky. Law Rep. 897, 53 S. W. 294; *Ennis v. Burnham*, 159 Mo. 494, 60 S. W. 1103; *Stevens v. Shaw*, 66 N. J. Eq. 116, 57 Atl. 1024.

Equity will not permit a party to enjoy the fruits of a contract, when he deliberately refuses to perform the obligations imposed upon him thereby: *Gillen v. Gillen*, 238 Ill. 218, 87 N. E. 388; *Patterson v. Patterson*, 81 Iowa, 626, 47 N. W. 768.

If he refuses to perform the very consideration of the deed, the conveyance will be set aside for failure of consideration: *Cumby v. Cumby*, 240 Ill. 235, 88 N. E. 549; and since he "has refused to comply with his part of the contract, and as he can return the consideration, and thus the appellant and he will be placed in statu quo, the chancellor, at the election of the appellant [grantor], should not hesitate to do it": *Reeder v. Reeder*, 89 Ky. 529, 12 S. W. 1063. As rescission is the general remedy in cases of breach of condition, fraud, undue influence, mental incapacity, and failure of consideration, the parts of this note treating of those subjects may be referred to for further information concerning the subject of "rescission."

b. Grounds of Relief.

1. **Fraud, Undue Influence and Incapacity.**—In the case where a grantor conveys his property in consideration that the grantee undertakes to furnish him a home, take care of him and support him during life, the consideration cannot be measured by dollars and cents. The personal kindness and numerous delicate attentions demanded by the age and condition of the grantor in such a case, and which they might expect from the affections of the grantee, are not marketable commodities; and it is therefore impossible, by mere money compensations, to make the grantor whole. What he has given his property for he has not received, and cannot receive; and the circumstances justify the conclusion that the grantee who obtained the deed did not intend to perform the contracts. This is the position taken in *Frazier v. Miller*, 16 Ill. 48; *Oard v. Oard*, 59 Ill. 46; *Jones v. Neely*, 72 Ill. 449; *Cooper v. Gum*, 152 Ill. 471, 39 N. E. 267; *Fabrice v. Von der Brelie*, 190 Ill. 460, 60 N. E. 835; *Gillen v. Gillen*, 238 Ill. 218, 87 N. E. 388; *Talbott v. Bedford*, 21 Ky. Law Rep. 897, 53 S. W. 294; *Holt v. Holt*, 32 Ky. Law Rep. 544, 106 S. W. 811; *Rexford v. Schofield*, 101 Mich. 480, 59 N. W. 837; *Reid v. Burns*, 13 Ohio St. 49; *Tuttle v. Burgett's Admr.*, 53 Ohio, 498, 53 Am. St. Rep. 649, 42 N. E. 427, 30 L. R. A. 214.

And where a father had other children, and did not appear to fully understand the nature of an instrument conveying about eight thousand dollars' worth of property in consideration of support, the court annulled the deed on the ground of undue influence: *Ennis v. Burnham*, 159 Mo. 494, 60 S. W. 1103.

It is also a well-established and just rule that a person, possessing means, cannot make provision for himself and family during life at the expense of his creditors. He must retain sufficient property to pay his existing debts or make provision for their liquidation by his grantee; otherwise the conveyance may be set aside and the deed canceled at the instance of any creditor: *Strong v. Lawrence*, 58 Iowa, 55, 12 N. W. 74; *Ennis v. Burnham*, 159 Mo. 494, 60 S. W. 1103; *Kegan v. Hazlett*, 128 Mo. App. 286, 107 S. W. 17; *Smith v. Smith*, 11 N. H. 459; *Morrison v. Morrison*, 49 N. H. 69. Such an agreement is a continuing fraud, and void, "not only as against precedent, but also subsequent, creditors." This is an exceptional ruling, and seems to have no good reason for its utterance, but it was so expressed in *Sidensparker v. Sidensparker*, 52 Me. 481, 83 Am. Dec. 527.

Also, such a conveyance made by a divorced husband is in fraud of the wife's claim for alimony, since by the decree allowing alimony she becomes a creditor: *Fahey v. Fahey*, 43 Colo. 354, 127 Am. St. Rep. 118, 96 Pac. 251, 18 L. R. A., N. S., 1147.

In *Ennis v. Burnham*, 159 Mo. 494, 60 S. W. 1103, cited above, the court in discussing mental incapacity and undue influence says: "A contract, therefore, by one of impaired mental and will power, with one standing in confidential relations with him, should be closely scrutinized, to see that no improper advantage has been taken or undue influence exerted. . . . 'Where one person has acquired over another a position of superior influence or advantage by reason of relationship, trust or confidence (whatever its origin), and business dealings occur between such persons, the court will require proof of the former that the dealings were fair and honest in all respects on his part, under penalty of rescinding such dealings entirely'": *Talbott v. Bedford*, 21 Ky. Law Rep. 897, 53 S. W. 294; *Davis v. Calvert*, 18 Ky. Law Rep. 975, 38 S. W. 884; *Stevens v. Shaw*, 66 N. J. Eq. 116, 57 Atl. 1024.

2. **Failure of Consideration.**—When a grantor by a voluntary conveyance transfers his property to another person on the sole condition that such other person shall provide for and maintain him during life, and after receiving the property the grantee refuses or neglects to perform his contract, equity will give relief by decreeing a reconveyance of the property to the grantor. Since the grantee in such cases has given nothing in return for what he has received, the revesting of title in the grantor leaves both parties in statu quo. There may also be partial failure of consideration, even though the grantor is well supplied with food, raiment and shelter; there is the element of conduct to be considered, and when the grantee's manner makes life miserable to the grantor, this element of the contract should, and generally, does, receive as careful consideration by courts as more material matters. The grantee will not be suffered to hound the unfortunate grantor to his grave with petty bickerings and abuse.

In *Dreisbach v. Serfass* (Pa.), 17 Atl. 513, 3 L. R. A. 836, the grantee's husband had tried to have the grantor declared a pauper

and supported at public expense, and, failing, had left the premises and declined to carry out his wife's agreement. He later endeavored to dispossess a third person, holding under a subsequent deed from the grantor; but the court, in denying his claim, said it would be "against good conscience to permit the vendee to recover the possession of the land from his vendor, or one holding his title, without rendering or offering to render the equivalent contracted for": *Fabrice v. Van der Brelie*, 190 Ill. 460, 60 N. E. 835; *Pittenger v. Pittenger*, 208 Ill. 582, 70 N. E. 699; *Gillen v. Gillen*, 238 Ill. 218, 87 N. E. 388; *Patterson v. Patterson*, 81 Iowa, 626, 47 N. W. 768; *Jenkins v. Jenkins*, 3 T. B. Mon. 327; *Scott's Heirs v. Scott*, 3 B. Mon. 2; *Reeder v. Reeder*, 89 Ky. 529, 12 S. W. 1063; *Lane v. Lane*, 106 Ky. 530, 50 S. W. 857; *Bevins v. Keen (Ky.)*, 64 S. W. 428; *Caudill v. Le-master*, 26 Ky. Law Rep. 1010, 82 S. W. 1009; *Dodge v. Dodge*, 92 Mich. 109, 52 N. W. 296; *Rexford v. Schofield*, 101 Mich. 480, 59 N. W. 837; *Goldsmith v. Goldsmith*, 46 W. Va. 426, 33 S. E. 266; *Fluharty v. Fluharty*, 54 W. Va. 407, 46 S. E. 199; *Lowman v. Crawford*, 99 Va. 688, 40 S. E. 17.

V. Rights of Third Persons.

a. Creditors of Grantor.—A voluntary conveyance of one's property in consideration of the support of himself or his family, without reserving enough to pay his debts, is fraudulent and void as to existing creditors: *Strong v. Lawrence*, 58 Iowa, 55, 12 N. W. 74; *Kegan v. Hazlett*, 128 Mo. App. 286, 107 S. W. 17; *Smith v. Smith*, 11 N. H. 460; *Morrison v. Morrison*, 49 N. H. 69; and in *Sidensparker v. Sidensparker*, 52 Me. 481, 83 Am. Dec. 527, the rule is extended so as to include subsequent creditors. A divorced wife, also, being a creditor by reason of alimony due her, may have the husband's deed canceled.

b. Purchasers.—A purchaser from the grantee takes with notice of all conditions contained in a recorded instrument of conveyance, and he can therefore be in no better or more favorable position than his vendor: *Rowell v. Jewett*, 69 Me. 293.

"Where land was conveyed upon a condition subsequent, one claiming title by a conveyance from the grantor before a breach of the condition has no title and cannot recover or forfeit the estate for a breach of the condition subsequent to his purchase": *Nicoll v. New York & Erie R. R. Co.*, 12 Barb. 460; *Warner v. Bennett*, 31 Conn. 468. Also, a subsequent purchaser from the grantor takes with notice of the prior grant; and he cannot enforce the condition in the prior deed: *White v. Bailey*, 65 W. Va. 573, 64 S. E. 1019. But the subsequent grantee's title will not be disturbed, when he is in possession, and it appears that the original grantee had abandoned the premises and failed to perform his contract: *Dreisbach v. Serfass*, 126 Pa. 32, 17 Atl. 513, 3 L. R. A. 836.

c. Heirs of Grantee.—In the event the grantee dies before the grantor, the fact that he cannot longer perform the contract will

not defeat his estate, for equity will protect the interests of the estate, and compel the grantor to accept a compensation in lieu of the forfeiture: *Seymour v. Belding*, 83 Ill. 222; *Messersmith v. Messersmith*, 22 Mo. 369; *Keister v. Cubine*, 101 Va. 768, 45 S. E. 285. Generally speaking, no one but the grantor has a right to complain for breach of such a contract: *Hensley v. Hensley* (Ky.), 30 S. W. 613; *Carney v. Carney*, 196 Pa. 34, 46 Atl. 264.

BEDFORD'S EXECUTOR v. CHANDLER.

[81 Vt. 270, 69 Atl. 874.]

PROMISSORY NOTE, When will Sustain a Recovery in Favor of the Payee Only.—A promise to pay to a designated payee and to no other person, executor, trustee or assignee is available to the payee only, and becomes unenforceable at his death. (p. 1058.)

GIFT INTER VIVOS, What Sufficient, and Reservation Which does not Destroy.—One who receives a note payable to himself alone and not to any executor, trustee or assignee may be regarded as making a gift inter vivos of so much of the note as shall not have been collected in his lifetime. The title of the gift passes to the maker of the note, subject to the right of defeasance in the payee or donor, at whose death the right of defeasance terminates. The reservation of this right did not make the gift invalid, and the limitation of the right was such that nothing was left in the donor to pass at his death. (p. 1058.)

CONSIDERATION, What is not.—A promise which involves nothing but what the promisor is already legally holden for affords no consideration. (p. 1059.)

PROMISE Given in Consideration of a Promise not to Sue for a Reasonable Time.—If a promissory note is executed in such form that it can be collected only by the payee in her lifetime, and the maker, on being applied to to pay it or give a new note, asks that the matter be permitted to rest until a designated future day, to which the payee agrees, and the maker agrees to pay at that day, but after the making of a partial payment only, the payee dies, her agreement to forbear was not founded on any consideration, and does not support the promise to pay at the later date, and no action can be sustained either on the note or the promise to pay at such later day. (p. 1060.)

Assumpsit. Verdict ordered for the defendant; the plaintiff excepted.

B. E. Bullard, for the plaintiff.

Taylor & Dutton, for the defendant.

271 MUNSON, J. In 1898 the defendant gave plaintiff's decedent a writing which reads as follows: "For value received I promise to pay Mrs. Carrie M. Bedford, and to no

other person, executor, trustee or assignee, the sum of three hundred dollars, with interest annually." Interest was paid thereon from time to time until July, 1904.

We think the restriction embodied in the writing cannot be regarded as a mere limitation upon the payee's right of transfer. It was evidently intended that the promise should be available ²⁷² to the payee in her lifetime, and become unenforceable at her death. But the plaintiff contends that the restriction is void, as an attempt to dispose of property after death without the required formalities; and contends further that if the transaction be viewed as a gift *inter vivos*, it lacks the requisites of present giving and complete delivery. It is enough to say as regards these claims that all the gift that the decedent intended was irrevocably made and completely delivered when the consideration of the note was made over in exchange for a promise of payment thus limited. The gift consisted of so much of the amount represented by the note as the payee should not collect in her lifetime. The title to the gift passed to the defendant, subject to a right of defeasance in the donor, and the right of defeasance terminated at the donor's death. The reservation of this right did not make the gift invalid, and the limitation of the right was such that nothing was left in the donor to pass at her death: *Blanchard v. Sheldon*, 43 Vt. 512; *Hackett v. Moxley*, 65 Vt. 71, 25 Atl. 898; *Green v. Tulane*, 52 N. J. Eq. 169, 28 Atl. 9.

It remains to inquire whether the obligation of the defendant has been enlarged by anything done in Mrs. Bedford's lifetime. It appears from the testimony of the plaintiff that early in December, 1904, in the lifetime of Mrs. Bedford and pursuant to her instructions, he applied to defendant for payment of the note and threatened to bring suit on it, saying that Mrs. Bedford had directed him to collect it, but offered to take a new note in place of the old one, explaining that Mrs. Bedford did not understand this writing and wanted a straight note. Defendant did not want to give a new note, nor pay the note at that time, but she did not want to be sued, and asked plaintiff to let the matter rest until January 1st, promising to pay the note at that time. Plaintiff said this would be satisfactory to him if it was to Mrs. Bedford, and said he would see her and let defendant know if there was anything different. Mrs. Bedford was content to let the matter rest until January 1st, and plaintiff said nothing further to defendant. Defendant paid plaintiff one hundred dollars on the note January 3d, and said she would pay the balance soon. This was brought to Mrs. Bedford's attention, and she con-

sented to the further delay. ²⁷³ Mrs. Bedford died about three weeks later, and plaintiff was appointed her executor, and sues in that capacity.

The facts shown amount to a promise on the part of Mrs. Bedford to forbear suit for a reasonable time. She did in fact forbear suit for a time which the court may treat as reasonable for the purposes of this discussion. But she could have brought suit at any time notwithstanding her promise, if the promise was without consideration. The consideration claimed here is the promise of the debtor to pay soon. A promise which involves nothing but what the promisor is already legally holden for affords no consideration: *Mason v. Peters*, 4 Vt. 101; *Russell v. Buck*, 11 Vt. 166; *Pomeroy v. Slade*, 16 Vt. 220; *Merrill v. Pease*, 51 Vt. 556; *Anonymous*, Cowp. 128; *Deacon v. Gridley*, 15 Com. B. 295; *Williams v. Stern*, 5 Q. B. D. 409; *Ives v. Bosley*, 35 Md. 262, 6 Am. Rep. 411; *Stuber v. Shack*, 83 Ill. 191; *Holmes v. Boyd*, 90 Ind. 333; *Davis v. Stout*, 126 Ind. 12, 22 Am. St. Rep. 565, 25 N. E. 862; *Turnbull v. Brock*, 31 Ohio St. 649; *Hunt v. Knox*, 34 Miss. 655; *Parmelee v. Thompson*, 45 N. Y. 58, 6 Am. Rep. 33. It is on this ground that sureties are held not to be released by an agreement to forbear in consideration of the debtor's promise to pay: *Joslyn v. Smith*, 13 Vt. 353; *Wheeler v. Washburn*, 24 Vt. 293; *Hoffman v. Coombs*, 9 Gill, 284; *Sully v. Childress*, 106 Tenn. 109, 82 Am. St. Rep. 875, 60 S. W. 499. But when the debtor does or promises more than his contract calls for, there is a consideration for the promise to forbear (7 Cyc. 900); as where he pays part of the debt before it is due, or promises to pay an increased lawful rate of interest, or gives or promises to give security: *Cox v. Carrell*, 6 Iowa, 350; *Prouty v. Wilson*, 123 Mass. 297; *Martin v. Bell*, 18 N. J. L. 167; *Alliance Bank v. Broom*, 2 Drew. & S. 289.

The case of *Russell v. Buck*, 11 Vt. 166, is specially in point. There the plaintiff was the holder of a promissory note indorsed by a firm in which the defendant was a partner, and the defendant gave him a writing by which he guaranteed the payment of the note if not called upon for it before a certain date. There was no agreement on the part of the plaintiff to delay collection of the maker. The plaintiff, having permitted the statute to run on any claim he had against the defendant as indorser, brought suit on this writing as an independent ground ²⁷⁴ of action. The court held that the writing had no consideration, and created no new liability; that if the defendant was then liable as indorser, it was merely the case of one who promises that if waited on he will pay what he is

already holden to pay; that if he was not then liable as indorser, the writing was simply a recognition of that liability, with a promise to pay if he himself was waited on.

There is nothing in *Hill v. Smith*, 34 Vt. 535, inconsistent with our other cases. That was an agreement to enlarge the time allowed for the delivery of goods, and was entered into before the original time of performance had expired, and without there having been any failure in the performance; and the defendant had omitted to complete the delivery within the time allowed by the original contract, in reliance on the supplemental agreement.

We think there was no consideration to give force to Mrs. Bedford's promise or forbearance. She forbore to her detriment, or rather to the detriment of her estate, but it was no more than the forbearance of any creditor who risks a delay in the bringing of a suit. She suffered no detriment from her promise to forbear, for the promise bound her to nothing. There was no change whatever in the situation; the debtor remained under the same liability, and the creditor retained the same right. The creditor's failure to exercise her right subjected her to a different risk from that ordinarily incurred, because of the peculiar nature of the obligation. But we see no ground upon which her forbearance at the debtor's request can be held to have raised a new promise for the benefit of her estate. To do so would be to create a further obligation which the debtor declined to give when threatened with a suit. The debtor would do nothing but promise payment of the existing obligation, and the creditor let the matter rest upon that. It was the ordinary case of deferring suit upon a promise of speedy payment. Mrs. Bedford took the chance of loss by delay in the hope of an early settlement without suit.

Judgment affirmed.

Consideration does not Depend upon whether the thing promised results in a benefit to the promisee or a detriment to the promisor. It is enough that something is promised, or the exercise of a present right is forborne: *Lyndon Savings Bank v. International Co.*, 78 Vt. 169, 112 Am. St. Rep. 900. A promise made to induce a person to perform an act which he is already bound in law to perform is without consideration and unenforceable: *Spencer v. McLean*, 20 Ind. App. 626, 67 Am. St. Rep. 271; *Davis & Co. v. Morgan*, 117 Ga. 504, 97 Am. St. Rep. 171. And the mere promise to refrain from the doing of an act does not constitute a sufficient consideration to support a contract, unless some advantage accrues to the promisee or some loss or disadvantage is sustained by the promisor: *Anderson v. Nystrom*, 103 Minn. 168, 123 Am. St. Rep. 320.

STATE v. AUDETTE.

[81 Vt. 400, 70 Atl. 833.]

STATUTES, Construction of.—In ascertaining the legislative intent, regard must be had to the subject matter of the statute, as well as to its language and the consequences which would follow the proposed construction. (pp. 1063, 1064.)

ADULTERY—Marriage of a Woman Believed to have Always been Unmarried.—One who meets a woman who is represented to him never to have been married, and who contracts a marriage relation with her, in good faith, under a mistake of fact honestly entertained on reasonable grounds, is not to be held guilty of adultery on proof that she was in fact married to another, who was still living. (p. 1064.)

Herbert M. Blanchard and Herbert G. Tupper, for the respondent.

Edward R. Buck, state's attorney, for the state.

401 MUNSON, J. The respondent has been adjudged guilty of adultery on an agreed statement of facts. The acts relied upon to sustain the charge were sanctioned by the marriage relation, as the respondent supposed. They were in fact the acts of an unmarried man with a married woman, for the supposed wife had a husband living when she espoused the respondent. So we are again called upon to consider the relation of mistakes of fact to criminal intent.

The state rests its claim, in part, upon the reasoning and decision in *State v. Ackerly*, 79 Vt. 69, 118 Am. St. Rep. 940, 64 Atl. 450. It was said there, upon a citation of previous decisions of this court, that when a statute makes an act penal, without reference to knowledge, ignorance of the fact is no defense. Among the cases referred to were some in which the act done, as the respondent understood it, was blameless. It is claimed by some text-writers, and held by some courts, that there can be no criminal liability without there having been some wrong in the act as it was understood to be, or some negligence in ascertaining the facts. But the view taken by this court in *State v. Tomasi*, 67 Vt. 312, 31 Atl. 780, and in *State v. Ward*, 75 Vt. 438, 56 Atl. 85, with reference to offenses purely statutory, accords with the main current of authority: *Commonwealth v. Boynton*, 2 Allen, 160; *Commonwealth v. Wentworth*, 118 Mass. 441; *Commonwealth v. Finnegan*, 124 Mass. 324; *Farmer v. People*, 77 Ill. 322; *State v. Hartfiel*, 24 Wis. 60; *Ulrich v. Commonwealth*, 6 Bush (Ky.), 400; *Crampton v. State*, 37 Ark. 108; *Fielding v. La Grange*, 104 Iowa, 530, 73 N. W. 1038. See, also, *Commonwealth v. Farren*, 9

Allen, 489; *State v. Smith*, 10 R. I. 258; *Barnes v. State*, 19 Conn. 398; *Commonwealth v. Weiss*, 139 Pa. 247, 23 Am. St. Rep. 182, 21 Atl. 10, 11 L. R. A. 530; *Jamison v. Burton*, 43 Iowa, 282; *McCutcheon v. People*, 69 Ill. 601; *State v. Cain*, 9 W. Va. 559; *State v. Heck*, 23 Minn. 549.

In *State v. Ackerly*, 79 Vt. 69, 118 Am. St. Rep. 940, 64 Atl. 450, the charge was bigamy, and it was held that one having a consort living, who marries again within the time fixed in the exception, is not excused by an honest belief ⁴⁰² in the death of the consort, based upon reasonable grounds. The decision was not put especially upon the omission from the prohibitory clause of words pertaining to knowledge, but upon what seemed to be the plain intent of the enactment considered as a whole. The same view has been taken of similar statutes in other jurisdictions: *Commonwealth v. Mash*, 7 Met. 472; *Commonwealth v. Hayden*, 163 Mass. 453, 47 Am. St. Rep. 468, 40 N. E. 846, 28 L. R. A. 318; *Jones v. State*, 67 Ala. 84. See *Parnell v. State*, 126 Ga. 103, 54 S. E. 804.

It was said in the *Ackerly* case (79 Vt. 69, 118 Am. St. Rep. 940, 64 Atl. 450), and said correctly, that the rule precluding the defense of ignorance of fact had been applied in cases of adultery. It should be noticed, however, that cases are sometimes cited in support of this statement that are not directly in point. In some of the cases the question was whether it was necessary for the prosecution to allege and prove knowledge: *Commonwealth v. Elwell*, 2 Met. 190, 35 Am. Dec. 398; *Fox v. State*, 3 Tex. App. 329, 30 Am. Rep. 144; *State v. Cody*, 111 N. C. 725, 16 S. E. 408. In some cases the parties marrying had relied upon improper advisers as to the legal effect of steps taken by themselves or others: *State v. Goodenow*, 65 Me. 30. In other cases a decree dissolving the defendant's prior marriage had been annulled because procured by his fraud: *State v. Whitcomb*, 52 Iowa, 85, 35 Am. Rep. 258, 2 N. W. 970; *State v. Watson*, 20 R. I. 354, 78 Am. St. Rep. 871, 39 Atl. 193.

But in *Commonwealth v. Thompson*, 11 Allen, 23, 87 Am. Dec. 685, the defendant married a woman who had left her husband for good cause eleven years before and had not seen or heard from him since, but who had read of the killing of a man who bore the full name of her husband and whom she believed to have been her husband, and who told the defendant before she married him that she was a widow. The court submitted nothing to the jury as to the good faith of the respondent or the grounds of his belief, but instructed them that the facts testified to were not a legal justification. The su-

preme court sustained the conviction, saying that the seven years' provision did not apply, because it was the wife that left instead of the husband, and making that fact conclusive against the defendant. But, even in this extreme case, it could be said that the defendant knew that there had been a marriage, and that there was a former husband to be accounted for.

403 In the case before us, the respondent, twenty-four years of age, met at a party a woman twenty-two years of age, whom he supposed to be single. He afterward corresponded with her and saw her from time to time, and called upon her where she was living, and she visited his parents at their home. Through all this acquaintance she represented herself to be a single woman, and he believed her to be such; but he made no inquiries about her, and received no information regarding her history except from herself. When the license was procured she said it was her first marriage. The marriage occurred about five months after the acquaintance commenced. During all this time she had a husband living in Massachusetts.

There is a plain distinction between this case and the case of one who has an illicit connection with a woman whom he mistakenly supposes to be unmarried, or above the age of consent, or not of the prohibited relationship, and is thereupon charged with adultery, statutory rape or incest, as the case may be. In such a case there is a measure of wrong in the act as the defendant understands it, and his ignorance of the fact that makes it a greater wrong will not relieve him from the legal penalty. Here, the connection was had after the performance of a marriage ceremony, in the full belief that the marriage was legal, and in the absence of any circumstance calculated to suggest the contrary. The only thing that can be suggested as a want of circumspection on the part of the respondent, if it ought to be considered such, is that he failed to make inquiries in the family and neighborhood where the woman lived as to her being what she held herself out to be. But, in the view taken by the state, if he had made a full inquiry and failed to ascertain the fact, his erroneous belief would have been no defense.

It has appeared from what has already been said that we do not consider the decision in the Ackerly case (79 Vt. 69, 118 Am. St. Rep. 940, 64 Atl. 450) controlling here. The fact that both statutes are without words referring to knowledge or intent does not require that they receive the same construction, for the absence of such words is but one of the matters to be considered in determining the construction. In ascer-

taining the intent of the legislature regard must be had to the subject matter of the statute as well as its language, and to the consequences that would follow the proposed construction. ⁴⁰⁴ There is ample authority in the decided cases for saying that penal statutes framed precisely alike in the respect indicated may be given opposite constructions. We have declared it to be the manifest intent of the bigamy statute that a person once married who marries again within the seven years on a supposition of the consort's death shall do so at his peril. But it by no means follows that all persons who marry, honestly believing upon reasonable grounds that the other party is single, do so in peril of a conviction for adultery if the fact proves to be otherwise. The two respondents whose cases we have considered stand different before the law. The one knows there is an obstacle to his marriage unless it has been removed by death, and takes the risk of a present marriage on inconclusive evidence rather than await the time when he can marry with the sanction of the law. The other knows beyond peradventure that he is free to marry, and takes no risk of his marriage being invalid except through the deceit of the other contracting party. The legislature cannot have intended that one so defrauded should incur the penalty of adultery, although squarely within the terms of the statute. A court may well construe the prohibitory clause of the bigamy section according to its letter, and yet class the adultery section with those general prohibitions which are held susceptible of limitation by implied exceptions.

The connection complained of was had in the supposed relation of husband and wife, by virtue of a marriage contracted when the respondent was under no prohibition based on a prior marriage, and where the relation, as we construe the agreed statement, was entered upon and continued in by reason of a mistake of fact, honestly entertained upon reasonable grounds and without negligence; and upon these facts we hold the respondent not guilty of adultery.

Exceptions sustained, judgment and sentence reversed, and respondent discharged.

Proof that the Second Marriage was entered into in good faith, under an honest but mistaken belief that the first marriage has been dissolved by divorce, constitutes no defense to a charge of bigamy: *People v. Spoor*, 235 Ill. 230, 126 Am. St. Rep. 197; *State v. Ackerly*, 79 Vt. 69, 118 Am. St. Rep. 940.

A Man cannot be Convicted of the Crime of Adultery who, in good faith, marries and cohabits with a woman whose husband has remained absent for more than seven years together without being

heard from, and is believed by both parties to be dead, although in fact he is still living: *Commonwealth v. Thompson*, 6 Allen, 591, 83 Am. Dec. 653. Compare, however, *Commonwealth v. Elwell*, 2 Met. 190, 35 Am. Dec. 398; *Commonwealth v. Thompson*, 11 Allen, 23, 87 Am. Dec. 685; *State v. Cutshall*, 109 N. C. 764, 26 Am. St. Rep. 599.

STATE v. CENTRAL VERMONT RAILWAY COMPANY.

[81 Vt. 463, 71 Atl. 194.]

COMMON CARRIERS, Common-law Right of to Discriminate.

At the common law, common carriers of freight were not bound to treat all shippers alike. They were bound only to carry for every shipper at a reasonable rate, and might favor any shipper or class of shippers where the circumstances warranted the distinction, as where the preferred shipper offered goods in larger quantities or under such conditions that they could be transported with less expense. (p. 1067.)

COMMON CARRIERS, Limitation upon Common-law Right of to Discriminate.—At the common law, there was always a limitation that the discrimination or preference must be reasonable and the terms not unreasonably unequal. (p. 1067.)

COMMON CARRIERS, Right to Prescribe Rates of.—It is within the powers of state legislatures with respect to commerce within the state, and of Congress with respect to interstate commerce, to prescribe rates to be charged by public carriers for their services, so long as the charges fixed do not require the services to be without reasonable compensation. (p. 1067.)

COMMON CARRIERS, Limitation upon Powers to Prescribe Rates for.—The power to fix the rates of common carriers is not a power to destroy, to compel the doing of service without reward, or to take private property for public use without just compensation or without due process of law. (p. 1067.)

STATUTES, Construction of.—In Arriving at Legislative Intent, not only must the statute in every part be considered, but when there are several statutes in *pari materia*, all must be considered together. (p. 1067.)

RAILWAYS, Statute Respecting Discrimination, When Declaratory of the Common Law.—A statute providing that carriers by railroad shall give to all persons reasonable and equal rates, benefits, privileges, facilities and accommodations for transportation of freight and passengers is merely declaratory of the common law, and does not forbid discrimination in rates which were permitted by that law, and a complaint charging that the defendant railway company discriminated in favor of a designated person by charging him between specified points on its line fifty cents less per ton than charged to plaintiff or any other person does not charge a forbidden discrimination, because the charge, though unequal, may have been reasonable and equal within the meaning of the statute. (p. 1071.)

C. W. Witters and H. H. Powers, for the defendant.

Clarke C. Fitts, attorney general, for the plaintiff.

⁴⁶⁴ TYLER, J. This is an action on the case brought by the state of Vermont to recover of the defendant the damage

that the plaintiff claims to have sustained by reason of the defendant's alleged violation of sections 3902 and 3904 of the Vermont Statutes. Section 3902 reads:

"A person or corporation operating a railroad shall give to all persons reasonable and equal terms, benefits, facilities and accommodations for the transportation of themselves, their agents and servants, and of merchandise and other property upon such railroad; and for the use of the depots, buildings and grounds thereof; and, at any point where such railroad connects with another railroad, reasonable and equal facilities of interchange."

Section 3904 provides that a person or corporation violating these provisions shall be liable to the party aggrieved ⁴⁰⁵ for all damages sustained by reason of such violation, in an action on the case.

The amended declaration alleges that ever since August 1, 1900, the defendant has owned and operated a railroad from Alburgh to Waterbury in this state; that the plaintiff has been obliged to buy and consume large quantities of coal for its asylum for the insane at Waterbury, which coal had to be shipped over said railroad from Alburgh, as that was a distributing point; that it was the defendant's duty to grant to all persons, including the plaintiff, equal terms and rates of freight for the carrying and shipment of coal over its road between said points; that in violation of its duty the defendant had granted to George Hall Coal Company, a corporation of Ogdensburg, New York, secret, lower and unequal terms for the carrying and shipment of coal over its road, between said points, than it had given to the plaintiff or to any other person or corporation, to wit, fifty cents per ton less, and that during all that time it had carried coal from Alburgh to Waterbury for said company at said preferred rates; that the plaintiff's only means of obtaining coal was by said railroad; that by means of said preference the George Hall Coal Company was able to and did crush out and prevent competition in the business of selling and delivering coal at Waterbury, and the plaintiff has been compelled to and has bought all its coal of said coal company at fifty cents more per ton, and has thus been aggrieved by the defendant's violation of the law and by its failure to grant to the plaintiff and others equal terms and rates of freight for carrying coal, and that an action has thereby accrued to the plaintiff under said statute.

The defendant having demurred to the amended declaration, the question is whether its allegations set out a cause of action under the statute.

At common law a common carrier of freight was not bound to treat all shippers alike. It was only bound to carry for every shipper at a reasonable rate. It might favor any particular shipper or class of shippers where the circumstances of the case warranted a distinction, as where the preferred shipper or class offered goods in larger quantities or under such conditions that they could be transported at less expense. But there is always ⁴⁶⁶ the limitation that the discrimination in preferences must be reasonable, and the terms must not be unreasonably unequal.

It is equally well settled that it is within the power of a state legislature, with reference to commerce within the state, and of Congress, with reference to interstate commerce, to prescribe the rates to be charged by public carriers for their services, so long as the charges fixed do not require that the services rendered shall be without reasonable compensation: *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. Rep. 418, 42 L. ed. 819.

But it is held that, though the power of the legislature to prescribe the charges of a railroad company is beyond question, it is not an unlimited power. It is not a power to destroy or to compel the doing of a service without reward, or to take private property for public use without just compensation or without due process of law: *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. Rep. 468, 36 L. ed. 247. See numerous cases cited in the opinion in *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. Rep. 418, 42 L. ed. 841; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 9 Sup. Ct. Rep. 47, 32 L. ed. 377; *Cleveland C. C. & St. L. R. Co. v. Closser*, 126 Ind. 348, 9 L. R. A. 754; *Louisville & N. R. Co. v. Commonwealth*, 99 Ky. 132, 59 Am. St. Rep. 457, 35 S. W. 129, 33 L. R. A. 209.

What was the legislative intent in this case?

In arriving at the intent of the legislature, not only must the statute in every part be considered, but when there are several statutes in *pari materia*, they must all be considered together. The legislature, at the session of 1882, passed an act, No. 37, which provides that: "A railroad corporation may establish for their sole benefit a toll upon all passengers and property carried on their railroad at such rates as are determined by the directors of the corporation, and may regulate such conveyance and transportation, the weight of loads, and other things in relation to the use of the road as the directors determine." This section provides, however, that the supreme court may, upon petition and hearing, alter or reduce the toll of any railroad operated in this state. This act was

approved November 28, 1882, took effect February 1, 1883, and gave the directors authority to fix the toll upon all property carried on their road. It now constitutes section 3896, Vermont Statutes, Act No. 36 of that year, which is embodied in sections 3902, 3903 and 3904, was approved on the following day and took effect upon its passage. These two statutes, passed at the same session and so ⁴⁶⁷ nearly contemporaneous, must be construed together, or rather the later one must be construed in the light of the earlier one, which needs no construction.

No. 36 is entitled, "An act to prevent unjust discrimination by railroad corporations." By its express terms it relates to discrimination in the transportation of persons, merchandise and other property by railroads. The words, "facilities and accommodations," obviously relate to the shipping, care and delivery of merchandise—in short, to all the incidents of transportation. If, as the defendant claims, the word "terms" is inapt to signify rates or charges, in common parlance it may have the same meaning in the sense in which people speak of the terms of a contract, meaning the things to be done and the compensation for doing them. "On reasonable terms" is a common expression, meaning the charges for services rendered or the price of goods sold and delivered. From the position of the word in the section and the adequacy of the other words to provide for the incidents of transportation, it is difficult to understand what other purpose the legislature could have had in using it than the regulation of freight charges. That this was the purpose is further indicated by the language of the second section: "Two or more corporations whose roads connect shall not charge or receive for the transportation of freight to any station on the road of either of them a greater sum," etc. The second section further provides that: "In the construction of this section the sum charged or received for the transportation of freight shall include all terminal charges," etc. The regulation of charges for the transportation of persons and property seems to have been one purpose of the act, whether the transportation is over one line or connecting lines of road.

That the word "terms" used in section 3902, providing that a person or corporation operating a railroad shall give to all persons reasonable and equal terms, benefits, etc., includes rates, is conclusively shown by section 3904 providing that section 3902 shall not be construed so as to prevent the issuing of excursion, mileage and commutation tickets, for the issuing

of such tickets is certainly the fixing of rates for transportation.

The conclusion is therefore inevitable that the word "terms" in Act No. 36, Vermont Statutes 3902, includes charges for transportation. The requirements of that act are not in conflict ⁴⁶⁸ with those of No. 37, which gives directors authority to fix rates subject to revision by this court. Manifestly No. 36 was passed to enforce upon directors the obligation to make rates reasonable and equal, as required by the common law.

In considering these acts, it must be observed that No. 36 contains the word "reasonable" as well as "equal." It reads: "Every person or corporation operating a railroad shall give to all persons reasonable and equal terms," etc.; therefore, the act must be construed so as to give force and effect to both words, if possible.

The General Statutes of New Hampshire, chapter 149, section 2, contains a provision essentially like the statute upon which this action is brought. In *McDuffee v. Portland & R. R. Co.*, 52 N. H. 430, 13 Am. Rep. 72, an action brought upon that statute, it was held that the statute was declaratory of the common law and not in derogation of it. The court said in the course of an elaborate opinion: "The common and equal right is to reasonable transportation service for a reasonable compensation. Neither the service nor the price is necessarily unreasonable because it is unequal in a certain narrow, strict and literal sense; but it is not a reasonable service, or a reasonable price, which is unreasonably unequal."

The court said in *Concord & Portsmouth R. R. v. Forsaith*, 59 N. H. 122, 47 Am. Rep. 181; "Absolute equality in the price rate per ton for the carriage of all merchandise of the same description, over equal distances, is not required, but a price rate which shall be reasonably equal for all. By enacting that 'the rates shall be the same for all persons, and for like descriptions of freight between the same points,' the legislature could not have intended an equality that is absolute, fixed and unvarying, if such equality is unreasonable." The court proceeded to say that the whole section must be considered in order to find the true construction; that the first clause, requiring that the rates shall be the same, is explained by the second clause, requiring that "all persons shall have reasonable and equal terms"; that, "taken together, it is plain that no arbitrary rule of absolute equality, but one of reasonable and just equality, was intended." The court further said that custom, in all branches of business, always

has been to move a large amount of a given commodity, in one parcel or in a given time, ⁴⁶⁹ at a less price per pound, yard or ton, than a smaller quantity of the same commodity delivered in smaller parcels at different times; that the expense of handling, carrying and storing the smaller amount is greater, pro rata, than that of the same operations upon the larger amount in one body, and that a discrimination in favor of the larger dealers is not inequality, but reasonable equality.

In *Lough v. Outerbridge*, 143 N. Y. 271, 42 Am. St. Rep. 712, the court laid down the broad rule that when the conditions and circumstances are identical, the charges to all shippers for the same service must be equal; but it was further held that a carrier may lawfully depart from the standard or usual rates if such rates are reasonable, and the deviation is in favor of particular customers for special reasons not applicable to the whole public. That court went to the extent of holding that a carrier may give reduced rates to customers stipulating to give it all their business and refuse those rates to others who are not able or willing so to stipulate, provided the charges exacted from those not joining in the stipulation are not excessive or unreasonable; but it is not necessary to carry the rule to that extent in the present case.

In *Fitchburg R. Co. v. Gage*, 12 Gray, 393, the court laid down the rule of reasonable compensation, and said that if, for special reasons, in isolated cases, the carrier sees fit to stipulate for the carriage of goods or merchandise of any class for individuals for a certain time or in certain quantities for less compensation than what is the usual, necessary and reasonable rate, he may undoubtedly do so without thereby entitling all other persons and parties to the same advantage and relief.

It was decided in *Concord & Portsmouth R. R. v. Forsaith*, 59 N. H. 122, 47 Am. Rep. 181, that a railroad company is not bound to carry large and small quantities of the same kind of merchandise between the same points at the same price.

The same rule is stated in *Avinger v. South Carolina Ry. Co.*, 29 S. C. 265, 13 Am. St. Rep. 716, 7 S. E. 493. See *Root v. Long Island R. Co.*, 114 N. Y. 300, 11 Am. St. Rep. 643, 21 N. E. 403, 4 L. R. A. 331, cited in 11 Am. & Eng. Ency. of Law, 643, where in the notes the rule is stated that a railway company may discriminate in favor of companies shipping large quantities of freight; that all discriminations are not necessarily unreasonable or unjust, and that only those that are unreasonable or unjust are unlawful. ⁴⁷⁰ In the main case there was a discrimination in carrying coal, and it was

held that it could not be determined as matter of law that the discrimination was unjust. In 6 Cyc. 498, the rule is given that there may be a discrimination in rates when founded on a reasonable difference in the conditions attending the different shipments. The rule is recognized in *Sargent v. Boston & L. R. Co.*, 115 Mass. 416, under a statute containing the same requirements as our Act No. 36.

It may be considered a well-established rule of the common law that the carrier cannot be charged with allowing undue preferences to a class of customers where the character of their shipments justifies a distinction, and it is equally well settled that what is reasonable equality in the rates for the carriage of merchandise of the same description between the same points, and whether the rates are reasonably equal, are questions of fact.

Upon the authorities it must be held that Vermont Statutes, 3902, Act No. 36, is declaratory of the common law. The only averment in the declaration of a violation of the statute is that the defendant discriminated in favor of the George Hall Coal Company by shipping coal for it between certain points on the defendant's road, at fifty cents less per ton than it granted to any other person or corporation or to the state of Vermont. The fact that the rates charged in this case were less than those charged to others does not entitle the plaintiff to a judgment, for, as has been shown, the rates charged may have been reasonable and equal within the meaning of the law, though less in amount.

The demurrer admits the allegation that the plaintiff suffered a loss of fifty cents per ton on coal purchased by it, which brings it within the definition of "aggrieved person"—one whose rights have been injuriously affected.

Judgment reversed; demurrer sustained; declaration adjudged insufficient; cause remanded.

A Carrier is Ordinarily Bound to accept and convey goods offered for transportation unless they are of a sort which he is not accustomed to or cannot carry: *Kirby v. Western Union Tel. Co.*, 4 S. D. 105, 46 Am. St. Rep. 765; *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393. He is generally bound to serve the public indifferently and without discrimination: *Ocean Steamship Co. v. Savannah etc. Supply Co.*, 131 Ga. 831, 127 Am. St. Rep. 265. It is said that in the absence of charter or statutory provisions to the contrary, a common carrier must carry for all who apply, but he may discriminate as to rates so long as no unreasonable charge is made: *Avinger v. South Carolina Ry. Co.*, 29 S. C. 265, 13 Am. St. Rep. 716. See, also, *Root v. Long R. R. Co.*, 114 N. Y. 300, 11 Am. St. Rep. 643; *Concord & Portsmouth R. R. v. Forsaith*, 59 N. H. 122, 47 Am. Rep. 181. A statute requiring railway companies to receive freight for shipment

and to furnish cars, and giving a right of action for damages resulting from the refusal so to do, is merely declaratory of common-law rights: *St. Louis etc. Ry. Co. v. State*, 85 Ark. 311, 122 Am. St. Rep. 33.

The Right of a State to Regulate the Charges Imposed by Common Carriers is discussed in *State v. Minneapolis etc. R. R. Co.*, 80 Minn. 191, 89 Am. St. Rep. 514; *Louisville etc. R. R. Co. v. Commonwealth*, 99 Ky. 132, 59 Am. St. Rep. 457; *Chicago etc. R. R. Co. v. Jones*, 149 Ill. 361, 41 Am. St. Rep. 278; *Burlington etc. Ry. Co. v. Day*, 82 Iowa, 312, 31 Am. St. Rep. 477.

PLOOF v. PUTNAM.

[81 Vt. 471, 71 Atl. 188.]

TRESPASS—Necessity.—An entry on the land of another may be justified by necessity. (p. 1074.)

TRESPASS—Mooring Sloop to the Dock of Another.—If one is sailing a loaded sloop, on which are his wife and minor children, and there arises a sudden and violent tempest, whereby the sloop and the persons thereon are placed in great danger of destruction, he is justified in mooring the sloop to a dock other than his own. (p. 1075.)

PLEADING—Necessity of Mooring to a Private Dock, When Sufficiently Shown.—If a pleading alleges that the plaintiff was sailing a loaded sloop on which were his wife and minor children, and that the stress of sudden and violent tempest compelled him to moor to the defendant's dock, to save his sloop and the people thereon, it is not necessary for him to negative the existence of natural objects to which he might have moored in safety. The details of the situation are matters of proof, and need not be alleged. (p. 1075.)

PLEADING—Wrongful Action in Casting Off a Moored Vessel.—A complaint which, after showing the necessity for the plaintiff's mooring his sloop to the defendant's dock, alleges that the defendant, by his servant, unmoored the sloop, sufficiently shows that the action of the servant was not for a purpose of his own, but was within the scope of his employment. (p. 1075.)

Trespass and case for damages alleged to have resulted from unmooring the plaintiff's sloop from the defendant's dock. The count in trespass alleged, "Yet the said defendant, by his agent and servant, with force and arms, willfully and designedly, cast off and unmoored the said sloop from the wharf or dock." The corresponding allegation of the count in case was, "Yet the said defendant, by his said agent and servant, disregarding his duty in this behalf, negligently, carelessly, and wrongfully cast off," etc. Demurrers to the plaintiff's declaration were interposed and overruled. The defendant excepted.

Batchelder & Bates, for the defendant.

Martin S. Vilas and Cowles & Moulton, for the plaintiff.

⁴⁷³ MUNSON, J. It is alleged as the ground of recovery that on the thirteenth day of November, 1904, the defendant was the owner of a certain island in Lake Champlain, and of a certain dock attached thereto, which island and dock were then in charge of the defendant's servant; that the plaintiff was then possessed of and sailing upon said lake a certain loaded sloop, on which were the plaintiff and his wife and two minor children; that there then arose a sudden and violent tempest, whereby the sloop and the property and persons therein were placed in great danger of destruction; that to save these from destruction or injury the plaintiff was compelled to, and did, moor the sloop to defendant's dock; that the defendant by his servant unmoored the sloop, whereupon it was driven upon the shore by the tempest, without the plaintiff's fault; and that the sloop and its contents were thereby destroyed, and the plaintiff and ⁴⁷⁴ his wife and children cast into the lake and upon the shore, receiving injuries.

This claim is set forth in two counts: one in trespass, charging that the defendant by his servant, with force and arms, willfully and designedly unmoored the sloop; the other in case, alleging that it was the duty of the defendant by his servant to permit the plaintiff to moor his sloop to the dock, and to permit it to remain so moored during the continuance of the tempest, but that the defendant by his servant, in disregard of his duty, negligently, carelessly and wrongfully unmoored the sloop. Both counts are demurred to generally.

There are many cases in the books which hold that necessity, and an inability to control movements inaugurated in the proper exercise of a strict right, will justify entries upon land and interferences with personal property that would otherwise have been trespasses. A reference to a few of these will be sufficient to illustrate the doctrine.

In *Miller v. Fandrye*, Poph. 161, trespass was brought for chasing sheep, and the defendant pleaded that the sheep were trespassing upon his land, and that he with a little dog chased them out, and that as soon as the sheep were off his land he called in the dog. It was argued that, although the defendant might lawfully drive the sheep from his own ground with a dog, he had no right to pursue them into the next ground. But

the court considered that the defendant might drive the sheep from his land with a dog, and that the nature of a dog is such that he cannot be withdrawn in an instant, and that as the defendant had done his best to recall the dog, trespass would not lie.

In trespass of cattle taken in A, defendant pleaded that he was seised of C, and found the cattle there damage feasant, and chased them toward the pound, and that they escaped from him and went into A, and he presently retook them; and this was held a good plea: 21 Edward IV, 64; Viner's Abridgment, "Trespass," H. a 4, pl. 19. If one have a way over the land of another for his beasts to pass, and the beasts, being properly driven, feed the grass by morsels in passing, or run out of the way and are promptly pursued and brought back, trespass will not lie: See Viner's Abridgment, "Trespass," K. a. pl. 1.

A traveler on a highway, who finds it obstructed from a sudden and temporary cause, may pass upon the adjoining land ⁴⁷⁵ without becoming a trespasser, because of the necessity: Henn's Case, W. Jones, 296; Campbell v. Race, 7 Cush. 408, 54 Am. Dec. 728; Hyde v. Jamaica, 27 Vt. 443 (459); Morey v. Fitzgerald, 56 Vt. 487, 48 Am. Rep. 811.

An entry upon land to save goods which are in danger of being lost or destroyed by water or fire is not a trespass: 21 Henry VII, 27; Viner's Abridgment, "Trespass," H. a. 4, pl. 24, K. a. pl. 3. In Proctor v. Adams, 113 Mass. 376, 18 Am. Rep. 500, the defendant went upon the plaintiff's beach for the purpose of saving and restoring to the lawful owner a boat which had been driven ashore and was in danger of being carried off by the sea, and it was held no trespass: See, also, Dunwich v. Sterry, 1 Barn. & Adol. 831.

This doctrine of necessity applies with special force to the preservation of human life. One assaulted and in peril of his life may run through the close of another to escape from his assailant: 37 Henry VII, pl. 26. One may sacrifice the personal property of another to save his life or the lives of his fellows. In Mouse's Case, 12 Coke, 63, the defendant was sued for taking and carrying away the plaintiff's casket and its contents. It appeared that the ferryman of Gravesend took forty-seven passengers into his barge to pass to London, among whom were the plaintiff and defendant; and the barge being upon the water a great tempest happened and a strong wind, so that the barge and all the passengers were in danger

of being lost if certain ponderous things were not cast out, and the defendant thereupon cast out the plaintiff's casket. It was resolved that in case of necessity, to save the lives of the passengers, it was lawful for the defendant, being a passenger, to cast the plaintiff's casket out of the barge; that if the ferryman surcharge the barge, the owner shall have his remedy upon the surcharge against the ferryman, but that if there be no surcharge, and the danger accrue only by the act of God, as by tempest, without fault of the ferryman, everyone ought to bear his loss, to safeguard the life of a man.

It is clear that an entry upon the land of another may be justified by necessity, and that the declaration before us discloses a necessity for mooring the sloop. But the defendant questions the sufficiency of the counts because they do not negative the existence of natural objects to which the plaintiff ⁴⁷⁶ could have moored with equal safety. The allegations are, in substance, that the stress of a sudden and violent tempest compelled the plaintiff to moor to defendant's dock to save his sloop and the people in it. The averment of necessity is complete, for it covers not only the necessity of mooring, but the necessity of mooring to the dock; and the details of the situation which created this necessity, whatever the legal requirements regarding them, are matters of proof and need not be alleged. It is certain that the rule suggested cannot be held applicable irrespective of circumstance, and the question must be left for adjudication upon proceedings had with reference to the evidence of the charge.

The defendant insists that the counts are defective in that they fail to show that the servant, in casting off the rope, was acting within the scope of his employment. It is said that the allegation that the island and dock were in charge of the servant does not imply authority to do an unlawful act; and that the allegations as a whole fairly indicate that the servant unmoored the sloop for a wrongful purpose of his own, and not by virtue of any general authority or special instruction received from the defendant. But we think the counts are sufficient in this respect. The allegation is that the defendant did this by his servant. The words "willfully and designedly" in one count, and "negligently, carelessly and wrongfully" in the other, are not applied to the servant, but to the defendant acting through the servant. The necessary implication is that the servant was acting within the scope of his employment: 13 Ency. of Pl. & Pr. 922; *Vogeli v. Pickel Marble etc. Co.*, 49 Mo. App. 643; *Wabash Ry. Co. v. Savage*,

110 Ind. 156, 9 N. E. 85. See, also, *Palmer v. St. Albans*, 60 Vt. 427, 6 Am. St. Rep. 125, 13 Atl. 569.

Judgment affirmed and cause remanded.

One Entering upon the Sea Beach of Another and removing, for the purpose of restoring to its owner, a boat cast ashore by a storm and in danger of being carried off by the sea, is not a trespasser: *Proctor v. Adams*, 113 Mass. 376, 18 Am. Rep. 500. And a traveler going from a highway upon adjoining land from necessity, because the highway is made temporarily impassable by snow-drifts, is not guilty of trespass if he does no unnecessary damage: *Campbell v. Race*, 7 Cush. 408, 54 Am. Dec. 728; note to *Wright v. Austin*, 101 Am. St. Rep. 111.

CASES
IN THE
SUPREME COURT
OF
WASHINGTON.

SANDBERG v. ROWLAND.

[51 Wash. 7, 97 Pac. 1087.]

PARTY-WALL—Covenants Running with Land.—Covenants for the erection of a party-wall run with the land, so that when one of the parties thereto conveys his lot, the grantee may enforce against the other party to the original contract the provision therein for payment. (p. 1080.)

Boyle, Warburton, Quick & Brockway, for the appellants.

Bates, Peer & Peterson, for the respondents.

¶ **DUNBAR, J.** This is an action brought by plaintiffs, respondents here, on a party-wall agreement. It was tried in the court below upon stipulated facts. The pertinent facts stipulated are as follows: That on and prior to the seventeenth day of April, 1890, William Zinram and Frances Zinram, his wife, were the owners in fee simple of lot 9, in block 1504, in the ^s city of Tacoma, and that on and prior to the said seventeenth day of April, 1890, J. B. Thompson and Ida E. Thompson, his wife, were the owners in fee simple of the adjoining lot 8 in said block; that on said seventeenth day of April, 1890, William Zinram and Francis Zinram, as parties of the first part, and J. B. Thompson and Ida E. Thompson, as parties of the second part, made and entered into a certain contract for the erection of a party-wall upon the line between the two lots above described, which said contract was duly recorded in the office of the auditor of Pierce county. After setting forth in the agreement a description of the wall which the parties of the first part agreed to erect, the agreement concludes as follows: "In consideration of the payments and erection by

the said parties of the first part of the said party-wall, the parties of the second part for themselves, their heirs, executors, administrators, and assigns agree that whenever they shall erect or cause to be erected or whenever any other part of the said party-wall is utilized for a building other than the one now on said lot number eight they will pay the said parties of the first part, their heirs or assigns, their proper proportion of the price of said party-wall at that time without interest, price to be paid by parties of the second part to be determined at the time the party-wall shall be purchased by the said parties of the second part."

It was further stipulated that, subsequent to the making of said contract and pursuant thereto, said William Zinram and Francis Zinram caused to be erected on the line between said lot 9 and lot 8 a party-wall, four stories high, the full length of said lot; that on or about the thirtieth day of December, A. D. 1904, the Philadelphia Securities Company, being the owner in fee simple of said lot 9, made and executed an agreement of sale of the premises to the plaintiffs herein (it is not necessary to set forth this agreement of sale); that said plaintiffs entered into possession of said property under said contract; that thereafter the plaintiffs, under the terms and provisions of said contract, received a warranty deed from the ⁹ said Philadelphia Securities Company for said lot 9 on the twenty-sixth day of January, 1907; that the defendants are now, and at all times since the twenty-fourth day of January, 1903, have been, the owners in fee simple of lot 8 aforesaid, and the assignees and successors in interest of said J. B. Thompson and Ida E. Thompson, his wife; that said defendants on or about the first day of July, 1906, caused to be erected a five-story brick building upon said lot 8, and have utilized therefor the party-wall theretofore erected by William Zinram and Francis Zinram upon the line between said lots 8 and 9; that on the twenty-ninth day of November, 1905, William Zinram and Francis Zinram acknowledged the receipt from Charles Rowland and Clara Williams of full payment of any and all claims under said party-wall agreement, and granted the said Charles Rowland and Clara Williams the right to the use of the said party-wall without any further compensation; that the proportion of said party-wall at the time it was used and utilized by the defendants was of the reasonable value of sixteen hundred and seventy-three dollars and fifty-nine cents; that the defendants have failed, refused and neglected to pay the plaintiffs any part of the value of

said party-wall, although requested so to do. After the hearing and argument of counsel on said agreed statement of facts, the court charged that the plaintiffs were entitled to a judgment against the defendants for the sum of sixteen hundred and seventy-three dollars and sixty-five cents, costs and disbursements. From this judgment in favor of the plaintiffs, this appeal is taken.

On the subject of the payment of the expense of the construction of a party-wall, the decisions of the courts have not been uniform. On the contrary, there has been an irreconcilable conflict. In New York and Illinois it has been uniformly decided that the payment for a party-wall is in no way connected with the land, and that the covenants in regard to the payment of the same or for its use cannot be construed to run with the land. But these are extreme cases, the logic of which does not seem to have appealed to courts generally. In other jurisdictions it has been determined that the right ¹⁰ to that portion of a party-wall resting on the lot of an adjoining owner is not personal to the owner of the lot on which the building is erected, but one running with the land, and that therefore a conveyance of the lot on which the building is erected passes to the grantee the right to recover of the adjacent owner the value of one-half of the wall when used by him. In many other jurisdictions it is held that it is purely a question of intention, to be gathered from the agreement of the original parties to the contract.

It is conceded by the appellants in this case that the doctrine of New York and Illinois has been repudiated by this court in *Hoffman v. Dickson*, 47 Wash. 431, 125 Am. St. Rep. 907, 92 Pac. 272, 93 Pac. 523, and it was there decided that such covenants run with the land, but that it must appear from the party-wall agreement that such was the intention of the parties to the contract. It is stoutly contended, however, that the terms of the contract in that case were essentially different from the terms of the contract in the case at bar, and that that case is therefore not an authority which would sustain the judgment in this case. It is true that the language of the agreement in that case was not identical with the language of the agreement in this case. In the *Hoffman* case it was provided that the covenants should run with the land and should bind the heirs, legal representatives and assigns of the respective parties to the contract. But the whole argument of the opinion indicates that the court would have affirmed the judgment if the language had been identical with the language used in this case. The decision was based

largely upon the decision of the case of *Southworth v. Perring*, 71 Kan. 755, 114 Am. St. Rep. 527, 81 Pac. 481, 2 L. R. A., N. S., 87, and what was said in the answer to the petition for rehearing in that case, in 82 Pac. 785, and the argument of the court in that case, was quoted with approval. In that case the language of the agreement which was construed was as follows: ¹¹ "The parties hereto bind and obligate their heirs, executors, administrators and assigns to the fulfillment of all the terms and conditions of this agreement."

It is contended by the appellants that such words are stronger than the words used in the contract here under consideration, and are easily distinguished therefrom. While the language is more redundant, the legal effect is exactly the same, for the statement that the parties of the second part, for themselves, their heirs, executors, administrators, etc., is just as binding upon themselves, their heirs, executors, administrators, and assigns as though they had stated that they were bound. The court in its conclusion stated: "We regard contracts of the character of that here involved as in their nature so related to the real property affected, and so adapted to impose their obligations and bestow their benefits upon the successors in title of the land owners by whom they are made, that the purpose that they shall have that effect is readily to be inferred from the employment of language having any substantial tendency in that direction. In the present case we hold that the use of the clause making the terms of the contract binding upon the heirs, executors, administrators and assigns of the parties sufficiently indicates that intention. What the effect of the omission of that provision might have been we do not determine."

But it is also contended by appellants that the cases cited and relied upon in *Southworth v. Perring*, 71 Kan. 755, 114 Am. St. Rep. 527, 81 Pac. 481, 2 L. R. A., N. S., 87, do not justify the conclusion reached by the court in that case. An examination of those cases convinces us that the contention is not justified, but that, on the contrary, many of the cases cited were determined on language less calculated to evince an intention to cause the covenants to run with the land than was the language used in that case. The authorities are so exhaustively set forth in that opinion and in the subsequent opinion on petition for rehearing, as also in the opinion of this court in *Hoffman v. Dickson*, 47 Wash. 431, 125 Am. St. Rep. 907, 92 Pac. 272, 93 Pac. 523, that we do not feel justified in again reviewing them, but hold that in this case

the covenants to pay for the wall were covenants running with the land.

¹² There seems to be nothing in the contention that the agreed statement of facts does not affirmatively show that payment for the wall had not been made to the Philadelphia Securities Company. The respondents were in possession of the premises and the wall at the time appellants paid the Zinrams, and it would be a violent presumption, in the absence of any showing or claim to that effect, that they then proceeded to pay the Philadelphia Securities Company after the surety company had contracted to convey the land to respondents.

The judgment is affirmed.

Mount, Rudkin, and Fullerton, JJ., concur.

Root, J., dissents.

Hadley, C. J., and Crow, J., took no part.

An Agreement Between Adjoining Owners to pay for the building of a party-wall is generally regarded as a covenant running with the land: *Rugg v. Lemley*, 78 Ark. 65, 115 Am. St. Rep. 17; *Southworth v. Perring*, 71 Kan. 755, 114 Am. St. Rep. 527; *Hoffman v. Dickson*, 47 Wash. 431, 125 Am. St. Rep. 907; notes to *Dunscorn v. Randolph*, 89 Am. St. Rep. 941; *Geiszler v. De Graaf*, 82 Am. St. Rep. 679. If the respective owners of two adjoining lots enter into an agreement, expressly binding their heirs and assigns, which provides that the wall of a building one of them is about to erect shall be placed upon the dividing line, and that when the other builds he shall use it as a party-wall and pay the first party one-half of its value, and after the building is erected both lots are conveyed, the grantee of the vacant lot who builds thereon and makes use of the wall must make payment therefor to the grantee of the improved lot: *Southworth v. Perring*, 71 Kan. 755, 114 Am. St. Rep. 527. One who uses a wall erected on the dividing line by the owner of an adjacent lot should pay a reasonable price for the use estimated as of the time the user takes place, and this although neither he nor his vendor was a party to the erection of the wall, and made no agreement, express or implied, concerning it: *Spaulding v. Grundy*, 126 Ky. 510, 128 Am. St. Rep. 328.

SULLIVAN v. SEATTLE ELECTRIC COMPANY.

[51 Wash. 71, 97 Pac. 1109.]

EVIDENCE.—The Record of a Coroner's Inquest is not admissible in civil actions to show the cause of death. (p. 1084.)

STREET RAILWAY—Death of Passenger—Evidence.—In an action against a street railway company for the death of an intoxicated passenger which occurred after he was permitted to alight at a dangerous place, evidence is not admissible to show that he attempted to get off the car at a point where the streets were safe, but was restrained by the railway employés. (p. 1086.)

STREET RAILWAY—Death of Passenger—Inadmissible Exclamations.—In an action for the death of an intoxicated passenger permitted to alight at a dangerous place, an exclamation by another passenger that "it was murder" to allow him to get off there is the expression of an opinion and not admissible in evidence. (p. 1086.)

STREET RAILWAY—Evidence of Intoxication of Passenger. In an action against a street railway company for the death of an intoxicated passenger permitted to alight at a dangerous place, evidence that when he got on the car he was all muddy and bloody about the face is admissible, as showing his then condition. (p. 1087.)

TRIAL—Misconduct of Counsel in Argument.—In an action against a street railway company for the death of an intoxicated passenger, counsel should not be permitted to refer to the absence of evidence that the deceased was a drunkard. (p. 1087.)

STREET RAILWAY—Intoxication of Passenger.—A conductor has a right to presume that every passenger entering his car is sane and sober until he has actual notice to the contrary; he is not required to make a mental or physical examination to ascertain his condition, with a view to protecting him. (pp. 1087, 1088.)

STREET RAILWAY—Death of Intoxicated Passenger.—Where a passenger, who has been permitted by the conductor to alight from a car at a lake station, falls from the platform or trestle and is drowned, the fact that he fell by reason of intoxication does not preclude a recovery against the carrier if its employés had notice of his intoxication and the place was dangerous for a person in his condition. (p. 1089.)

This case was before the supreme court in 44 Wash. 53, 86 Pac. 786, where the judgment of the court below was reversed and a new trial ordered. The action was for the death of Sullivan by drowning, alleged to have been due to the negligence of the Seattle Electric Company. The facts surrounding the death, as stated in 44 Wash. 53, 86 Pac. 786, are substantially as follows: The Seattle Electric Company operated a car line along the west edge of Lake Union and over the waters of that lake. The line where it crosses the lake is double-tracked, the east track being for cars outbound from Seattle and the west track for those returning. Immediately to the west of the car line, and separated from it by a railway, is a plank roadway known as the "Boulevard." At intervals along its car line where it parallels this roadway

the electric company has constructed platforms or stations opening into the roadway for the convenience of its passenger service. One of these stations, "Hinckley Station," lies about midway of the lake.

Sullivan boarded one of the cars of the company in Seattle one evening while under the influence of liquor. Remembering some duty he had not performed in Seattle, he insisted on being let off the car after it had entered on the Lake Union trestle; but the conductor, deeming it unsafe in his condition to let him off there, forcibly restrained him from leaving the car. This enraged Sullivan, and he indulged in vile and abusive language which he refused to cease. The conductor finally told him that he could get off at Hinckley Station, and when the car reached that place he was permitted to alight at the usual place used by alighting passengers. There was testimony that Sullivan walked in the direction of the roadway as the car started along. This was the last time he was seen alive. A few days later his body was found in the lake directly below the south edge of the platform where it joins the plank roadway. The negligence of the electric company, as alleged by the plaintiffs, consisted in permitting Sullivan to get off the car at Hinckley Station, which they allege was a dangerous place for one in his condition.

James B. Howe and R. G. Sharpe, for the appellant.

John E. Humphries and George B. Cole, for the respondents.

⁷² RUDKIN, J. This action was instituted by the widow and minor children of David Sullivan, deceased, to recover damages for his death, which is alleged to have been caused by the wrongful act or neglect of the defendant. The case was before this court on a former appeal where a full statement of the facts will be found: *Sullivan v. Seattle Elec. Co.*, 44 Wash. 53, 86 Pac. 786. On a retrial of the action, the plaintiffs had judgment for the sum of three thousand dollars, and the defendant has appealed. In the course of the trial the respondents offered in evidence the report of the deputy coroner to the county auditor, made pursuant to section 6 of the act of March 7, 1891, Laws 1891, page 188, for the purpose of proving the cause of death. The appellant challenged the competency of this report, but its objection was overruled and this ruling is the first error assigned. It was formerly held that the record of a coroner's inquest on a dead body was competent but not conclusive evidence of

the cause of death in all civil actions, because it was the result of an inquiry made under competent public authority to ascertain matters of public interest and concern: 1 Greenleaf, sec. 556. This rule still prevails in a few jurisdictions, but the great ⁷³ weight of modern authority is against it: *Memphis & C. R. Co. v. Wormack*, 84 Ala. 149, 4 South. 618; *Germania Life Ins. Co. v. Ross-Lewin*, 24 Colo. 43, 65 Am. St. Rep. 215, 51 Pac. 488; *In re Dolbeer's Estate*, 149 Cal. 227, 86 Pac. 695; *Central R. Co. v. Moore*, 61 Ga. 151; *Union Cent. Life Ins. Co. v. Hollowell*, 14 Ind. App. 611, 43 N. E. 277; *Aetna Life Ins. Co. v. Kaiser*, 115 Ky. 539, 74 S. W. 203; *Wasey v. Travelers' Ins. Co.*, 126 Mich. 119, 85 N. W. 459; *State v. Cecil Co. Commrs.*, 54 Md. 426; *Louis v. Connecticut Mut. Life Ins. Co.*, 58 App. Div. 137, 68 N. Y. Supp. 683; *Insurance Co. v. Schmidt*, 40 Ohio St. 112; *Cox v. Royal Tribe*, 42 Or. 365, 95 Am. St. Rep. 752, 71 Pac. 73, 60 L. R. A. 620; *Aetna Life Ins. Co. v. Milward*, 118 Ky. 716, 68 L. R. A. 285, 82 S. W. 364; *Kane v. Supreme Tent, Knights of Maccabees*, 113 Mo. App. 104, 87 S. W. 547; *Boehme v. Sovereign Camp, Woodmen of the World*, 98 Tex. 376, 84 S. W. 422; *Kinney v. Brotherhood of American Yeoman*, 15 N. D. 21, 106 N. W. 44; *Chambers v. Modern Woodmen of America*, 18 S. D. 173, 99 N. W. 1107; *Wigmore on Evidence*, sec. 1671.

The rule excluding such records prevails indiscriminately in actions on insurance policies and in actions to recover damages for death by wrongful act, as will appear from an examination of the cases cited. The reason for the change in the rule is not far to seek. "By the ancient law, such high credit was given to a coroner's inquest that the judge would not receive a verdict acquitting a person of the death of a man found against the accused by the coroner's inquest, unless the jury finding such acquittal also found what other person did the act, or by what other means the party came to his death: 2 Bacon's Abridgment, tit. 'Coroner.' This rule does not now obtain anywhere, and the natural inquiry is, What remnants of it ought to remain? The inquiry into the cause of death cannot, under our law, in and of itself establish the status of anyone or of any property. . . . At the ancient common law when the jury found that a person had committed suicide, ignominious burial followed. To this extent the inquest established the status of the deceased, but, under our practice, nothing follows ⁷⁴ upon the verdict except in case it is found that a crime has been committed. Why, then, should a stranger to the proceeding be bound by

the verdict? Why should it be evidence against a stranger of the cause of his death? We cannot see any well-grounded reason why such a verdict should be either conclusive or evidence against a stranger to the proceeding": *Wasey v. Travelers' Ins. Co.*, 126 Mich. 119, 85 N. W. 459.

The reasons for excluding this class of testimony are thus stated by the court in *Germania Life Ins. Co. v. Ross-Lewin*, 24 Colo. 43, 65 Am. St. Rep. 215, 51 Pac. 488. "In case of death under suspicious circumstances, or resulting from accident, the rule permitting inquisitions to be used in evidence would result in a race and scramble to secure a favorable coroner's verdict, that would influence, and perhaps control, in case suit should be instituted against life insurance companies upon policies of insurance, and in cases of accidents occurring as the result of negligence on the part of corporations operating railways, street-car lines, mining for coal or the precious metals, etc. Law-writers, of late, have frequently animadverted upon the carelessness with which such inquests are frequently conducted, and to allow inquisitions to be used in a suit between private parties upon a cause of action growing out of the death of the deceased, as in this case, would be to introduce an element of uncertainty into the practice which, we think, would be contrary to public policy, and pernicious in the extreme; and for this reason we conclude, upon careful consideration, that the safer and better rule is to exclude such inquisitions."

We have thus far considered the report of the coroner as if it were entitled to the same degree of credit as the record of an inquest, because the parties have so treated it, but in our opinion the report does not stand on as high a plane as the formal record. It is simply a report made to the auditor by the coroner as a part of the vital statistics of the state, under the provisions of the act creating the state board of health, and, as said by the court in *Sovereign Camp of W. O. W. v. Grandon*, 64 Neb. 39, 89 N. W. 448: "It is a mere police regulation, and is not intended for supplying the public at large with information upon which reliance⁷⁵ may be placed in the business affairs of the community. We do not think the record is of such a character as to entitle it to be received in evidence, as affecting the interest of a party to a litigation."

The respondents offered testimony tending to show that the deceased attempted to get off the car at a point where the streets were graded and level, but was restrained from so doing by the servants of the appellant. This testimony was ad-

mitted over objections, but the court afterward charged the jury that they could only consider it in determining the condition of the deceased. Doubtless the entire conduct of the deceased while he was a passenger on the car might be given in evidence for the purpose of showing his condition and the knowledge that the appellant or its servants had of that condition, but the condition of the streets where the appellant first attempted to leave the car had no bearing upon that question. The jury might well infer from this testimony that the appellant was in the wrong in restraining the deceased from leaving the car at a safe and proper place, and how far this fact may have influenced or entered into the general verdict we do not know. The testimony bearing upon the character of the streets where the deceased attempted to leave the car should have been excluded.

Three witnesses called by the respondents were permitted to testify, over objection, that at or about the time the deceased left the car, a woman passenger in the same car got up or jumped up, and exclaimed that "it was murder," or "looked like murder," to let the deceased off at that place. The appellant assails the ruling of the court in admitting this testimony on three grounds: First, because the exclamation was not made at the time the deceased left the car; second, because the exclamation was made by a passenger or bystander in no way connected with the principal transaction; and third, because the exclamation was a mere expression of opinion. We will pass over the first two grounds of objection as they are not necessarily involved in this case, and so far as we are at present ⁷⁶ advised, will not arise on a retrial. Assuming without deciding that exclamations of a mere bystander, in no manner connected with the principal transaction, are admissible in evidence, yet such exclamations must relate to matters of fact which the party might properly testify to if called as a witness, and not to mere matters of opinion. To hold otherwise would place exclamations above sworn testimony. If the exclamation in question related to the principal transaction at all, it was nothing more than the expression of an opinion on the part of this woman that if a person in the condition of the deceased were permitted to get off the car at that point he would meet his death. It must be perfectly apparent to anyone that if called as a witness this woman could give expression to no such opinion, and if her opinion found its way into the records inadvertently it would be forthwith stricken: Hughes' Admr. v. Louisville & N. R. Co., 104 Ky. 774, 48 S. W. 671; Allen

v. State, 111 Ala. 80, 20 South. 490; State v. Ramsey, 48 La. Ann. 1407, 20 South. 904; Kaelin v. Commonwealth, 84 Ky. 354, 1 S. W. 594; De Walt v. Houston etc. R. Co., 22 Tex. Civ. App. 403, 55 S. W. 534.

One of the witnesses for the respondents was permitted to testify over objection that when the deceased got on the car he was all muddy and bloody about the face. We think this testimony had some tendency to show the condition of the deceased and to attract the attention of the servants of the appellant to his condition, and that the testimony was proper for that purpose.

It is next objected that counsel for the respondents was permitted to read portions of the testimony taken at another trial in his argument to the jury. Of course, it would be improper to permit such testimony to be read unless it was also offered at the second trial, but the question will not arise again and we will not further discuss or consider it. In his closing argument to the jury counsel for the respondent further said concerning the deceased: "He was a man of good habits, gentlemen. If he had not been, they would have ⁷⁷ raked this land over with a fine tooth comb to show this man was a drunkard." The general character of the deceased was not an issue in the case; it would not have been competent for the appellant to offer proof of his general character for sobriety, and counsel should not have been permitted to refer to the absence of such testimony in argument.

The following instruction to the jury was duly excepted to, and the giving of the instruction is assigned as error: "If you find from the evidence that said David Sullivan was in such a state of intoxication as to be unable to care for himself and that the servants of the defendant in charge of the car upon which he was a passenger knew that he was in such condition, or by the exercise of reasonable care, that is, such care as a reasonably prudent person engaged in like occupation would ordinarily exercise under similar circumstances to ascertain the condition of a passenger, should have known that he was in such an intoxicated condition as to be unable to care for himself, then it was the duty of the servant of the defendant company operating said car to take such precaution for his safety as his condition required under all the surrounding circumstances."

This instruction is erroneous. A conductor has a right to presume that every passenger entering his car is both sane and sober until he has actual notice to the contrary. He is not compelled to make a mental or physical examination to

ascertain his condition, and the doctrine of imputed or implied notice has no application to such a case.

"If a passenger voluntarily becomes intoxicated, the law does not impose the duty on the common carrier to place a guard over such passenger to prevent him from injuring himself in a place of danger. If a passenger, however, while in such condition as averred, does place himself in a place of peril, then before the company can be held liable if an injury results therefrom it must be proven that the agents or servants operating the train knew that fact—not that they should have known it because of any duty by law imposed on the company to watch such passenger—but the actual fact of such perilous position must be brought home to ⁷⁸ the knowledge of the servants operating such train. The company was not bound to have its servants at the rear platform of the coach on which Carr was sitting at Mulkeytown for the reason that it owed him no such duty, as he had not indicated any intention of alighting there, and in fact he did not intend to do so": *St. Louis etc. R. Co. v. Carr*, 47 Ill. App. 353.

"We think, however, if a passenger is in need of special assistance, either from sickness or other misfortune, and this fact is known to the employés of the carrier, it is their duty to render it; but they are not required to anticipate such wants or needs. The trial court therefore erred by inserting into the instructions given to the jury the idea that it was incumbent upon the employés of the appellant to observe the condition of the passengers in order to see whether or not they needed assistance. This thought is embraced in the use of the expression 'or was apparent' in the instructions after stating the duty of the employés of appellant if appellee's health was known to them. As said before, if the employés of the railroad knew that the appellee was in feeble health, and needed assistance, it was their duty to render her such reasonable help as lay in their power in order that she might alight from the car in safety. But they owed her no duty of observation to ascertain her condition, and therefore the expression 'or was apparent' should have been omitted": *Illinois Cent. R. Co. v. Cruse*, 29 Ky. Law Rep. 914, 96 S. W. 821. See, also, *Strand v. Chicago etc. R. Co.*, 67 Mich. 380, 34 N. W. 712.

Other errors are assigned in the giving and refusing of instructions, but we think these questions are fully covered by our former opinion. As there stated, the issues in this case are: First, was the deceased intoxicated? Second, did

the servants of the appellant have actual notice of his condition? Third, was the place where the deceased was permitted to alight from the car a reasonably safe place to land a person in his condition? And fourth, was the act of the appellant or its servants in suffering and permitting the deceased to leave the car at that particular time and place and in his then condition the natural and proximate cause of his death? If the jury ⁷⁹ should find all of these issues in favor of the respondents they would be entitled to a verdict, and the mere fact that the deceased fell into the lake from the platform or trestle by reason of his intoxication—if he did so fall—would not of itself preclude a recovery, as the appellant was bound to anticipate such negligence on his part. Such we believe to be the law as laid down in the former opinion, and that opinion is the law of this case.

The judgment of the court below is reversed, and the cause is remanded for a new trial.

Fullerton, Dunbar, Crow and Mount, JJ., concur.

A Railway Company is not Required to accept as a passenger a person who is incapable of taking care of himself by reason of intoxication; but if it does accept him as a passenger it owes him the duty of exercising such care as may be reasonably necessary for his safety: See the note to Illinois Cent. R. R. Co. v. Smith, 107 Am. St. Rep. 299; Price v. St. Louis etc. Ry. Co., 75 Ark. 479, 112 Am. St. Rep. 79; Benson v. Tacoma Ry. & Power Co., 51 Wash. 216, post, p. 1096. As to the liability of the railway company for the death of an intoxicated passenger after he has been put off the train, see Haug v. Great Northern Ry. Co., 8 N. D. 23, 73 Am. St. Rep. 727; Cincinnati etc. Ry. Co. v. Marrs, 119 Ky. 954, 115 Am. St. Rep. 289.

ANUSTASAKAS v. INTERNATIONAL CONTRACT COMPANY.

[51 Wash. 119, 98 Pac. 93.]

GUARDIAN AD LITEM—Failure to Appoint.—The fact that a guardian ad litem is not properly appointed for minors in an action brought by them and their mother for wrongful death does not authorize a nonsuit if the complaint states a cause of action in her favor. (p. 1090.)

ALIENS.—The Plea of Alienage is not favored in law. (p. 1093.)

DEATH.—A Nonresident Alien Widow may Maintain an Action in Washington for the wrongful death in that state of her husband. (p. 1093.)

Roberts & Hulbert and Ballinger, Ronald, Battle & Tennant, for the appellant.

Edward Brady, for the respondents.

119 RUDKIN, J. This action was instituted by the widow and minor children of G. K. Anustasakas, deceased, to recover damages for his death caused, as is alleged, by the neglect of the defendant. At the close of the plaintiffs' testimony the court granted a nonsuit, but afterward set aside the nonsuit and granted a new trial. From the latter order this appeal is taken.

There is nothing in the record to indicate the particular grounds upon which either motion was granted, but in support of the nonsuit the appellant contends: (1) That the guardian ad litem for the minor respondents was not properly appointed; (2) that there was no proof of negligence on the ¹²⁰ part of the appellant; (3) that the deceased assumed the risk; (4) that the deceased was guilty of contributory negligence; and (5) that nonresident aliens have no right of action to recover damages for death by wrongful act or neglect under our statute.

The fact that the guardian ad litem was not properly appointed for the minors, if such be the fact, would not authorize a nonsuit, as the complaint stated a cause of action in favor of the widow at least, unless her alienage would defeat a recovery, a question we will discuss later.

The next three questions may be considered together. It appears from the testimony that the deceased met his death while in the employ of the appellant, and that death resulted from injuries received from a cave-in, in a ditch in which he was working. In view of a retrial of the action, we deem it unnecessary to discuss the facts further than to say that under the testimony the questions of negligence, contributory negligence, and assumption of risk, were so clearly for the jury that we are constrained to believe that the nonsuit must have been granted on other grounds: *Christianson v. Pacific Bridge Co.*, 27 Wash. 582, 68 Pac. 191, and cases there cited; *Hilgar v. Walla Walla*, 50 Wash. 470, 97 Pac. 498, 19 L. R. A., N. S., 367.

The remaining question is, Can a nonresident alien maintain an action to recover damages for death by wrongful act or neglect under our statute? The courts of Pennsylvania, Wisconsin, and Indiana have decided this question in the negative: *Deni v. Pennsylvania R. Co.*, 181 Pa. 525, 59 Am. St. Rep. 676, 37 Atl. 558; *McMillan v. Spider Lake Sawmill*

& Lumber Co., 115 Wis. 332, 95 Am. St. Rep. 947, 91 N. W. 979, 60 L. R. A. 589; Cleveland etc. R. Co. *v.* Osgood, 36 Ind. App. 34, 73 N. E. 285.

The federal courts sitting in Pennsylvania, from necessity, follow the decisions of the local courts: Zeiger *v.* Pennsylvania R. Co., 151 Fed. 348, affirmed in 158 Fed. 809, 86 C. C. A. 69. In Brannigan *v.* Union Gold Min. Co., 93 Fed. 164, the United States circuit court for Colorado followed the Pennsylvania ¹²¹ decisions in construing the Colorado statute, and we are informed that the United States circuit court for this state, in a case not reported, followed the Wisconsin decision in construing our statute. Woodward *v.* Michigan etc. R. Co., 10 Ohio St. 121, Texas & Pac. R. Co. *v.* Richards, 68 Tex. 375, 4 S. W. 627, St. Louis etc. R. Co. *v.* McCormick, 71 Tex. 660, 9 S. W. 540, 1 L. R. A. 804, De Harn *v.* Mexican Nat. R. Co., 86 Tex. 68, 23 S. W. 381, and Mexican Nat. R. Co. *v.* Jackson, 89 Tex. 107, 59 Am. St. Rep. 28, 33 S. W. 857, 31 L. R. A. 276, cited by appellant from the courts of Ohio and Texas, are not in point here, as they simply hold that the statutory right of action will not be enforced by the courts of another state. However, this rule is by no means universal: Stewart *v.* Baltimore & O. R. Co., 168 U. S. 445, 18 Sup. Ct. Rep. 105, 42 L. ed. 537.

On the other hand, the courts of Massachusetts, New York, Virginia, Illinois, Missouri, Georgia, Alabama, and Tennessee hold that alienage or nonresidence of the widow or minor children is no defense to actions of this kind: Mulhall *v.* Fallon, 176 Mass. 266, 79 Am. St. Rep. 309, 57 N. E. 386, 54 L. R. A. 934; Tanas *v.* Municipal Gas Co., 88 App. Div. 251, 84 N. Y. Supp. 1053; Pocahontas Collieries Co. *v.* Rukaes, 104 Va. 278, 51 S. E. 449; Kellyville Coal Co. *v.* Petraytis, 195 Ill. 215, 88 Am. St. Rep. 191, 63 N. E. 94; Philpott *v.* Missouri Pac. R. Co., 85 Mo. 164; Augusta R. Co. *v.* Glover, 92 Ga. 132, 18 S. E. 406; Luke *v.* Calhoun Co., 52 Ala. 115; Chesapeake etc. R. Co. *v.* Higgins, 85 Tenn. 620, 4 S. W. 47.

In speaking of the Pennsylvania decisions in Vetalaro *v.* Perkins, 101 Fed. 393, Colt, J., said: "The decisions of the court in both these cases rest largely upon the proposition that no case can be found in which Lord Campbell's act has been extended to nonresident aliens, and that the act has no extraterritorial force. This is hardly in accordance with the fact. A more correct statement, it seems ¹²² to me, would be to say that the English courts have never questioned the right of a nonresident alien to maintain an action in the common-law courts under Lord Campbell's act."

In *Mulhall v. Fallon*, 176 Mass. 266, 79 Am. St. Rep. 309, 57 N. E. 386, 54 L. R. A. 934, Holmes, C. J., said: "The question then becomes one of construction, and of construction upon a point upon which it is probable that the legislature never thought when they passed the act. In view of the decisions to which we have referred, we lay on one side as too absolute some expressions which are to be found in the English cases, and some of which are cited in *Adam v. British & Foreign Steamship Co.*, 79 L. T., N. S., 31. Our different relation to our neighbors politically and territorially is a sufficient ground for a more liberal rule, at least as to inhabitants of the United States.

"One or two cases may be found where a general grant of a right of action for wrongfully causing death has been held to confer no rights upon nonresident aliens: *Deni v. Pennsylvania R. R.*, 181 Pa. 525, 59 Am. St. Rep. 676, 37 Atl. 558; *Brannigan v. Union Gold Min. Co.*, 93 Fed. 164. But compare *Knight v. West Jersey R. R.*, 108 Pa. 250, 56 Am. Rep. 201. On the other hand, in several states the right of the nonresident to sue is treated as too clear to need extended argument: *Philpott v. Missouri Pacific R. R.*, 85 Mo. 164; *Chesapeake etc. R. R. v. Higgins*, 85 Tenn. 620, 4 S. W. 47; *Augusta Ry. v. Glover*, 92 Ga. 132, 18 S. E. 406; *Luke v. Calhoun County*, 52 Ala. 115.

"Under the statute the action for death without conscious suffering takes the place of an action that would have been brought by the employé himself if the harm had been less, and by his representative if it had been equally great, but the death had been attended with pain: Stats. 1887, c. 270, sec. 1, cl. 3. In the latter case there would be no exception to the right of recovery if the next of kin were nonresident aliens. It would be strange to read an exception into general words when the wrong is so nearly identical, and when the different provisions are part of one scheme. In all cases the statute has the interest of the employés in mind. It is on their account that an action is given to the widow or next of kin. Whether the action is to be brought by them or by the administrator, the sum to be recovered is to be assessed with ¹²³ reference to the degree of culpability of the employer or negligent person. In other words, it is primarily a penalty for the protection of the life of a workman in this state. We cannot think that workmen were intended to be less protected if their mothers happen to live abroad, or less protected against sudden than against lingering death. In view of the very large amount of foreign labor employed in

this state we cannot believe that so large an exception was silently left to be read in. Whether if the statute were of a different kind we could make a distinction between a mother living just across the boundary line between Massachusetts and Rhode Island and one living in Ireland, need not be considered now."

The plea of alienage is not favored in law, and we are of opinion that the rule which permits nonresident aliens to maintain actions of this kind is supported by the weight of authority, and is more in harmony with the liberal cosmopolitan spirit of the age than the narrow provincial rule which would close our courts to widows and orphans solely because they happen to be nonresident aliens.

The order is therefore affirmed.

Hadley, C. J., Fullerton, Crow, Mount and Dunbar, JJ., concur.

The Holding of the Principal Case, while opposed by some decisions, has the support of the majority of the authorities and seems sound in principle: Pittsburgh etc. Ry. Co. v. Naylor, 73 Ohio St. 115, 112 Am. St. Rep. 701; Alfson v. Bush Co., 182 N. Y. 393, 108 Am. St. Rep. 815, and cases cited in the cross-reference note thereto.

KELLY v. KUHNHAUSEN.

[51 Wash. 193, 98 Pac. 603.]

NAMES—Doctrine of Idem Sonans.—The names "Minnie E. Tilter" and "Minnie E. Tiller" are idem sonans. (p. 1095.)

TAX TITLE—Misnomer of Party—Idem Sonans.—Tax proceedings will not be set aside because the notice of summons thereunder was addressed to Minnie E. Tilter instead of Minnie E. Tiller, for these names are idem sonans. (pp. 1094, 1096.)

C. J. Stephanus, for the appellants.

Walter S. Fulton, for the respondent.

1903 DUNBAR, J. The facts in this case are stipulated. The respondent, Minnie E. Kelly, plaintiff below, was formerly Minnie E. Tiller, and took title to the real estate in question in that name, December 8, 1897. The taxes for 1900, 1901, and 1903 were allowed to become delinquent. On July 28, 1904, a certificate of delinquency for the delinquent taxes of 1900 was issued to Hugo N. Kuhnhausen. On October 18, 1904, the holder of the certificate of delinquency

began an action to foreclose the same, but named as the parties defendant thereto "Minnie E. Tilter and John Doe Tilter, her husband, whose true first name is to plaintiff unknown, and all persons unknown, if any, having or claiming an interest or estate in and to the hereafter described real property." The only service had was by publication, addressed to the defendants as stated above, Minnie E. Tiller being a nonresident of the state during all the time mentioned herein. No appearance was made by any of the defendants, and judgment and sale followed, the defendant Fred Nuglisch claiming through the purchaser at ¹⁹⁴ the tax sale. This action was brought to set aside the tax proceedings because the notice or summons thereunder was addressed to Minnie E. Tilter instead of Minnie E. Tiller. On the trial of the cause, judgment was rendered in favor of the plaintiff, the respondent here, and appeal followed.

The appellants contend that the names "Minnie E. Tilter" and "Minnie E. Tiller" are idem sonans, and that the court erred in holding that they were not. This is really the only question to be determined in the case.

"Idem sonans is said to exist if the attentive ear finds difficulty in distinguishing them when pronounced, or if common and long-continued usage has by corruption or abbreviation made them identical in pronunciation": *State v. Griffie*, 118 Mo. 188, 23 S. W. 878.

The same definition might be brought into requisition where the duty devolves upon the eye instead of the ear to distinguish the names.

"The rule of idem sonans is that absolute accuracy in spelling names is not required in legal documents or proceedings, either civil or criminal; that if the name as spelled in the document, though different from the correct spelling thereof, conveys to the ear, when pronounced according to the commonly accepted methods, a sound practically identical with the sound of the correct name as commonly pronounced, the name as thus given is a sufficient designation of the individual referred to, and no advantage can be taken of a clerical error": *Hubner v. Reickhoff*, 103 Iowa, 368, 64 Am. St. Rep. 191, 72 N. W. 540.

It is said in *State v. White*, 34 S. C. 59, 27 Am. St. Rep. 783, 12 S. E. 661, quoting from *Schooler v. Asherst*, 1 Litt. 216, 13 Am. Dec. 232: "The doctrine of idem sonans has been much enlarged by modern decisions to conform to the growing rule that a variance, to be material, must be such a one as has misled the opposite party to his prejudice": and quot-

ing from *Ward v. State*, 28 Ala. 53: "The books abound in hair-breadth distinctions; but we apprehend the true rule to be, that if the names may be sounded ¹⁹⁵ alike, without doing violence to the power of the letters found in the variant orthography, then the variance is immaterial"; the court holding that "Canada McCutcheon" and "Kernedy McCutcheon" are idem sonans. The decisions on this question are numerous and irreconcilable, some courts holding that certain names fall within the rule while other courts refuse to apply the rule to similar names which are equally indistinguishable. The cases are compiled in 21 American and English Encyclopedia of Law, second edition, pages 313 to 317, inclusive, and for the reason above stated it would be profitless to cite and analyze the hundreds of cases there presented. But we think, under the overwhelming weight of authority, that the names under discussion are idem sonans.

One of the strongest cases presented by the respondent in opposition to this contention is *Chamberlain v. Blodgett*, 96 Mo. 482, 10 S. W. 44, where in a tax foreclosure case it was held that, where the proceedings were against M. B. Miller and the true name of the owner, a nonresident, was M. B. Millen, the court acquired no jurisdiction. It will be noticed, however, that both Miller and Millen are common names, which would not attract any particular attention to the listener or the hearer. It will be further observed that only the initials in each case are set forth. Whether the court would have so ruled had there been a full Christian name used, as in this case, is problematical. The question is not, Are the names Tiller and Tilter, detached and unassociated with anything else, idem sonans? It might be possible that so considered they would not be, although it must be confessed that the similarity in sound is so great that, were the names pronounced by an ignorant person, or one who was careless in articulation or whose voice was inclined to the husky, the difference in sound would scarcely be perceptible. For the names must be construed with reference to their associations; that is, in this case with reference to their respective initials or given names, and considering them altogether the question is, Would the variance mislead? The only variance in this case is the substitution of ¹⁹⁶ the letter "t" for the second letter "l." In the first place, it is not a common name. In the second place, the initial "E" is the same; and in the third place, the given name "Minnie" is the same. So that it seems to us that the pictures presented to the eye of the ordinary reader are so nearly identical that the danger

of being misled is too remote and improbable to justify the annulment of an otherwise valid judgment. And if the party has not been misled, of course the mistake, however flagrant in itself, will be harmless.

The judgment will be reversed, with instructions to dismiss the action.

Fullerton, Rudkin and Mount, JJ., concur.

Chadwick, J., took no part.

The Doctrine of Idem Sonans is the subject of a note to Thornily v. Prentice, 100 Am. St. Rep. 322. It has been held that the names "Sarah Staunton" and "Sarah Stanton" are idem sonans: People v. Spoor, 235 Ill. 230, 126 Am. St. Rep. 197; and also that the names "Sheffey" and "Cheffey" are not idem sonans: Boyd v. State, 128 Iowa, 699, 111 Am. St. Rep. 215.

A Mistake in the Middle Initial of a Name in the Publication of Summons may be a fatal defect. Thus, it has been held that the publication of summons on partition directed to "George H. Leslie" does not confer jurisdiction upon the court to adjudicate the rights of "George W. Leslie": D'Autremont v. Anderson Iron Co., 104 Minn. 165, 124 Am. St. Rep. 615. And it has also been held that tax foreclosure proceedings of the land of "John E. Carney," on a publication of summons against "John G. Carney," cannot be upheld on the theory that the middle initial is no part of a person's name: Carney v. Bigham, 51 Wash. 452, 99 Pac. 21, 19 L. R. A., N. S., 905. Said the court in this case: "At common law, it is true, a legal name consisted of one given name and one surname or family name, and mistakes in a middle initial or a middle name were not regarded as of consequence. But since the use of initials instead of a given name before a surname has become a common practice, the necessity that these initials be all given and correctly given in court proceedings has become of importance in every case and in many absolutely essential to a correct designation of the person intended."

BENSON v. TACOMA RAILWAY AND POWER COMPANY.

[51 Wash. 216, 98 Pac. 605.]

STREET RAILWAYS—Duty Toward Intoxicated Passengers.

A street railway company is not bound to accept an unattended passenger so intoxicated that he cannot take care of himself; but if it does accept such a passenger, it must render him such special care and assistance as his condition requires in order that he may be safely transported. (p. 1099.)

STREET RAILWAYS—Intoxicated Passenger—Question for Jury.—Where the evidence shows that the intoxication of a passenger was apparent when he boarded a street-car, or must have been apparent almost immediately thereafter, and that the conductor afterward stated that the passenger was drunk when he got on the car and kept getting drunker, it is for the jury to determine, in an

action for his death by falling from the outside platform of the car to the ground, whether he was unable properly to care for himself, and if so whether his condition was known to the conductor, and whether the latter exercised due care. (p. 1099.)

INSTRUCTIONS.—The Giving of an Erroneous Instruction at the request of the appellant which is favorable to him does not constitute prejudicial and reversible error, although the instruction may conflict with other correct ones. (p. 1100.)

Blattner & Chester and L. B. da Ponte, for the appellants.

F. D. Oakley and John E. Gallagher, for the respondent.

217 HADLEY, C. J. This is an action to recover damages for the death of the plaintiff's husband. The defendant, Tacoma Railway and Power Company, owns and operates a line of electric railway between the cities of Tacoma and Puyallup, in Pierce county, in this state. The complaint alleges that, about 9 o'clock in the evening of November 4, 1907, the plaintiff's husband, Otto Benson, presented himself as a passenger on one of the above-named defendant's cars, which car was in charge of the defendant Gardner, who was the conductor and agent of the railway company; that when Benson presented himself as a passenger, he was so much under the influence of intoxicating liquor that he was unable to take care of himself; that knowing him to be in such condition, the defendants accepted him as a passenger and undertook to convey him to his destination; that his state of intoxication continued to increase during the time of his transportation, and the defendants knew that he was constantly becoming less able to care for himself as his state of intoxication increased; that the defendants, knowing his condition, carelessly and negligently permitted him to ride in a dangerous position on the platform of the car while he was in such a state of intoxication as to be unconscious and heedless of his danger; that the defendants, knowing his position was dangerous for one in his condition, neglected to exercise proper care and precaution to prevent injury to him, and failed to bestow upon him the degree of attention which his condition required in order to afford him a safe passage to his destination; that while in the aforesaid position and under the circumstances **218** stated, he fell from the car, striking his head upon the ground, and that he thereby received injuries from which he died.

The answer alleges that when Benson boarded the car there was nothing in his appearance or manner to indicate that he was intoxicated, and that his actions thereafter did not indicate that he was intoxicated to such an extent as to be

either reckless or indifferent as to his safety, but that he was to some extent intoxicated; but while the car was running at a high rate of speed, he went to the rear platform where the defendant Gardner, the conductor, was, and that the latter immediately requested him to remain inside the car, as it was against the rules of the company to ride upon the platform; that the deceased then and there agreed to return to the car, but carelessly and negligently went too near the edge of the platform, and either stepped off or fell off. The cause was tried by a jury, and a verdict was rendered for the plaintiff in the sum of four thousand dollars. Judgment was entered for the amount of the verdict, and the defendants have appealed.

The first assignment of error is that the court erred in overruling the motion for new trial on the ground that the evidence was insufficient to justify the verdict. It is argued that the testimony, taken as a whole, does not show that the appellants were guilty of any negligence which in any way contributed to the death of Benson. There was much testimony to the effect that he had been drinking much and often on the afternoon and evening of the day he was injured. One cannot read the record of the testimony and escape the conclusion that he was a badly intoxicated man when he presented himself as a passenger, and the appellants even admit in their answer that he was intoxicated to some extent. The degree of appellants' responsibility in the premises must be determined by the extent to which his intoxicated condition and his inability to care for himself were apparent. The general rule in such cases is stated as follows: "While a railway company is not bound to accept for transportation without an attendant one who, because of physical ²¹⁹ or mental disability, is unable to take care of himself, yet, if its servants do voluntarily accept such a person, unattended, they should render to him such special care and assistance as his condition requires in order that he may be safely transported. And the same principle applies to persons who are known to be partially or entirely helpless on account of intoxication or physical disability": 6 Cyc. 599.

The evidence conflicts as to the deceased's appearance with reference to his apparent inability to care for himself; but the testimony, we think, manifestly shows that, if his intoxicated condition was not apparent at the moment he boarded the car, it must have been apparent almost immediately afterward. His conduct and manner must have revealed the fact to the conductor, soon afterward, that he was

apparently in a reckless state of intoxication. The conductor's own testimony is sufficient for the jury upon that subject, although he says it was not apparent to him that the deceased was unable to properly care for himself. By way of impeaching his testimony, it was testified that the conductor stated, after the accident and before the trial, that when Benson got on board the car he "was drunk as h—l, and kept getting drunker." Under all these circumstances, we think the only proper course was to leave it to the jury to say whether he was unable to properly care for himself, and, if so, whether that condition was known to the conductor, and furthermore, whether the necessary care commensurate with his condition and surroundings was extended to him by the defendants. It is true the conductor testified that he told him to leave the platform and go into the car, but it was again for the jury to say whether that was the exercise of sufficient care, having in view his condition and the entire environment. The jury having found that the appellants were negligent in the premises, we think the trial court did not err in refusing to grant a new trial on the ground of the insufficiency of the evidence.

It is assigned that the court erred in giving the first paragraph of the instructions, because the same is inconsistent with the ninth paragraph, for which reason it is alleged the **220** charge was misleading and prejudicial. The first paragraph of the instructions follows: "You are instructed that a street railway company is not bound to accept for transportation without an attendant one who, because of physical or mental disability, is unable to take care of himself. Yet if its servants do voluntarily accept such a person unattended, they should render to him such special care and assistance as his condition requires, in order that he may be safely transported; and this principle applies to persons who are known to be partially helpless on account of intoxication."

The ninth paragraph was given as follows: "I instruct you that defendants would not have been justified under the evidence in refusing to accept the deceased as a passenger, nor was it their duty to place a guard or watch over him; but simply to use such care or caution for his safety as his conduct or appearance would indicate to a man of ordinary prudence to be necessary under the circumstances. The burden of proof is upon the plaintiff to establish such lack of care, and unless she has done so by a fair preponderance of the evidence, you must find for the defendant."

The first paragraph, it will be seen, is a fair statement of the law according to the authorities cited above, and is not erroneous. The ninth paragraph was requested by the appellants and was given as requested. The requested instruction, we think, was erroneous, not only because it improperly commented upon the facts in issue and invaded the province of the jury, but also because it stated an erroneous rule. The giving of this erroneous instruction at the request of appellants and favorable to them did not, however, constitute prejudicial and reversible error against appellants, although the instruction may have conflicted with other correct ones: *Tham v. Steeb Shipping Co.*, 39 Wash. 271, 81 Pac. 711.

Other instructions are criticised, and error is assigned upon them; but we think the charge as a whole contains a fair statement of the law applicable to the issues and facts, and we find no error therein. The judgment is affirmed.

Rudkin, Fullerton, Mount and Dunbar, JJ., concur.

Chadwick, J., took no part.

A Carrier is not Bound to Accept an Intoxicated Passenger, who is unable to protect himself from injury, but if it does so, it owes him the duty of exercising such care as may be reasonably necessary for his safety: *Price v. St. Louis etc. Ry. Co.*, 75 Ark. 479, 112 Am. St. Rep. 79; note to *Illinois Cent. R. R. Co. v. Smith*, 107 Am. St. Rep. 299.

SPOKANE v. MACHO.

[51 Wash. 322, 98 Pac. 755.]

EMPLOYMENT AGENCIES — Unconstitutional Regulation.— A municipal ordinance making it a misdemeanor for the keeper of an employment agency to make willful misrepresentations to or willfully deceive persons seeking employment through him, is unconstitutional class legislation in making such acts criminal by persons in one kind of business while not so in others. (p. 1102.)

L. R. Hamblen, F. D. Allen and Harry A. Rhodes, for the appellant.

J. M. Geraghty and Alex. M. Winston, for the respondent.

322 CHADWICK, J. Defendant was arrested and charged with the violation of an ordinance of the city of Spokane, Washington, entitled, "An ordinance licensing and regulating the keepers of employment offices and the business of employment agencies in the city of Spokane, providing a

penalty ³²³ for the violation thereof," etc. Among other matters covered by the ordinance, it is provided:

"Sec. 7. It shall be unlawful for any person keeping an employment office to make any willful misrepresentations to any person seeking employment through such office, or to willfully deceive any person seeking employment through such office, and take a fee for such employment": Ordinances, Spokane No. A2633.

Defendant was convicted before the police magistrate of the city; whereupon he appealed to the superior court. In that court he demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, the defendant discharged, and from a judgment of dismissal the city has appealed.

The charter provisions relied upon to sustain this prosecution are as follows:

"Sec. 53. To regulate or prohibit the carrying on within the corporate limits of the city, of occupations which are of such a nature as to affect the public health or good order of the city, or to disturb the public peace, and which are not prohibited by law; and to provide for the punishment," etc.

"Sec. 55. To provide for the punishment for all disorderly conduct and of all practices dangerous to the public safety or health, and make all regulations necessary for the preservation of public morality, health, peace, and good order," etc.

While no account of it was taken in the court below, subdivision 5, section 59, "To license, tax, regulate, and control hawkers, peddlers, . . . and all other classes of business not otherwise in this charter provided for," is now urged as sufficient in itself, or when taken in connection with the others, to warrant a conviction and sentence. Assuming that it is within the police power of the city to enact an ordinance to protect the citizen from frauds, impositions, willful misrepresentations, and deceits, section 7 of the ordinance in question cannot be sustained. It is a fundamental proposition that an ordinance must be fair in its terms, impartial in its operation, ³²⁴ and general in its application: Dillon on Municipal Corporations, 322; McQuillan on Municipal Ordinances, 193. The ordinance before us assumes to license and regulate the business of employment agencies. This has been held to be a proper exercise of the police power of the state: Price v. People, 193 Ill. 114, 86 Am. St. Rep. 306, 61 N. E. 844, 55 L. R. A. 588. But section 7 goes further. It defines a com-

mon-law crime and provides a penalty for its infraction; not for all who may be guilty of a like offense, but the employment agent who shall, by willful misrepresentation or deceit, obtain the money of another. It cannot be denied that the business of the employment agent is a legitimate business, as much so as is that of the banker, broker, or merchant; and under the methods prevailing in the modern business world, it may be said to be a necessary adjunct in the prosecution of business enterprises. The vice of the section under discussion lies in this, that it makes an act criminal in one who may be engaged in a lawful business, while the act committed under like circumstances by another may not be so. A business may be classified by ordinance under the police power of a state if the object of the legislation is revenue, and all necessary and proper penalties may be provided to insure its due enforcement. But if the object is regulation merely, such classification will not be tolerated: *In re Camp*, 38 Wash. 393, 80 Pac. 547.

It was frankly admitted in the argument of this case that section 7 was enacted for the purpose of regulating the business of employment agencies. When exercising its power to regulate a business, the municipality may classify subjects of legislation, but the law must treat alike all of a class to which it applies, and must bring within its classification all who are similarly situated or under the same condition. From the very nature of things, there can be no dissimilarity of condition or situation between the employment agent who indulges in a false pretense and any other person who resorts to deceit or fraudulent representations to accomplish a wayward purpose.

325 "The classification must be based on some reason suggested by a difference in the situation and circumstances of the subjects treated, and no arbitrary distinction between different kinds or classes of business can be sustained, the conditions being otherwise similar": *State v. Sheriff of Ramsey County*, 48 Minn. 236, 31 Am. St. Rep. 650, 51 N. W. 112.

Under the rule just quoted, those engaged in a business lawful and orderly in itself, although subject to license and regulation, cannot be made a class upon which a penal statute shall operate to the exclusion of others; for the crime defined is not common to the business of employment agencies, but common to all, and to be sustained must include within its terms all who may be likewise guilty. It has been held that "an ordinance which would make the act done by one penal and impose no penalty for the same act done under like

circumstances by another, could not be sanctioned or sustained because it would be unjust and unlawful": *Tugman v. Chicago*, 78 Ill. 405; *Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 196; *May v. People*, 1 Colo. App. 157, 27 Pac. 1010; *McQuillan on Municipal Ordinances*, 193.

While the cases cited were all upon a different state of facts, in that they sought to exempt a class within a class, yet the principle applies with undiminished force to the case at bar. This is apparent when it is remembered that it is the act with which the law is concerned, rather than the business in which one may be engaged when he commits it. It is the law that stands at the bar of this court for judgment; not the respondent. To sustain section 7, it must be measured by the general welfare clauses of the charter hereinbefore quoted, and when so graduated it cannot meet the test. It makes the act of one engaged in a particular business criminal, while the same act committed by another in a different business may go unchallenged by the city. If the respondent is guilty, those aggrieved must resort to the general law of the state for a remedy. Subdivision 5 of section 59 can have no application here. The only question open under section 7 is whether, in the exercise ³²⁶ of its authority, the city has gone beyond the reasonable and constitutional limit of police regulation. We decide that it has done so.

The judgment of the lower court is affirmed.

Fullerton, Mount and Dunbar, JJ., concur.

Hadley, C. J., and Crow, J., took no part.

That Employment Agencies are a proper subject for municipal regulation, see the note to *Hager v. Walker*, 129 Am. St. Rep. 282.

As to What Acts may be Declared Criminal by the legislature, see the note to *Booth v. People*, 78 Am. St. Rep. 235.

BEILKE v. CARROLL.

[51 Wash. 395, 98 Pac. 1119.]

SALOON-KEEPER—Liability for Act of Barkeeper.—The owners of a saloon who leave the place in charge of a bartender are liable for his act in pouring alcohol into the shoe of a patron and setting it on fire. (p. 1106.)

Chas. E. Miller, for the appellant.

Welsh, Welsh & O'Phelan, for the respondents.

³⁹⁸ HADLEY, C. J. This is an action for damages for personal injuries. The cause came on for trial before a jury, and at the close of the testimony submitted by the plaintiff, the defendants moved that the court discharge the jury and enter judgment in favor of the defendants. The motion was granted on the ground that the evidence was insufficient to sustain a verdict for plaintiff, and judgment was entered dismissing the action. The plaintiff has appealed.

Appellant's testimony showed the facts hereinafter stated, and it is even conceded in respondents' brief that such facts appeared in evidence. The respondents, John Carroll and William Carroll, were, on and prior to January 15, 1908, co-partners under the firm name and style of Carroll Brothers, conducting a saloon in the city of Raymond, Washington, in which liquors were sold at retail under a license duly issued by said city. William Esswein, who was made a codefendant in this action with the Carrolls, was in the employ of the latter as their servant, and was acting as bartender. On the date above named the appellant entered the saloon, purchased and drank a glass of beer, and immediately thereafter left the barroom and entered an adjoining room, where he sat down in a chair and fell asleep. While asleep, Esswein, the servant ³⁹⁹ and bartender, poured alcohol in appellant's shoe which was on his right foot and set fire to the alcohol, which burned the foot. At the time of the occurrence neither of the Carrolls was present and neither one had knowledge of the act of the servant. Esswein, the servant, was never served with summons in the case, and did not appear in the action.

Appellant's amended complaint, upon which the action was tried, was drawn upon the theory that the respondents were responsible for the acts of their servant at the time mentioned, and that they are liable in damages for the injuries received by appellant as the result of the servant's act. Respondents, upon the other hand, contend that the act of their employé was entirely without the scope of the duties included within his employment, and that inasmuch as it was done without their knowledge, consent or acquiescence, they cannot be liable.

If respondents had been present upon the saloon premises and in the immediate charge thereof at the time, perhaps the doctrine that the employer cannot be made liable for the act of his servant committed wholly without the scope of the duties of the employment might have applied. However, under the circumstances shown by the facts in this case, the

employé became at the time more than a mere ordinary servant acting under the immediate instructions of the master. The master had left the place in entire charge of this servant, late at night, while it was yet open to the public and while patrons were still invited to enter to transact business and to receive the customary treatment accorded to customers. The master cannot start a saloon to going and then go off and leave it to take care of itself. In contemplation of law, he must either be present in person or by some one who represents him and who for the time being stands in his shoes and acts in his behalf. The policy of the state toward the saloon business is such that the owner of a saloon cannot be permitted to absent himself from his place of business and then escape liability to the customers of his saloon for injuries received in the manner ⁴⁰⁰ that appellant was injured, merely because the owner is not present, has not personal knowledge of the act, and does not actually consent thereto. The business of selling intoxicating liquors in this state is placed under many restraints by law, among which are the requirements that the vender must procure a license and must give a bond conditioned to keep an orderly house. Here was a customer who, as shown by the evidence he submitted—and there was no other testimony—quietly entered the saloon at a late hour of the night, bought and drank a glass of beer, unobtrusively and peaceably sat down in a chair provided for that purpose for customers, and simply fell asleep. Under such circumstances he had a right to rely upon the belief that he was in an orderly house and would receive the protection of such a one. He had a right to rely upon the belief that the master was either present in person or by a responsible and delegated representative, keeping a careful lookout that the doings in the house should in all respects be orderly. The act in question cannot be called an orderly one. It was essentially an extremely disorderly one, and was committed directly by the person then in charge of the place. Under such circumstances, we think it should be held that the employé in charge was the employer's delegated representative for that purpose, and that inasmuch as the employers were charged by law with the duty of preventing disorderly conduct in their place of business, they must be liable when the act was actually committed by the person whom they had placed in control.

The case of *Curran v. Olson*, 88 Minn. 307, 97 Am. St. Rep. 517, 92 N. W. 1124, 60 L. R. A. 733, involved facts quite similar to those in the case at bar, the circumstances in the case

before us being, if any different, more aggravating in appellant's favor than were those in the cited case. In that case a party who had been a patron of the saloon for some days, and who had spent all his money, went into the saloon at about 1:30 A. M., and fell asleep in his chair. A cook, in a restaurant in the rear of the saloon belonging to a third party, went into the saloon, got alcohol ⁴⁰¹ from the bartender in charge of the room, poured it upon the foot of the sleeping man, and set it on fire, causing serious injury. It is stated in the opinion that the evidence tended to show that the bartender knew, or might have known by the exercise of the slightest care, for what purpose the alcohol was to be used, and that he could have prevented the injury. Neither of the proprietors was present at the time. It will be seen that the thing was actually done by one not even in the employ of the proprietors of the saloon, but the court said: "The defendants were bound to use reasonable care to protect their guests and patrons from injury at the hands of vicious or lawless persons whom they knowingly permitted to be in and about their saloon. If they delegated this duty to their bar-keeper, they are responsible for his negligence in the premises: *Mastad v. Swedish Brethren*, 83 Minn. 40, 85 Am. St. Rep. 846, 85 N. W. 913, 53 L. R. A. 803. The evidence is ample to sustain a finding by the jury that the defendants were guilty of negligence, which was the proximate cause of the plaintiff's injury."

As we have intimated, the wrong done in the case at bar was even worse, so far as it involved the proprietor, than was that in the Minnesota case, for the reason that in the present case the wrong was actually committed by the delegated representative of the owner who was at the time in entire charge. It is true that, in the case of *Anderson & Co. v. Diaz*, 77 Ark. 606, 113 Am. St. Rep. 180, 92 S. W. 861, 4 L. R. A., N. S., 649, the facts were essentially the same as in the case at bar. The bartender assisted a patron to place alcohol upon the foot of another patron who was asleep, and then set it on fire. The holding there was agreeable to respondents' contention here, to the effect that the act was without the scope of the servant's duties, and that the employer was not liable. For the reasons we have already stated, however, we think the Minnesota decision is based upon sound principles, and we decline to follow the Arkansas decision.

We think the court erred in granting the challenge to ⁴⁰² appellant's evidence, and the judgment is therefore re-

versed, and the cause remanded with instructions to grant a new trial.

Crow, Dunbar and Fullerton, JJ., concur.

Rudkin and Chadwick, JJ., took no part.

The Doctrine of the Principal Case is supported by *Curran v. Olson*, 88 Minn. 307, 97 Am. St. Rep. 517; *Rommel v. Schambacher*, 120 Pa. 579, 6 Am. St. Rep. 732. In *Anderson & Co. v. Diaz*, 77 Ark. 606, 113 Am. St. Rep. 180, it is stated that a saloon-keeper does not hold himself out to the public as a protector of his patrons, and is not bound to the same degree of care to protect them as is required of an innkeeper or a common carrier. It is held in that case that a saloon-keeper is not liable for an assault on one of his patrons committed by his barkeeper while acting without the scope of his employment.

CHILD v. SMITH.

[51 Wash. 457, 99 Pac. 304.]

MORTGAGE—Limitation of Actions.—A Provision in a Mortgage that if the note is not paid at maturity it may be renewed and the mortgage continued a lien upon the premises does not bar the mortgagor from pleading the statute of limitations in an action of foreclosure. (p. 1108.)

MORTGAGEE—Right to Equitable Lien on Payment of Taxes. A mortgagee has an equitable lien for taxes and special assessments paid by him in good faith to protect his security under the belief that his mortgage is a subsisting lien, when in fact it has been barred by the statute of limitations. (p. 1110.)

MORTGAGEE—Subrogation on Payment of Taxes—Limitations.—A mortgagee who pays the general taxes to protect his lien is subrogated to the rights and liens held by the county and state, and as against his equitable lien thus acquired the mortgagors can interpose the plea of the statute of limitations. (p. 1110.)

MORTGAGEE—Subrogation on Payment of Assessments—Limitations.—A mortgagee who pays special assessments is subrogated to the rights of the city, but his equitable lien thus acquired may become barred by the statute pertaining to such assessments. (p. 1111.)

John L. Wiley, for the appellant.

Merritt, Oswald & Merritt, for the respondents.

458 CROW, J. This action was commenced on April 16, 1907, by Will A. Childs, against Minnie Good Smith and J. Carter Smith, her husband, to foreclose a mortgage on lot 12, block 1, of Chandler's Addition to the city of Spokane. The plaintiff alleged that on June 27, 1890, the defendants executed and delivered to the Northwestern Guaranty Loan Com-

pany, a corporation, their note for three hundred and fifty dollars, payable December 27, 1890, secured by their mortgage on the real estate above mentioned, the same being the mortgage sought to be foreclosed in this action; that on December 8, 1892, they executed and delivered to the Northwestern Guaranty Company a renewal note for the same debt, payable June 27, 1893; that no payments of either principal or interest have been made thereon; that by mesne conveyances the plaintiff, on October 7, 1893, became the owner and holder of the renewal note and mortgage; that the defendants neglected to pay taxes and special assessments which had become valid liens on the real estate; that plaintiff paid such general taxes for all years from 1893 to 1903, inclusive, except for the years 1898 and 1899; that on January 14, 1904, he also paid one hundred and fifty-five dollars and three cents to the city of Spokane on delinquent street assessments, and that for such taxes and assessments he holds an equitable lien. The defendants alleged that the cause of action in the complaint stated did not accrue within six years prior to the commencement of this suit, and that it is barred by the statute of limitations. The trial court held with the defendants on this issue, and entered a final judgment in their favor, dismissing the action. The plaintiff has appealed.

459 There is no dispute as to the facts. The mortgage contained a stipulation reading as follows: "It is further expressly agreed and understood by and between the parties hereto that in the event said promissory note is not paid at the maturity thereof, together with the interest due thereon, or any part thereof, the same may be renewed at the option of the said party of the second part, and said renewal note and interest shall be secured by this mortgage, and the same shall continue a lien upon said premises until the debt hereby secured and any and all renewals thereof, shall be fully paid and satisfied."

The appellant contends that he has at all times relied upon this stipulation as a waiver of any defense under the statute of limitations, and as preserving to him a continuing lien upon the premises; that he has therefore refrained from bringing suit by foreclosure or otherwise within the statutory period, and that the respondents should be estopped by the express terms of their contract from pleading the bar of the statute. The appellant falls into error in his interpretation of the clause above quoted. It simply accorded to him the right to demand and obtain renewal notes. This he failed to do, after one renewal had been made, and at all times after

he purchased the note and mortgage. His mortgage lien and note are therefore barred, being more than six years past due. The trial court properly sustained the plea of the statute of limitations to the note and mortgage.

The appellant further contends that the trial court erred in refusing him an equitable lien for the taxes and assessments which he has paid. This contention should be sustained. Believing he held a valid mortgage lien not barred by the statute of limitations, the appellant in good faith paid the delinquent taxes and assessments for the purpose of protecting such lien. These payments were not voluntarily made. In *Wheeler Co. v. Pates*, 43 Wash. 247, 86 Pac. 625, the holder of a void tax deed, claiming title, paid taxes on the land subsequent to the tax foreclosure and sale. His deed was afterward adjudged to be invalid, but this court recognized ⁴⁶⁰ his right to an equitable lien for the subsequent taxes so paid by him, saying: "Respondent's right of recovery is not based upon any statute, but it is upon purely equitable grounds arising from the fact that the payments made have inured to the benefit of appellants and have accomplished for them the discharge of a duty with respect to the land which they, as the real owners, were under obligations to discharge themselves."

In *Hemen v. Rinehart*, 45 Wash. 1, 87 Pac. 953, the plaintiff commenced an action to quiet his title to certain real estate as against a pretended judgment lien asserted by the defendants. In their answer the defendants pleaded facts upon which they relied to sustain the validity of their judgment lien, and also pleaded their payment of certain delinquent taxes to protect the same. Their judgment had become dormant, and it was held that they were entitled to no lien thereunder; but in passing upon their claim to a lien for the taxes this court said: "The first affirmative defense does, however, allege the payment of two hundred and thirty-one dollars and twenty cents of general taxes by the appellants, which they made for the purpose of protecting their asserted lien. These payments were not voluntary, but were made in good faith. The judgment was an actual lien for the period of five years after its rendition, and the appellants have in good faith, although erroneously, believed and insisted that they have continued to hold a lien until the present time. Under the previous decisions of this court, they are entitled to an equitable lien on the land for the total amount of taxes paid by them, with interest from the several dates of pay-

ment." See, also, *Spokane v. Security Sav. Society*, 46 Wash. 150, 89 Pac. 466.

The payment of the general taxes by the appellant Childs has prevented the respondents' property from being sold for delinquent taxes. It nowhere appears that they at any time paid or offered to pay the taxes for which a lien is now claimed by the appellant. Appellant did not make a voluntary ⁴⁶¹ payment, nor did he intend to protect the title for the benefit of the respondents. Although mistaken, he honestly believed he held a valid mortgage lien, not barred by the statute of limitations, and made the payments for the sole purpose of protecting such supposed lien. Under these circumstances, he is entitled to an equitable lien on the land to secure the taxes so paid by him under a misapprehension, and is also entitled to interest thereon from the respective dates of payment at the rate of six per cent per annum. The respondents are in no position to plead the statute of limitations as against these general taxes, or the appellant's equitable lien therefor. When appellant made the payments he was equitably subrogated to the rights and liens held by the county and state. Respondents did not make the payments, and they could not successfully interpose a plea of the statute of limitations against the state or county, if they still held the tax liens and were seeking to enforce the same: *Port Townsend v. Eisenbeis*, 28 Wash. 533, 68 Pac. 1045; *Denman v. Steinbach*, 29 Wash. 179, 69 Pac. 751.

Ballinger's Code, section 1740 (Pierce's Code, sec. 8678), provides that taxes assessed upon real estate shall, after levy, be a lien thereon until paid. Had no payment of these general taxes been made by the appellant, and had there been no tax foreclosure, the lien would still exist in favor of the county and state, and respondents' property would still be subject thereto. It would be inequitable and a manifest injustice to permit the respondents to now secure a release of their property from the lien held by the appellant by a plea of the statute of limitations. To avoid such a miscarriage of justice the appellant should be equitably subrogated to all the rights and liens of the county and state.

What we have said in regard to the general taxes applies to the special assessments, except that appellant's equitable lien therefor might be barred by the statute pertaining to such assessments. The record fails to show when they became delinquent. Under the act of 1895 (Bal. Code, sec. 1150; ⁴⁶² Pierce's Code, sec. 3637), an action by the city to enforce its lien would be barred in ten years after delin-

quency. If at the time of the commencement of this action more than ten years had elapsed since the original delinquency to the city on the special assessments afterward paid by appellant, his equitable lien therefor would be barred; otherwise not. Although he is entitled to be subrogated to the rights of the city, he cannot hold a lien for any longer time than the city itself could have successfully asserted the same. While on equitable principles he succeeds to the rights and lien of the city, it is manifest that he can acquire nothing more. The pleadings set forth all the facts necessary to show the appellant's equitable lien for the taxes and assessments. The parties are all before the court, and their rights should be finally determined in this action.

The judgment is reversed and the cause remanded, with instructions to the trial court to ascertain the amount of the general taxes, and also assessments not barred, with six per cent interest thereon from the respective dates of payment, to decree the appellant an equitable lien on the land therefor, to enter a judgment foreclosing the same, and to award him an order of sale to enforce payment. The appellant will recover costs in this court.

Fullerton, Mount and Rudkin, JJ., concur.

The Right of a Mortgagee to Subrogation, where he discharges other liens on the property for the protection of his own, is discussed in the note to *American Bonding Co. v. National etc. Bank*, 99 Am. St. Rep. 512; and the right of a person to subrogation in the event of his paying delinquent taxes is discussed at page 498 of this note. According to *Mersick v. Hartford etc. R. R. Co.*, 76 Conn. 11, 100 Am. St. Rep. 977, one who advances money with which to pay taxes on railroad property which is subject to a mortgage does not thereby acquire the lien which the state might have had on the property.

A Mortgagee Who, to Protect His Mortgage, pays off a judgment foreclosing a tax lien against the land, without any request from the owner thereof, is entitled to include the sum thus paid in his foreclosure, but has no right to a personal judgment therefor: Stone v. Tilley, 100 Tex. 487, 123 Am. St. Rep. 819.

DELACEY v. COMMERCIAL TRUST COMPANY.

[51 Wash. 542, 99 Pac. 574.]

COMMUNITY PROPERTY.—Where a Man Enters Land as a Homestead which is not subject to entry because within a grant to a railroad company, he acquires no interest therein, community or otherwise, and hence his wife can assert no community interest in the property. (p. 1114.)

COMMUNITY PROPERTY.—The Community is an Entity. The rights of the wife cannot be disassociated from those of the husband; the right of each is dependent upon the other, and unless it exists in the one it cannot exist in the other. (p. 1114.)

COMMUNITY PROPERTY.—Settlement on Public Land.—No community interest results to the spouses by reason of a settlement on government land. (p. 1114.)

ADVERSE POSSESSION.—An Entryman on Public Land cannot put the statute of limitations in motion against the government, either in his own behalf or in behalf of one whose occupancy is dependent on his entry; and one contesting for government land cannot gain the advantage of the statute over his adversary while a contest or litigation in aid of his title is pending. (p. 1114.)

ADVERSE POSSESSION.—Where Husband and Wife Enter Land as a Homestead which is not subject to entry because within a railroad grant, and he is defeated in his contest with the railroad company, her possession with him during the contest is not adverse. (p. 1115.)

EJECTMENT.—Parties.—Persons Concluded by Judgment.—Where a contest in the land department has been decided in favor of a railroad company as against an entryman under the homestead law, his wife is not a necessary party in an action of ejectment against him by the railroad company, and she and the other members of the family are concluded by the judgment therein. (p. 1115.)

EJECTMENT.—The Plaintiff must Recover, if at All, upon the Strength of his own title rather than upon the weakness of his adversary's. (p. 1116.)

Garretson & Early, A. H. Garretson and Chas. E. George, for the appellant.

Fogg & Fogg and B. S. Grosseup, for the respondents.

543 CHADWICK, J. In April, 1886, James Delacey, husband of the plaintiff, made settlement with his family upon one hundred and sixty acres of land, lying within the corporate limits of the city of Tacoma, in Pierce county, intending to claim it under the homestead laws of the United States. The land was within the limits of the original grant in aid of the Northern Pacific Railroad Company, by Congress, under the act of July 2, 1864, and the acts and resolutions supplemental thereto and amendatory thereof. The company filed its maps of definite location May 14, 1874, and March 26, 1884, so that, at the time of the Delacey settlement, the land

was not subject to private entry. It was so held in the several departments, and by the Secretary of the Interior, by whom the contest was finally decided November 28, 1891: *Northern Pac. R. Co. v. Flett*, 13 Land Dec. 617.

Patent was issued to the Northern Pacific Railroad Company, and filed for record in Pierce county, Washington, on January 18, 1893. In April of that year the railroad company brought an action of ejectment against James Delacey, as sole defendant, in the United States circuit court for the district of Washington, in which judgment of ouster was obtained. This case was appealed to the supreme court of the United States. The decision of the lower court was affirmed May 22, 1899: *Northern Pac. R. Co. v. Delacey*, 174 U. S. 622, 19 Sup. Ct. Rep. 791, 43 L. ed. 1111. Pending the appeal to the supreme court of the United States, the Northern Pacific Railway Company succeeded to the rights of the original plaintiff in the ejectment case, and was substituted as the plaintiff therein.

Upon remand, final judgment was entered in the United States circuit court, sitting at Tacoma. Prior to the entry of the judgment there was filed in said court a motion, in the name of James Delacey, defendant, supported by the affidavit of plaintiff, in which the statute of limitations, the community interest of plaintiff, and the fact that she had not been made a party to the action of ejectment, were urged as ⁵⁴⁴ reasons why the court should limit and confine its order of removal to defendant James Delacey. This motion was overruled and the judgment became *res adjudicata* as to all the rights of the parties to the ejectment suit.

In the fall of 1894, James Delacey abandoned the land and his family. His whereabouts, if alive, is now unknown. On March 22, 1900, plaintiff was ejected from the land under a writ of restitution issued out of the United States circuit court. In the year 1907, plaintiff was awarded a decree of divorce from her husband, and by a later modified decree it was adjudged that the property herein involved was community property, and the whole thereof was set apart to her sole and separate use. She has also acquired by deed the interest, if any, of all her children, the issue of her marriage with James Delacey. During the time the Delaceys lived on the land, from 1886 until March, 1900, valuable improvements were made. On the seventh day of November, 1905, the Northern Pacific Railway Company conveyed the lands in controversy to defendant, the Commercial Trust Company. This action was brought by plaintiff to recover possession and

quiet her title to the land. From a decree in favor of defendants, plaintiff has appealed.

It will be seen that appellant relies upon the assertion of a community interest in the land, and upon the statute of limitations. She claims that she "entered into the possession of the land as the owner thereof under a claim of right and in good faith, and has continued to occupy the same as the owner thereof by actual, uninterrupted, and notorious possession, under a claim of right, from April, 1886, to the latter part of March, 1900." The fact that James Delacey acquired no interest in the land, community or otherwise, is an adjudged fact, from which the conclusion must inevitably flow that the appellant could acquire no greater right than her spouse. The community is an entity; the rights of the wife cannot be disassociated from those of her husband; the right of each is dependent upon the other, and unless it exist ⁵⁴⁵ in the one it cannot exist in the other. It may be laid down as a fixed rule that no community interest results to the spouses by reason of settlement on government land. The entryman takes title upon such conditions and under such terms as the Congress may prescribe. The government may designate the object of its bounty, or its preferred vendee, and fix the terms of its indulgence. Under existing laws, there is no limitation upon its power to give or take away up to the time patent issues. Mere settlement creates no rights in the entryman other than those given by statute or recognized by rule of the department. Nor can he put the statute of limitations in motion against the government, either in his own behalf or in behalf of those whose occupancy on the land is dependent upon his entry. Therefore, one contesting for government land cannot gain the advantage of the statute over his adversary while the contest or litigation in aid of his title is pending: *Port Townsend v. Lewis*, 34 Wash. 413, 75 Pac. 982; *Blake v. Shriver*, 27 Wash. 593, 68 Pac. 330; *Hesser v. Siepmann*, 35 Wash. 14, 76 Pac. 295.

The homestead law was passed without reference to our local laws of property: *McCune v. Essig*, 199 U. S. 382, 26 Sup. Ct. Rep. 78, 50 L. ed. 237; *Hall v. Hall*, 41 Wash. 186, 111 Am. St. Rep. 1016, 83 Pac. 108; *Cunningham v. Krutz*, 41 Wash. 190, 83 Pac. 109, 7 L. R. A., N. S., 967; *Towner v. Rodegeb*, 33 Wash. 153, 99 Am. St. Rep. 936, 74 Pac. 50. It is only when title is vested that the land becomes subject to the law of the state. It may then with propriety control its conveyance, provide for its taxation, and fix rules of descent. Appellant, therefore, did not, and could not, acquire any

right by reason of her community relationship or as an individual prior to the final determination of the contest between her husband and the railway company. She held in privity with him. James Delacey did not enter adversely to the respondents' grantor, but as a homesteader, willing to try out his claim with the Northern Pacific Railroad Company under the rules ⁵⁴⁶ governing contests between conflicting claimants for the public land. Appellant is in no better position than he would have been had he remained on the land, for it is because of his entry and attempted filing that she became an occupant, and not because of the present assertion of an independent adverse claim under a claim of right. Appellant, though her possession was in a general sense adverse, did not, under the well-established rule in this state, hold under a claim of right or with color of title. It is not mere undisturbed, exclusive possession of property that makes title, but a hostile adverse possession under a claim of right or color of title, as the case may be. The foundation of the title, the time of its inception, must be marked with these essential elements. One essential will not follow another or be created by the mere lapse of time. All must concur from the beginning until the end of the period fixed by the statute. Otherwise no right to assert the statute accrues: *Port Townsend v. Lewis*, 34 Wash. 413, 75 Pac. 982. Our holding is, that appellant has no community interest in the land; that neither she nor James Delacey had any interest whatever subject to the jurisdiction of the superior court of Pierce county in the divorce proceeding; that the deed from her children was of no effect; and that the running of the statute could not by any possible process of reasoning antedate the termination of the contest in the United States land departments, thus disposing of her claim under the ten year statute of limitations.

Neither was appellant a necessary party to the ejectment suit. The successful contestant in the land department may invoke either the equity or the law side of the courts in aid of his title, and in so doing he is not bound to look for parties other than his adversary, for no interest could attach pending contest in the land department. But if the rule were otherwise as to third persons domiciled on the land, it is certain that the family of James Delacey, and all persons who could not assert a title or right independent of him, were bound by the judgment in the action of ejectment and subject to the ⁵⁴⁷ writ without being named therein. There being no independent or community interest in the appellant,

the general rule in such cases applies. It is stated by Mr. Freeman as follows: "The defendant and all the members of his family, together with his servants, employés, and his tenants at will or sufferance, may be removed from the premises in executing a writ of possession. . . . All persons entering upon the possession of the property *pendente lite* are presumed to have entered under the defendant; and *prima facie*, are liable to be turned out by the writ. It is obvious that the temptation to render the plaintiff's action fruitless by turning over the possession to one not a party to the suit is very great. All courts will exercise great caution in considering the right of a person to retain possession after the judgment, when it is clear that he entered *pendente lite*. His right will always be denied, unless it is clear that he did not enter under the defendant, nor by any collusion with him": Freeman on Executions, 3d ed., sec. 475. See, also, Saunders v. Webber, 39 Cal. 287; 1 Herman on Estoppel, 204; Lichty v. Lewis, 63 Fed. 535, 77 Fed. 111, 23 C. C. A. 59.

This disposition of the case makes it unnecessary to discuss the remaining assignments of error, all of which go to the strength of respondents' title. It would be idle to consume space in the citation of authority to support the proposition that appellant must recover, if at all, upon the strength of her own title rather than upon the weakness of the title of the respondents.

The judgment of the lower court is affirmed.

Rudkin, C. J., Fullerton, Crow and Mount, JJ., concur.

Dunbar and Gose, JJ., took no part.

Community Property in land acquired from the public domain is discussed in the notes to Nilson v. Sarment, 126 Am. St. Rep. 116; Ahern v. Ahern, 96 Am. St. Rep. 922. According to Creamer v. Briscoe, 101 Tex. 490, ante, p. 869, where a man and wife enter a homestead donation, and she dies and he remarries before the expiration of the requisite time for perfecting title, the land is the community property of the first marriage upon his subsequent performance of the legal requirements for acquiring title.

PEARSON v. ALASKA PACIFIC STEAMSHIP COMPANY.

[51 Wash. 560, 99 Pac. 753.]

EMPLOYER'S DUTY to Select Competent Employés.—A master who places a servant in charge of dangerous machinery where special knowledge, skill, or experience is required for its safe and successful operation, must make reasonable effort to ascertain his qualifications. If he fails to do so, he cannot escape liability by showing that there was nothing in the conduct of the servant during the first two hours' employment to indicate his incompetency. (p. 1118.)

MASTER'S DUTY to Employ Competent Servants.—A master who employs a man as winch-driver in loading a vessel must make reasonable effort to ascertain his qualifications. He cannot escape liability for injury to other employés through the incompetency of the winch-driver by showing that there was nothing in his conduct during the first two hours of his employment indicating incompetency, or by showing that he belonged to a union with which the master had a contract to employ its members exclusively. (p. 1119.)

EVIDENCE.—Expert Testimony is not Admissible on the question of the proper or competent operation of a winch in an action by a hatch-tender of a vessel for injuries sustained through the incompetence of the winch-driver in operating the winch while the vessel was being loaded, since the inquiry does not involve the mysteries of any particular science or trade, and the jurors are as competent to draw correct inferences in relation thereto as witnesses. (pp. 1120, 1121.)

MASTER AND SERVANT—Negligent Operation of Winch.—In an action by an employé for injuries received from the alleged negligent operation of a winch, evidence as to how a winch of a different make and of a more complicated kind is operated is properly excluded. (p. 1121.)

DAMAGES—Measure of for Personal Injuries.—A verdict of seven thousand five hundred dollars is not excessive where a stevedore, twenty-eight years old, with an earning capacity of twelve hundred dollars a year, has his knee-cap and elbow-joint fractured so that it becomes necessary to remove parts of the bone, thereby practically destroying his capacity for manual labor. (p. 1122.)

Ira A. Campbell and Bogle & Spooner, for the appellant.

W. E. Southard and R. B. Brown, for the respondent.

561 RUDKIN, C. J. On the nineteenth day of October, 1906, the plaintiff and other stevedores in the employ of the defendant were engaged in loading cargo from one of the wharves at the port of the city of Seattle to the deck of the steamer "Watson." The plaintiff acted as hatch-tender, and gave the signals to the winch-driver, directing him when and how to start, run and stop the winch, as might be necessary in discharging and loading cargo. At the time of receiving the injuries complained of in this action the plaintiff and his

coemployés were loading so-called brick scows from the wharf to the steamer deck. The winch-driver, in obedience to signals from the plaintiff, hoisted two of the scows from the wharf and swung them to a position over the deck, between the hatch coamings and the side of the vessel. The plaintiff then directed the winch-driver to lower the scows to the deck, but instead, by an improper movement of the levers by which the winch was operated and controlled, the winch-driver swung the scows over the hatch coamings and hatchway, knocking the ⁵⁶² plaintiff through the hatchway to the bottom of the vessel, thereby causing the injuries for which a recovery is here sought. The case was tried before a jury, resulting in a verdict in favor of the plaintiff in the sum of seven thousand five hundred dollars; and from the judgment on this verdict, the defendant has appealed.

The appellant has assigned error in the refusal of the court to grant a nonsuit at the close of the respondent's case, or to direct a judgment in its favor at the close of all the testimony. These two assignments present the same general question, and may be considered together. The principal ground of negligence charged in the complaint was the allegation that the appellant employed and retained in its employ an incompetent and inexperienced winch-driver. The appellant contends that the hatch-tender and the winch-driver were fellow-servants; that the only evidence of incompetency or inexperience on the part of the winch-driver was the single act of negligence which caused the injury complained of, and that a single act of negligence on the part of a servant is not sufficient evidence of incompetency or unskillfulness to charge the master with knowledge of such incompetency or unskillfulness.

That the hatch-tender and winch-driver were fellow-servants may be conceded, for the purpose of this appeal, and we might also concede that the appellant's further contention is sound, if the single act of negligence which caused the injury were the only evidence of incompetency or unskillfulness on the part of the winch-driver. But we think the testimony of the winch-driver himself tends very strongly to show that he was both inexperienced and incompetent. When the master places a servant in charge of dangerous machinery where special knowledge, skill or experience is required for its safe and successful operation, he must make reasonable effort to ascertain the qualifications of the servant thus employed, and if he fails to do so, he cannot escape liability by showing that there was nothing in the conduct of the servant

during the ⁵⁶³ course of two hours' employment to demonstrate or give notice of his incompetency.

The rule is thus stated by this court in the recent case of *Seewald v. Harding Lumber Co.*, 49 Wash. 655, 96 Pac. 221: "It was respondent's duty to make reasonable effort to learn the qualifications of the engineer, having regard to the safety of the other men, and it was for the jury to say whether it had learned, or by the exercise of reasonable care might have learned, of that incompetence in time to have removed him and prevented this accident. Speaking of the degree of care required of a master in the selection of servants, the court, in *Wabash Ry. Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. Rep. 932, 27 L. ed. 605, said: 'It is such care as, in view of the consequences that may result from negligence on the part of employes, is fairly commensurate with the perils or dangers likely to be encountered.' "

There is nothing in the record before us to indicate that the appellant made any effort to ascertain the qualifications of the winch-driver at the time of or prior to his employment, except an offer to prove that the appellant had a contract with the Longshoremen's Union of Seattle, of which the respondent is a member, under which the appellant agreed to employ members of that union exclusively; and we are clearly of opinion that the testimony was ample to warrant the jury in finding that the winch-driver was incompetent and inexperienced; that such incompetency and inexperience might have been ascertained by the appellant prior to the injury by the exercise of reasonable diligence on its part; that the incompetency and inexperience of the winch-driver was the direct and proximate cause of the injury, and that the respondent was not guilty of contributory negligence. The motions for nonsuit and for a directed verdict were therefore properly denied.

The appellant offered to prove that it had a contract with the Longshoremen's Union, of which the respondent is a member, whereby it agreed to employ members of that union exclusively; that said union is an association organized for the ⁵⁶⁴ purpose of furnishing experienced men in loading and unloading vessels at the port of Seattle; that the union furnished the winch-driver in question pursuant to a request from the appellant; and that the appellant relied upon the fact that the winch-driver thus furnished was competent to discharge the duties assigned him; but an objection to the offer of proof was sustained. As stated above, there was in our opinion ample evidence to establish the fact of incom-

petency on the part of the winch-driver, and in view of the fact that the safety of other employés of the common master required that the winch-driver should possess special knowledge and skill, it was incumbent on the master to make reasonable effort to ascertain his competency and fitness. It is conceded that the master made no inquiry itself, and that no inquiry was made by the union which the master constituted its agent for that purpose. Admitting, therefore, that the master is presumed to exercise proper care in the selection of his servants, that presumption cannot prevail when it affirmatively appears that both the master and the agency to which he intrusts that duty have been negligent and derelict in that regard. There was, therefore, no error in the ruling complained of.

Error is assigned in the rulings of the court sustaining objections to the following questions propounded by the appellant to certain of its witnesses:

"I will ask you, Mr. Maunder, as an expert, whether or not the fact that one of the winches on the aft deck of the 'Watson' responded to the application of steam quicker than either a double winch with the lever working up and down, or a single winch, would in your judgment cause a man operating the winch to make the mistake of starting the winch ahead when he should have backed it?

"Q. State whether or not in your judgment, as an experienced stevedore, familiar with the operation of winches and the duties and position of hatch-tender, a hatch-tender with five years' experience could tell from two hours' operation of a winch, one of the winches on the aft deck of the 'Watson,' ⁵⁶⁵ whether or not those winches were being operated in a proper and competent manner by the winchman?

"Q. I will ask you whether or not, in your judgment as an experienced stevedore, it is proper for a hatch-tender to take hold of a swirling load of cargo which is about to be landed on the deck of a vessel, in such a manner as to permit himself to be caught between that load and the hatch coaming when the load is swinging over the hatch hold?

"Q. I will ask you whether or not, in your judgment, Mr. Rogers, a man who has acted as stevedore on board ships for five years, and during that time has tended hatch, is competent to pass upon the proper or improper operation of the winch on the aft deck of the 'Watson'?"

We do not think that the subject matter of these inquiries involved any of the mysteries of any particular science, trade, or craft, and the jury was as competent to draw correct in-

ferences in relation thereto as the witnesses to whom the questions were propounded.

“When all relevant facts can be or have been introduced before the jury, and the latter are able to deduce a reasonable inference from them, no reason exists for receiving opinion evidence, and it is inadmissible. ‘The governing rule deduced from the cases permitting the opinions of witnesses is that the subject must be one of science or skill or one of which observation and experience have given the opportunity and means of knowledge, which exists in reasons rather than descriptive facts, and therefore cannot be intelligently communicated to others not familiar with the subject so as to possess them with a full understanding of it.’ Ordinary standards of conduct, of safety or danger, comfortable endurance or human ability in a customary connection, the operation of well-known natural laws, the application of force in a familiar form, the common characteristics of animals and what is likely to frighten or otherwise injure them, or what, on the other hand, may be approached by them with safety, and methods of doing business which involve no special training, are within this rule. So also the existence of social customs, inferences drawn from ordinary resemblances, and, in general, whatever anyone may observe for himself and reach a reasonable conclusion with regard to it may be decided by a ⁵⁶⁶ jury without the assistance of any experience other than their own. It does not follow because a witness is duly qualified and the general subject is a proper one, that his judgment can be asked on any branch of the inquiry. The precise point of each individual inquiry must be beyond the intelligence of an average jury, and ‘so far partake of the nature of a science as to require a course of previous habit or study in order to an attainment of a knowledge of them.’ The specific decisions under this general rule turn too frequently upon the facts of the particular case to warrant an attempt at exact classification. If the jury, although presumably devoid at the beginning of a trial of experience concerning a subject matter, can be so informed during its progress as to reach an accurate conclusion, the subject is not one for an inference, conclusion, or judgment, and the evidence may be excluded in the discretion of the court”: 17 Cyc. 41 et seq.

Within this rule, the court did not abuse its discretion in the rulings complained of. The ruling of the court in sustaining an objection to the following question is also assigned as error: “Q. I will ask you how the lever on the single

winch operates?" We fail to see the materiality of this question, as the winch on the steamer "Watson" was of a different make and of a more complicated kind. Exception was also taken to the refusal of the court to give certain instructions requested by the appellant, but the requests so far as proper or material were embodied in the general charge of the court.

The only remaining assignment is the refusal of the court to grant a new trial, because the verdict is excessive. At the time of receiving the injuries complained of the respondent was twenty-eight years of age, and had an earning capacity of from one hundred and fifteen dollars to one hundred and thirty dollars per month during seven months of the year, and of seventy-five dollars per month during the remaining five months, making an average earning capacity of upward of twelve hundred dollars per year. His knee-cap and elbow-joint were fractured, and it became necessary to remove portions of the bone from the elbow-joint by reason of tubercular infection, so that the respondent has and will have no use of the injured arm. His ⁵⁶⁷ earning capacity in the particular employment in which he was engaged and earned his livelihood, or in the performance of manual labor in any other employment, is practically destroyed; and under such circumstances we cannot say that a verdict of seven thousand five hundred dollars is excessive.

Finding no error in the record, the judgment is affirmed.

Fullerton, Mount and Dunbar, JJ., concur.

It is the Duty of an Employer to exercise reasonable care to select competent employes. If he fails to discharge this duty and employs men incompetent for the work, or retains them in the service after notice of their incompetency, other employes cannot be held to have assumed the risk incident thereto: *Jenson v. Great Northern Ry. Co.*, 72 Minn. 175, 71 Am. St. Rep. 475; *Williams v. Kimberly and Clark Co.*, 131 Wis. 303, 120 Am. St. Rep. 1049; *Norfolk & Western R. R. Co. v. Hoover*, 79 Md. 253, 47 Am. St. Rep. 392; *Hughes v. Baltimore etc. R. R.*, 164 Pa. 178, 44 Am. St. Rep. 597; *Beers v. Isaac Prouty Co.*, 200 Mass. 19, 128 Am. St. Rep. 374. An employer is bound to institute affirmative inquiries to ascertain the qualifications of an employé whom he transfers to a more responsible position for which special qualifications are demanded, unless the employé has given proof of his capacity in some similar position: *Still v. San Francisco & N. W. Ry. Co.*, 154 Cal. 559, 129 Am. St. Rep. 177.

INDEX TO THE NOTES.

Adoption of Children, revocation of wills by, 632.

Carriers, common and private, distinctions between, 34.

common, definitions of, 34.

common, presumption is that common-law liability attaches for acts of, 34.

common, when and to what extent insurers, 34.

common, when become private carriers, 34.

private, right of to contract for exemptions from liability, 34, 35.

Carriers of Livestock are common carriers, 433-435.

burden of proof as to cause of loss of or injury to, 442.

care which must exercise over while in transit, 450.

common-law rules of liability, when not applicable to, 433.

common carriers, rules respecting where they are not regarded as, 435.

delay in transportation, liability for loss or injury to, 455-460.

delays due to failure to exercise due care, 458.

delays, excuses for which are insufficient to relieve from liability, 459, 460.

delivery of, improper, what is and liability for, 460.

diligence which must be used to transport within a reasonable time, 456.

diligence required of, 444.

duties of are those of common carriers, 434.

duties of, limitations upon, from what arise, 434.

duty of to deliver within a reasonable time, 457.

duty of to furnish food and water, 452-455.

duty of to furnish proper loading and unloading facilities, 448-450.

duty of to furnish safe and suitable cars, 446, 462.

duty of to supply safe and suitable machinery and appliances, 461.

duty of to supply stock-cars, 461.

feeding and watering, contracts casting the duty of upon the shipper, 453, 454.

feeding and watering during carriage, 452-455.

feeding and watering during carriage, duty of, when assumed by the shipper, 452.

injuries due to the manner of transportation, when assumed by the shipper, 462, 463.

injuries during and in the mode of transportation, 450-452.

injuries for which liable, 440.

injuries due to the condition of the cars, 446-448.

injuries while unloaded and being fed, 451.

Carriers of Livestock, injury burden of proving cause of, 443.

injury, burden of proving cause of when the shipper accompanies, 444.

injury, burden of proving that it was the act of God, 443.

insurers, liabilities of as, 435, 436.

insurers, reasons for liability as, 436.

liabilities of, exemptions from, 433-435.

liability of and reasons for exemption from, 440.

liability of, burden of proof respecting, 441, 442.

liability of due to the mode of transportation, 450.

liability of for exposing to contagious and infectious diseases, 452.

liability of for failure to furnish cars, 455, 456.

liability of for failure to run trains on time, 457.

liability of for injury sustained while loading and unloading, 448-450.

liability of for loss or damage to due to improper delivery of, 460.

liability of for loss due to natural propensities of, 438, 440.

liability of for loss or injury due to unsafe cars, 446.

liability of, reasons affecting, 439.

liability of, special contracts limiting, when valid, 445.

liability of where sickness is contracted en route, 437.

liability of where the owner or his agent accompanies, 439.

limitations upon liability due to the nature of the business, 439.

negligence of while loading and unloading, liability for, 448-450.

negligence, contributory on the part of the shipper, what amounts to, 461-464.

negligence, failure to comply with interstate statute is, 455.

negligence of with respect to cars causing delay, 456.

notice which must take of the ordinary weakness and character of, 442.

risk, assumption of on the part of the shipper, 461.

safe delivery of, when insurers of, 436.

shippers, negligence on the part of, contributory, what amounts to, 461-464.

sickness contracted en route, nonliability for, 437.

were unknown at the common law, 433.

Children, adoption of, implied revocation of wills resulting from, 632.**Conveyances for the Support of the Grantor, breach of, waiver of by the grantor, when arises, 1050.**

breach of, what constitutes, 1048-1050.

breaches of by third persons, 1051.

conditions of may be treated as covenants, 1046-1048.

condition subsequent, whether implied from, 1044-1046.

consideration, failure of from failure to keep the agreement, 1055, 1056.

construction of as to the support which must be given, 1048.

covenants, cases treating them as, 1046-1048.

creditors of the grantor, rights of as against, 1056.

Conveyances for the Support of the Grantor, damages for breaches of, actions for, 1051.

defeasances implied in, 1041, 1042.

equity, relief in from, 1040, 1053.

extrinsic evidence of the consideration for, 1042.

fraud as a ground for relief from, 1054, 1055.

heirs of the grantee are bound by, 1056.

liability for breach of, 1053.

lien or charge imposed by, 1041, 1042.

mortgages, whether may be treated as, 1041-1043.

purchasers with notice of, 1056.

relief from, grounds of, 1054.

relief from, nature and kinds of, 1051, 1052.

rescission by the grantor, how may be accomplished, 1053.

rescission of by suits in equity, 1053, 1054.

rights of third persons as against, 1056.

signature of the grantee not necessary to, 1040, 1041.

specific performance of agreements implied under, 1052.

trusts, whether created by, 1043, 1044.

undue influence as a ground for relief from, 1054, 1055.

waiver of, what amounts to, 1050, 1051.

Definition of ademption of legacies, 650.

of delivery of an escrow, 911, 912.

of escrows, 911, 912.

Divorce, suits by and against insane persons for, 853.

wills, implied revocation of resulting from, 632.

Escrows, agreements for, what amount to, 913.

are irrevocable, 936.

bonds, conditions annexed to delivery of in unknown to the obligees, 930, 931.

bonds, delivery of in, 929, 930.

chattel mortgages, delivery of in, 922.

conditions accompanying the deposit, effect of, 913-917.

conditions annexed by one party without the consent of the other, 934, 935.

conditions of, breach of and its effect, 961, 962.

conditions of, death preventing the performance of, 960.

conditions of, how to be expressed, 950, 951.

conditions of may rest in parol, 950.

conditions of, nonperformance of and its effect, 959.

conditions of, performance of and its effect, 965.

conditions of, proof of, 950, 951.

conditions of, when strictly construed, 958, 959.

conditions of, which must be known to the depository, 932.

conditions, performance of, sufficiency of and time for, 958-965.

conditions, what insufficient to create, 956-958.

conditions which are fatal to, 914, 915.

Escrows, constable's bonds, delivery of in, 973.

contracts of purchase, delivery of in, 922.

control by the depositor over the possession of the deposit, 919.

death, delivery after, effect of, 921.

death of the depositor and its effect, 920.

creation of, what sufficient evidence of, 951-955.

definitions of, 911, 912.

delivery, effect of, 973, 974.

delivery, second, whether necessary to the passing of the title, 967.

delivery of contrary to conditions, 912.

delivery of, definitions of, 911, 912.

delivery of, effect of, 935.

delivery of instrument for inspection does not create, 933, 934.

delivery of must be to a stranger, 912.

delivery of on condition that other parties will unite in, 928.

delivery of procured by theft or fraud, 942.

delivery of subject to recall, effect of, 938.

delivery of to or by an agent, 918.

delivery of to take place after the grantor's death, 920, 921.

delivery of to the depositary, necessity for, 923.

delivery of to the grantee, 923-925.

delivery of, what amounts to and sufficiency of proof of, 933, 937.

deposit of must be irrevocable, 912.

deposit of, no particular form of words need be connected with,
913.

deposit of on condition that other signatures be procured, 913,
914.

deposit of, when not deemed unconditional, 912.

depositaries, agents and attorneys as, 925.

depositaries, agents and servants of corporations as, 926.

depositaries, agents, cases where may act as, 932.

depositaries, co-obligor or agent as, 931.

depositaries, control of must be unconditional, 918.

depositaries, decision of that the condition has been performed,
941-943.

depositaries, delivery of by generally, 940-943.

depositaries, delivery of by, when may be made, 941.

depositaries, delivery of by, when valid, 963.

depositaries, duties of, 942.

depositaries, duty of to deliver according to the conditions, 939.

depositaries, grantee of a bill of sale as, 932.

depositaries, grantees as, 923-925.

depositaries, grantee's refusal to accept, 932.

depositaries, knowledge by of the conditions, whether essential,
932.

depositaries, liability of, 949.

depositaries, obligees of bonds as, 927.

depositaries, payee of note as, 927.

Escrows, depositaries, principal obligors as, 930.

depositaries, promisees or payees of simple contract as, 932.

depositaries, redelivery by, when authorized, 948.

depositaries, unauthorized delivery by and its effect, 943-948.

depositaries, whether may be regarded as agents of either party, 923.

fraudulent abstraction or delivery of, 970.

grantee, agent or attorney, delivery to, effect of, 925, 926.

grantee, delivery of to is absolute, 923, 924.

grantee, delivery of to where another person is still to execute, 924, 925.

grantor's power to recall, 939.

guaranty, contracts of, delivery of in, 923.

intention of the parties and its effect, 917.

negligence in taking an unauthorized, 944.

parol evidence to show conditions of, 913, 915, 924, 950.

payee of note, delivery of to, 927.

pleading of, 973.

promissory notes, delivery of in, 922.

ratification of wrongful delivery in, 971, 972.

remedy for depositary's refusal to deliver, 973.

requisites of, 912.

reservation of control by the grantor is fatal, 919.

revocation of, 939.

sealed and unsealed instruments, differences between, 918.

specific performance in aid of, 973, 974.

sureties, delivery by of bonds in, 930.

tests of, 917, 918.

time when instrument deposited in becomes operative, 965, 967.

title does not pass by the unauthorized delivery of, 943, 946.

title, relation of back to the first delivery, 968, 970.

title to property before delivery of, 935, 936.

title under, at what time deemed to vest, 936.

title under, when passes, 965.

title, when vests under, 916.

to be delivered after the death of the grantor, 915.

voluntary conveyances, recall of before delivery, 939.

what may be deposited in, 922.

writing need not accompany the deposit of, 913, 915, 916, 950.

writings which may be delivered in, 922.

wrongful procurement of the instrument by a party, 970.

Evidence, escrows, parol to show conditions of, 913, 915, 924, 950.

estoppel arising from offering incompetent, 759.

in rebuttal of irrelevant or incompetent, 761-763.

incompetent, estoppel arising from offering, popular rule on the subject, 759-766.

incompetent, party first offering waives objection to when offered by his adversary, 759.

Evidence, incompetent, right of the court to rule out though the other party has offered like evidence, 766.

illegal, admission of on one side, cases holding it does not warrant the admission of like evidence on the other, 766, 767.

irrelevant, right to introduce, whether may be founded on the introduction of like evidence by the adversary, 767.

irrelevant to rebut irrelevant, 759.

objection to, failure to make, whether waives right to object to evidence of like character, 767, 768.

objection to, waiver of by offering evidence of like character, 759-766.

Executors and Administrators, claims against estate, affidavits in support of, when sufficient, 315, 317.

claims against estate, amendment, right of, 323, 324.

claims against estate, capacity of person, whether must be stated, 313.

claims against estate, contingent, statements of, 317.

claims against estate, copy of instrument relied upon, when necessary, 317.

claims against estate, credits, how must be set forth in, 316.

claims against estate, description of claim must be sufficient to distinguish it from similar claims, 312.

claims against estate, facts, statement of in may be general, 311.

claims against estate, facts, what disclosure of necessary, 312.

claims against estate, formality in is not required, 311.

claims against estate, indefiniteness in may be aided by affidavit, 312.

claims against estate, itemizing accounts in, 314.

claims against estate, justness of must appear, 315.

claims against estate, liens or securities, references to, when necessary and what sufficient, 318.

claims against estate, limitations, statute of, effect of upon, 324.

claims against estate, married women, services of, claims for, by whom may be made, 314.

claims against estate, note due, statement of, 317.

claims against estate, offsets, must be negatived in, 315, 316.

claims against estate, oral statement of is not permissible, 313.

claims against estate, original instruments in support of, when must be exhibited, 317.

claims against estate, pleadings, rules of need not be followed in, 312.

claims against estate, services of married woman, claim for should be presented by her husband, 314.

claims against estate, services, statement of claims for, 314.

claims against estate, statements of, offsets must be negatived in, 315, 316.

claims against estate, sufficient, illustrations of, 312.

Executors and Administrators, claims against estate, verification of by persons other than the claimants, reasons for, whether must be stated, 323.

claims against estate, verification of, form and contents of, 318.

claims against estate, verification of, necessity for, 318-320.

claims against estate, verification of, persons who may verify, 322, 323.

claims against estate, verification of, sufficiency of, 320-322.

claims against estate, verification of, whether may be made after the claim is filed, 321.

claims against estate, verification of, waiver of, 320.

claims against estate, verification, what claims must be supported by, 320.

claims against estate, waiver of defects in, 314, 315.

claims against estate, waiver of verification of, 320.

claims against estate, writing, must be in, 313.

trusts, right of to execute, 523.

Insane Persons, actions against, mode of proceeding in, 842, 844.

actions against, restraining in equity, 845.

are wards of the court, 843.

commencing actions against without ascertaining capacity of, 843.

contracts of, enforcement of by suit, 851.

courts, power of over, 842.

difference between and infants, 842.

divorce, suits against for are maintainable, 853.

divorce, suits by for, 853.

estates of, when deemed to be in the possession of the court, 844, 845.

guardians ad litem, appointment of, for, 843, 850.

judgments against, appellate proceedings upon, 854.

judgments against, are not void, 847.

judgments against, collateral attack upon, 851.

judgments against, effect of, 847.

judgments against, equity, proceedings in for relief from, 856, 858.

judgments against, innocent purchasers are protected by, 849.

judgments against, knowledge by plaintiff of the insanity of, 852.

judgments against, remedies for relieving from, 854-856.

judgments against, remedies for void, 848.

judgments against, setting aside because of, 853.

judgments against, whether illegal, 848.

judgments against, whether voidable, 849.

judgments against, without the appointment of a guardian, 849.

judgments against, writs of coram nobis to avoid, 855.

judgments against, writs of error to revise, 856.

jurisdiction over, how to be obtained, 845.

leave of the court, when necessary to authorize actions against, 844.

may appear and prosecute or defend by attorneys, 842.

Insane Persons, may sue and be sued, 842, 852.

power of courts to protect, 842.

presumption is in favor of sanity, 843.

presumption of the continuance of insanity, 843.

process against, how may be served, 850.

service of process on must comply with the statute, 845.

Joint Tenancy, trust estates are held in, 508-512.

trust estates, exceptions to the rule that they are held in, 512-514.

Judgments Against Insane Persons. See **Insane Persons**.

Livestock. See **Carriers of Livestock**.

Railway Corporations, cars furnished by the shipper or hired at his request, liability for injuries due to, 46.

cars of other corporations, when not liable for defects in, 46.

circus trains and the like, liability for injuries occurring during the transportation of, 35, 36, 48-51.

circus and other special trains, employés of, when bound by contracts limiting liability for injuries to, 48-51.

circus trains, duty of to inspect, 36.

connecting, duty of to inspect cars, 47.

contracts exempting from liability for injuries due to cars of other companies, 47.

contracts exempting from liability for injuries to sleeping-cars and their employés, 39, 40.

contracts exempting from liability for injuries received on trains which they have hauled as private carriers, 47-51.

contracts exempting from liability to employés riding on circus trains, 43, 48.

contracts made by them to transport special trains, when binding on employés, 47, 48.

express messenger, liability for injury to, 37.

inspection of cars of connecting carriers, 47.

liability of two employés riding on special trains, contracts excluding such liability, 47-51.

liability of when hauling cars owned by others, 35.

menagerie trains, duties and liabilities of when moving, 36, 37.

private carriers, when act as, 35.

refrigerator-cars, liability for injuries due to though owned by another, 45, 46.

sleeping-car companies and their employés, right of to contract for exemption from liability when hauling, 38.

sleeping-cars, assaults on passengers in, liability for, 44.

sleeping-cars, defects in, liability for injuries due to, 44.

sleeping-cars, duty of to accept and transport, 38.

sleeping-cars, duty of to furnish to passengers, 38.

sleeping-cars, duty of to passengers occupying, 41.

Railway Corporations, sleeping-cars, employé's and servants of, to what extent deemed employé's and servants of the railway company, 41, 43.

sleeping-cars, employé's, contracts respecting liability for injuries to, 39.

sleeping-cars, free passes, passengers riding upon, liability of to, 44.

sleeping-cars, passengers in, liability to, 41-44.

sleeping-cars, right of to run trains consisting of none but passenger-cars, 40.

special cars, liability for injuries due to the condition of, 44.

Revocation of Wills by change in testator's circumstances. See Wills.

Trusts, appointment of new trustee, duty of, when devolves upon court, 517.

courts which may appoint new trustee on a vacancy, 519-522.

death of less than all of the trustees, devolution of title upon, 508.

death of less than all of the trustees, who may execute trust after, general intent of the testator, 508.

death of sole or last surviving trustee, devolution of title upon, 515.

devolution of title on the death of one of several trustees, 508-514.

devolution of title on the death of the sole or last surviving trustee, 515.

duties of trustee, when indicate that survivor cannot act, 514.

equity, jurisdiction of over, 517.

equity, power of to appoint a new trustee, 517, 518.

exception of from statutes abolishing joint tenancy, 509-511.

executors and administrators, right of to execute, 523.

expiration of by operation of law, 523, 524.

heir at law, when devolve upon, 515-517, 522.

heir at law, when may execute, 515, 522.

heirs, statutes taking away the power of to execute, 522.

in personal property pass to the executor or administrator, 517.

intent of the testator, how to be determined, 508.

intent that surviving trustee shall execute, when apparent, 512.

joint power of trustees, when prevents survivor from acting, 513.

joint tenancy, exceptions to the rule that they are held in, 512-514.

joint tenancy, property subject to is held in, 508.

joint tenancy, statutes abolishing do not affect, 509.

new trustee, right of courts to appoint, 518.

new trustee, suit for the appointment of, when precludes survivor executing, 513.

new trustee, who may appoint, 519-522.

Trusts, oldest son, title and ability to execute, when devolve upon, 516, 517.

personal, what are, 524.

successor of trustee, who may move for the appointment of, 523.

surviving trustees, right of to execute, 514, 515.

survivorship of on the death of a trustee, 508, 509.

title, devolution of upon the appointee of the court, 518.

title, when vested by grants in, 516.

title, whether remains in abeyance after the death of the trustee and until his successor is appointed, 518.

vacancies in trustees, how and by whom may be filled, 521.

who may execute after the death of a sole or last surviving trustee, 532.

who may execute after the death of one of the trustees, 508-514.

Wills, contesting and resisting probate of are based on the same grounds, 188.

contesting, difference between and attacking validity of, 187.

contesting, heir not interested is not entitled to contest, 188.

contesting, interest which will authorize, 188.

contesting, right of generally extends to all persons interested, 188.

contesting, right of is purely statutory, 187.

contest of, acceptance of benefits under, effect of upon, 212-216.

contest of, acquiescence which will defeat right of, 213.

contest of, administrator, when may maintain, 204.

contest of, agreements affecting the right of, 218.

contest of, appearing and consenting to the original probate, when does not prevent, 210.

contest of, assignment of right of, 193-195.

contest of by a public administrator, 204.

contest of by persons cited and appearing in the probate proceeding, 203.

contest of by persons having rights independent of the will, 202, 203.

contest of by the attorney general, 204.

contest of, creditors of decedent, right of to maintain, 196.

contest of, creditors of heirs at law, right of to maintain, 196-202.

contest of, devisees and legatees, right of to maintain, 195.

contest of, divorced husband, when may maintain, 192.

contest of, election to take under the will, when does not prevent, 210.

contest of, estoppel against arising from accepting benefits under the will, 212.

contest of, estoppel to maintain, 206-212.

contest of, executors, when may maintain, 205.

contest of, grantees of heirs may not maintain, 193.

contest of, guardianship, person entitled to, when may maintain, 206.

- Wills, contest of, heirs excluded by a previous will, whether may maintain, 190.**
- contest of, heirs of testator, when entitled to maintain, 189, 204, 205.
 - contest of, heirs of testator, who are not prejudiced, whether may maintain, 189, 190, 201, 202.
 - contest of, heirs, whether may maintain as to personal property, 192.
 - contest of, husband of executrix, whether may maintain, 190.
 - contest of, interest, slight, when will sustain, 205.
 - contest of, interest, which will justify must exist at the probate of, 188, 189.
 - contest of, interest which will support must be direct and pecuniary, 188.
 - contest of, interest which will support, nature of, 188.
 - contest of, interest which will support, tests of, 188, 189.
 - contest of, interest which will not support proceeding to maintain, 205-208.
 - contest of, lienholders, right of to maintain, 199-202.
 - contest of, miscellaneous instances of persons who may maintain, 204.
 - contest of, pretermitted child, when may maintain, 204, 205.
 - contest of, receivers cannot maintain, 206.
 - contest of, restoration of benefits received under a condition precedent to, right to maintain, 216-218.
 - contest of, right of is a personal privilege, 191.
 - contest of, right of, whether may descend or be devised, 191.
 - contest of, tests of interests which will justify, 188, 189.
 - contest of, widow of testator, heirs of may not maintain, 192.
 - contest of, widow of testator, when entitled to maintain, 189, 190, 191, 202.
- revocation of, change in circumstances of testator, statutes declaring what amounts to, 630, 631.**
- revocation of, common-law rule respecting, where still prevails, 631.**
- revocation of, contracts of sale, when may result in, 643.**
- revocation of, conveyances not recorded until after the death of the testator, 643.**
- revocation of, conveyances not valid cannot result in, 643.**
- revocation of, from a change in the testator's family or in his beneficiaries, 632.**
- revocation of, from changes in the condition and circumstances of the testator, ecclesiastical rules respecting, 629.**
- revocation of from changes in the condition and circumstances of the testator, history of rules respecting, 628-630.**
- revocation of from changes in the condition and circumstances of the testator, origin of rules of, 628.**
- revocation of from changes in the condition and circumstances of the testator, reasons for rules respecting, 628, 629.**

Wills, revocation of from change in circumstances implied, 631.

revocation of implied from a change in the circumstances of the parties pro tanto only, 652-654.

revocation of implied from a change in the form of personal property, 651.

revocation of implied from a change in the form of real property, 644-646.

revocation of implied from a conveyance liable to be set aside for fraud, 651.

revocation of implied from a conveyance of property, reservations in, whether affect, 646.

revocation of implied from a conveyance of property though a mortgage is taken, 646.

revocation of implied from conveyances to and other transactions with the devisee, 646-649.

revocation of implied from conveyances, when partial only, 652.

revocation of implied from executory contracts of sale, 641-643.

revocation of implied from purchasing the devised premises, 649.

revocation of implied from the adoption of a child, 632.

revocation of implied from the conveyance of property, limitation upon the rule respecting, 639-641, 651.

revocation of implied from the conveyance of the testator's property, 635-641.

revocation of implied from the execution of a trust deed, 636.

revocation of implied from the involuntary alienation of real property, 649.

revocation of implied from the settlement of property rights of husband and wife, 633.

revocation of implied from the subsequent birth of issue, 632.

revocation of implied from the subsequent divorce of the testator, 632.

revocation of implied from the termination of title to the devised premises, 649.

revocation of implied from the transfer of personal property, 650.

revocation of, intentions not executed cannot amount to, 641.

revocation of is controlled by statute, 630.

revocation of, presumption of from a change in the testator's circumstances, 629, 630.

revocation of, proceeds of sale of land, how affected by, 644.

revocation of, what conveyances do not amount to, 639.

revocation of, when not implied from a conveyance of property, 637.

INDEX.

ABSENT WITNESSES.

See Criminal Law, 5, 6.

ACCOMPLICE TESTIMONY.

See Criminal Law, 4.

ACCOUNTS.

See Evidence, 2.

ACKNOWLEDGMENTS.

1. **DEEDS, Acknowledgment of by an Unconstitutional Officer.**—The acknowledgment of a deed purporting to be taken before J. W. H., judge of a designated inferior court, is void, if the statute undertaking to create such court is unconstitutional. (Ala.) King Lumber Co. v. Crow, 65.

2. **AN ACKNOWLEDGMENT by a Husband and Wife of a Mortgagor of Their Homestead Taken by a Supposed Officer Appointed and Acting Under an Unconstitutional Statute** is void as to the wife and the homestead interest. (Ala.) King Lumber Co. v. Crow, 65.

ADMINISTRATION.

See Executors and Administrators.

Note.

Adoption of Children, revocation of wills by, 632.

ADULTERY.

1. **ADULTERY—Marriage of a Woman Believed to have Always been Unmarried.**—One who meets a woman who is represented to him never to have been married, and who contracts a marriage relation with her, in good faith, under a mistake of fact honestly entertained on reasonable grounds, is not to be held guilty of adultery on proof that she was in fact married to another, who was still living. (Vt.) State v. Audette, 1061.

2. **ADULTERY may be Proved by Circumstantial Evidence** both in civil and in criminal cases. (Vt.) Taft v. Taft, 984.

3. **ADULTERY, Evidence Sufficient to Establish.**—The only general rule that can be laid down on the evidence necessary to establish adultery is, that the circumstances must be such as lead the guarded discretion of a reasonable and just man to the conclusion that the alleged act was committed. (Vt.) Taft v. Taft, 984.

4. **ADULTERY—Evidence Respecting Offense not Charged.**—In a suit for divorce on the ground of adultery, evidence of occasions before or after those charged in the bill is admissible for the purpose of showing an adulterous disposition. (Vt.) Taft v. Taft, 984.

5. **ADULTERY, Evidence of is for the Trial Court.**—The weight and the sufficiency of the evidence offered to prove adultery as a

ground for divorce are for the trial court and will not be revised by the appellate court. (Vt.) Taft v. Taft, 984.

ADVERSE POSSESSION.

1. **ADVERSE POSSESSION.**—An Entryman on Public Land cannot put the statute of limitations in motion against the government, either in his own behalf or in behalf of one whose occupancy is dependent on his entry; and one contesting for government land cannot gain the advantage of the statute over his adversary while a contest or litigation in aid of his title is pending. (Wash.) Delacey v. Commercial Trust Co., 1112.

2. **ADVERSE POSSESSION.**—Where Husband and Wife Enter Land as a Homestead which is not subject to entry because within a railroad grant, and he is defeated in his contest with the railroad company, her possession with him during the contest is not adverse. (Wash.) Delacey v. Commercial Trust Co., 1112.

ALIENATION OF AFFECTIONS.

See Husband and Wife, 13-27.

ALIENS.

1. **ALIENS.**—The Plea of Alienage is not favored in law. (Wash.) Anustasakas v. International Contract Co., 1089.

2. **NATURALIZATION.**—The Court has a Discretion to Determine Whether an Alien is Fit for Naturalization. This discretion is not arbitrary, but judicial and subject to review if abused. It is a legal, not a personal, discretion. (Ill.) United States v. Hrasky, 288.

3. **NATURALIZATION**—Good Character of Alien.—An alien who has habitually and knowingly violated the Sunday closing law by keeping the back door of his saloon open, and who intends to continue such practice after naturalization, should be denied naturalization as wanting in good moral character, notwithstanding many citizens violate the law in like manner. (Ill.) United States v. Hrasky, 288.

See Death, 2.

ANIMALS.

TRESPASSING ANIMALS, Damages by, When not Proximate, but Remote.—If horses trespassing on the highway by an inclosure in which other horses are confined approach a barbed-wire fence, biting and striking at the confined horses, and one of the latter, either in striking back or in attempting to jump over the fence, catches and cuts its foot, and is thereby ruined, this damage is deemed remote and not proximate, and its owner cannot recover therefor from the owner of the animals so trespassing. (S. D.) Loiseau v. Arp, 741.

APPEAL AND ERROR.

Assignment of Error.

1. **APPEAL**—Assignment of Errors.—When a case is removed from the trial to the appellate court, it is the duty of the complaining party to point out in his brief all errors relied upon for the reversal; and where he fails in this regard and the cause is by him brought to the supreme court for review, no errors will be considered other than those presented by his brief to the appellate court. (Ill.) People v. Strauch, 255.

2. **APPEAL AND ERROR.**—An assignment that the court separately and severally erred in refusing to give defendant's written

charges 1, 2, 6, 7, 8, 8½, 9, and 11 does not comply with rule 1 of the supreme court practice, and is too general to be considered on appeal. (Ala.) *Southern Ry. Co. v. Nowlin*, 91.

Harmless Error.

3. **APPEAL AND ERROR—Immaterial Variance.**—If a variance is alleged to have existed between the complaint and the evidence, and the party relying on such variance fails to show wherein it was material, the appellate court will not assume its materiality and that the trial court erred in refusing an instruction based thereon. (Vt.) *McDuffee v. Boston & Maine R. R.*, 1019.

4. **APPEAL AND ERROR, Ruling, When Deemed Prejudicial.**—Erroneous rulings, if not prejudicial to the rights of a party, may be disregarded; but where the findings are contrary to the evidence, and such errors may have misled the jury, they are material. (Kan.) *Thorpe v. Fleming*, 366.

5. **ERROR AND APPEAL—Error not Prejudicial to Appellant.**—That part of a decree which does not prejudice the appellant will not be considered on appeal. (Ala.) *King Lumber Co. v. Crow*, 65.

6. **APPEAL AND ERROR.—The Erroneous Overruling of a Motion to Strike Out** parts of a complaint, if directed at mere surplusage, is error without injury. (Ala.) *Alabama Great Southern Ry. Co. v. Godfrey*, 76.

Questions Appealable or Reviewable.

7. **APPEAL—Case Involving Elective Franchise.**—An appeal from a decision in naturalization proceedings lies directly to the supreme court, since a "franchise" is involved. (Ill.) *United States v. Hrasky*, 288.

8. **APPEAL—Questions Reviewable.**—When a plaintiff in error assigns for error in the supreme court that the appellate court erred in affirming the judgment, every question reviewable in the supreme court under the errors assigned in the appellate court is properly raised. (Ill.) *Van Cleef v. Chicago*, 275.

9. **APPEAL AND ERROR.**—Questions not shown by the record to have been presented and passed upon in the lower court will not be considered by the appellate tribunal. (Vt.) *Jenness v. Simpson*, 1029.

Directing Amendments to Pleading.

10. **APPEAL AND ERROR—Directing Amendments to Pleadings on Appeal.**—If in a suit by a wife to obtain property given by her to her husband, or paid for by her and conveyed to her and him as tenants by the entireties, evidence is received outside of the pleadings tending to show that her action was due to his coercion or undue influence, the court, in remanding the cause, will direct that her bill may be amended so that the party may offer additional evidence upon the question of fraud, coercion or undue influence. (Md.) *Reed v. Reed*, 552.

Effect of Reversal.

11. **APPEAL—Effect of Reversal.**—The Rights of a Purchaser in good faith relying upon a decree, before any writ of error is prosecuted or other action taken to avoid it, will be protected, notwithstanding the decree is afterward reversed. (Ill.) *Chicago & N. M. Ry. Co. v. Garrett*, 229.

APPEARANCE.

1. **APPEARANCE—Proceedings Sufficient to Constitute.**—Where the defendant against whom a judgment has been rendered without
Am. St. Rep., Vol. 130—72

service of process appears to quash a garnishment and to contest a motion to amend the return of service, he submits himself to the jurisdiction of the court. (Colo.) *Stubbs v. McGillis*, 116.

2. JURISDICTION of the Person, Estoppel to Deny.—A defendant who appears generally in an action is estopped from claiming that the court has no jurisdiction of his person. (S. D.) *Bowler v. First Nat. Bank*, 725.

ARBITRATION AND AWARD.

1. ARBITRATION AND AWARD, Agreement for Statutory, What Amounts to.—An agreement reciting that the parties are desirous of settling a controversy by arbitration in accordance with the statutes of Alabama evinces a common intent to provide for arbitration and award as distinguished from common-law arbitration. (Ala.) *Tennessee Coal I. & Ry. Co. v. Roussell*, 56.

2. ARBITRATION AND AWARD, Agreement for, When Adopts the Terms of the Statute.—An agreement for an arbitration and award in accordance with the statutes of a designated state must be construed as if the requirements of the statute of that state were written in the agreement in full. (Ala.) *Tennessee Coal I. & Ry. Co. v. Roussell*, 56.

3. ARBITRATION AND AWARD—Failure to Observe Conditions of.—Under an agreement for arbitration and award in accordance with the provisions of the statute, the substantial conditions of the statute as construed by the courts of this state must be complied with to render the award immune from attack, whether it is urged as a cause of action or of defense. (Ala.) *Tennessee Coal I. & Ry. Co.*, 56.

4. ARBITRATION AND AWARD, Statute Concerning Condition of Which is not Mandatory.—The provision of the statute requiring a copy of the award to be delivered to each of the parties is not a matter of substance, and the failure to so deliver such condition is not fatal to the award. (Ala.) *Tennessee Coal I. & Ry. Co.*, 56.

5. ARBITRATION AND AWARD.—The Provision of the Statute Requiring Arbitrators to be Sworn before making their award is of substance, and a compliance with the provision must be alleged in support of the award. (Ala.) *Tennessee Coal I. & Ry. Co. v. Roussell*, 56.

6. PLEADING COMPLIANCE WITH LAW, When Deemed to Imply Compliance with the Statutory Law.—If, in alleging an arbitration and award, the pleader avers that the arbitrators were sworn according to the laws, this implies that they were sworn in the manner provided by statute. The averment is not susceptible of the construction that they were sworn in a manner prescribed by laws other than statutory. (Ala.) *Tennessee Coal I. & Ry. Co. v. Roussell*, 56.

7. ARBITRATION AND AWARD, Agreement for, When Sufficiently Definite and Certain.—An agreement of submission to arbitration declaring that the parties have a controversy relating to the amount of damages, if any, suffered and which will hereafter be suffered by the party of the second part in his ownership of designated lands for the present and future operation of coal-washers of the party of the first part, now or hereafter to be located on a specified creek and its tributaries, and designating the arbitrators and submitting to them the settlement of the amount of such damages and all other damages which have been or may hereafter be suffered from such coal-washing operations, is definite and certain as to the matters submitted. (Ala.) *Tennessee Coal I. & Ry. Co. v. Roussell*, 56.

8. ARBITRATION AND AWARD, Agreement for, What may Include.—An agreement submitting claims to arbitration may include claims for damages from a private nuisance and all future damages possible of infliction by its continuance. (Ala.) *Tennessee Coal I. & Ry. Co. v. Roussell*, 56.

9. ARBITRATION AND AWARD—Certainty in the Award.—An award assessing damages in the whole sum of one hundred dollars, of which amount fifty dollars is for damages which may be done in the future, is certain, where the submission authorizes the arbitrators to assess all damages, future as well as present and past, due to the maintenance of specific acts of nuisance. (Ala.) *Tennessee Coal I. & Ry. Co. v. Roussell*, 56.

10. ARBITRATION AND AWARD.—The Failure to Give One of the Parties Notice of the time and place of hearing before the arbitrators does not vitiate the award, if he was present at the hearing and participated in the arbitration. (Ala.) *Tennessee Coal I. & Ry. Co. v. Roussell*, 56.

ARCHITECTS.

See Contracts, 10-22.

ARREST.

1. ARRESTING OFFICER, Duty of.—On making an arrest, it is the duty of the officer to take defendant before the subscribing justice of the peace, as commanded in the warrant. (Vt.) *Wright v. Templeton*, 990.

2. ARRESTING OFFICER, When Becomes a Trespasser Ab Initio. If an arresting officer, instead of taking a prisoner before the subscribing justice of the peace, as commanded by the warrant, takes him to another place for the purpose of conferring with the state's attorney as to what further to do with the prisoner, this is such an abuse of process as makes the officer a trespasser ab initio. (Vt.) *Wright v. Templeton*, 990.

ASSESSMENTS.

See Municipal Corporations, 13-18.

ASSIGNMENT FOR CREDITORS.

1. ASSIGNEE for the Benefit of Creditor, Setoff not Assertable Against.—The suit of an assignee for the benefit of creditors is not subject to a setoff based on a claim acquired by the defendant by its assignment to him after the execution of the assignment to the plaintiff. (Md.) *Richardson v. Anderson*, 543.

2. SETOFF Against Assignee for Benefit of Creditors, What Essential to.—In order that there may be a setoff in favor of a creditor of the assignor, the debt must exist at the time of the assignment by virtue of a claim then due. (Md.) *Richardson v. Anderson*, 543.

3. ASSIGNEE for the Benefit of Creditors—Setoff in Favor of Indorser Who had not Paid When the Assignment was Made.—If the debtor of an insolvent who has made an assignment for the benefit of creditors is at the date of the assignment liable as an accommodation indorser of the assignee and is subsequently compelled to discharge his liability as such indorser, this does not create a claim in his favor which he can assert in an action against him by the assignor. (Md.) *Richardson v. Anderson*, 543.

4. AN ASSIGNEE for the Benefit of Creditors takes the property subject to all existing equities. (Md.) *Richardson v. Anderson*, 543.

5. THE WAIVER of a Claim Against an Assignee for the Benefit of Creditors is not Inferable from the mere failure to collect it prior to the assignment. (Md.) *Richardson v. Anderson*, 543.

ASSUMPSIT.

ASSUMPSIT—Express or Implied Contracts.—Under a Complaint presenting an indebitatus assumpsit, evidence of either an express or implied contract is admissible. (Colo.) *Harvey v. Denver & R. G. R. Co.*, 120.

ASSUMPTION OF RISK.

See Negligence, 5.

ATTORNEY FEES.

See Libel and Slander.

BANKRUPTCY.

1. **BANKRUPTCY**—Recording of a Mortgage or Conveyance, When Deemed to be Necessary Within the Meaning of the Clause Avoiding Preferences.—Under that portion of the bankruptcy act declaring that, where a preference consists of a transfer, the period of four months shall not expire until four months after the date of the record or registry of the transfer, if by law such recording or registry is required, a transfer or encumbrance may be avoided by the trustee in bankruptcy, though it was valid between the parties, if it was recorded within such four months, if the recording was necessary to make the transfer or encumbrance effective against any class of persons, as, for instance, purchasers or encumbrancers in good faith and without notice. (S. D.) *Bowler v. First Nat. Bank*, 725.

2. **PLEADING**—Averment of Insufficiency of Assets.—An averment that the bankrupt's estate is insolvent and that there is not property enough to pay the general creditors is a statement of facts and not a mere conclusion of law. (S. D.) *Bowler v. First Nat. Bank*, 725.

3. **BANKRUPTCY**, Action to Set Aside Preferences.—A Demand is not Necessary before bringing an action by a trustee in bankruptcy to set aside a conveyance or mortgage as a preference. (S. D.) *Bowler v. First Nat. Bank*, 725.

4. **ACTIONS**, Joinder of Causes of, When Against the Same Person as Trustee.—If a mortgage is executed and a conveyance made to a creditor affecting different parcels of real property, one of which is situate beyond the state, one suit may be maintained by the trustee in bankruptcy to avoid both as preferences, under a statute permitting a plaintiff to unite in the same complaint several causes of action, where all arise out of claims against a trustee by virtue of a contract or by operation of law, because the creditor receiving such preferences becomes thereby an involuntary trustee. (S. D.) *Bowler v. First Nat. Bank*, 725.

5. **JURISDICTION** of Property Situate in Another State.—An action can be maintained in one state by a trustee in bankruptcy to set aside as a preference a conveyance of lands situate in another state, if the court has jurisdiction of the person of the defendant to whom such preference was given. (S. D.) *Bowler v. First Nat. Bank*, 725.

BANKS AND BANKING.

1. **BANKING**—Right to Charge Payments Against a Depositor.—In the absence of either prior or subsequent negligence or misleading conduct on the part of a depositor, a bank or banker cannot charge the depositor with any payments except such as are made in conformity with his order, for the relation of a bank and its depositors is one simply of debtor and creditor, and it matters not what care is

exercised and what precautions are taken by the bank, no payments made otherwise can be charged against the depositor. (Del.) *National Dredging Co. v. Farmers' Bank*, 158.

2. **THE RELATION OF A BANK and Its Depositors** is that of debtor and creditor. (Del.) *National Dredging Co. v. Farmers' Bank*, 158.

3. **BANKING—Forgeries, Payments Made Because of.**—Payments made by a bank on forgeries so skillfully executed as to deceive the most expert, or because of false pretenses so adroit and plausible as to be likely to impose on experienced bank officers, are, nevertheless, not chargeable against the depositor. (Del.) *National Dredging Co. v. Farmers' Bank*, 158.

4. **BANKS—Payments Caused by Unauthorized Erasures.**—Where the erasure of the words "or order" or "the order of" and the insertion of the words "or bearer" in a check without the authority of the depositor making it results in its payment by the depositor's bank to a person other than the payee, such payment is not payment to the payee—is not payment in conformity with the orders of the depositors, and, therefore, the depositor cannot be charged with it. (Del.) *National Dredging Co. v. Farmers' Bank*, 158.

5. **BANKS—Passbooks—Effect of Writing upon in Returning with Vouchers.**—The object of the depositor's bankbook or passbook is to inform him from time to time of the condition of his account as it appears on the books of the bank. The sending of his passbook to be written up, and returned with the vouchers is in its effect a demand to know what the bank claims to be the state of his account, and the returning of the book with the vouchers is the answer to the demand, and imports in effect a request by the bank that the depositor will in proper time examine the account so rendered and either sanction or repudiate it. The depositor cannot, therefore, without injustice to the bank, omit all examination of his account when rendered at his request. His failure to make it or have it made within a reasonable time after opportunity given for the purpose is inconsistent with the object for which he obtains and uses his passbooks. (Del.) *National Dredging Co. v. Farmers' Bank*, 158.

6. **BANKS—Negligence on the Part of the Depositor in not Examining His Passbook.**—Where a suit is brought by a depositor to recover from the bank money deposited by him, which the bank has paid out otherwise than in conformity with his orders, and the bank sets up the defense that it is nevertheless entitled to charge the depositor with such payments because of the conduct of the depositor subsequent to such payment, the preliminary question to be determined is whether the bank was or was not guilty of negligence in making the payment. If it were negligent, if its officers be found to have failed to exercise due and reasonable care in detecting the forgery or fraud, then the negligence of the depositor, his failure to perform his duty in examining his passbook and vouchers with reasonable care and report to the bank within a reasonable time any errors or mistakes would constitute no defense. (Del.) *National Dredging Co. v. Farmers' Bank*, 158.

7. **BANKING, Failure of Depositor to Notify Bank of Forged Checks, Effect of on Subsequent Payments of Similar Checks.**—Where a suit is brought by a depositor to recover from a bank payments made on forged or fraudulently altered checks, which constitute a series of successful forgeries, held, that after the depositor's passbook has been balanced and returned to him with any of the forged or fraudulently altered checks, and it appears that there was no negligence or want of due and reasonable care on the part of the bank in paying the said forged or fraudulently altered checks, the failure

of the depositor to notify the bank within a reasonable time that such checks have been forged or fraudulently altered will, if the delay be caused by his negligence in not using due care and diligence in examining the passbook and vouchers, or in giving notice, if he had discovered the forgeries, constitute a defense for the bank to the depositor's suit for money subsequently paid out on similar checks. (Del.) *National Dredging Co. v. Farmers' Bank*, 158.

8. BANKING, Failure of Depositor to Notify Bank of Forged Checks, Effect of Antecedent Payments.—With respect to the payments made before such settlement, however, where a depositor has failed in his duty in respect to the examination of his passbook and vouchers with reasonable care and diligence, held, that in the absence of negligence or want of due and reasonable care on the part of the bank in making such payments, the depositor becomes liable to the bank for all damages sustained by the bank in consequence of such omission of duty. The extent of the liability of the depositor is commensurate with the loss sustained by the bank in consequence of his neglect of duty—no more, no less. (Del.) *National Dredging Co. v. Farmers' Bank*, 158.

9. BANKING—Liability of Depositor not Notifying Bank of Payment of Forged or Altered Checks.—Neither the doctrine of ratification nor estoppel can be invoked, but the damages sustained by the bank as a result of the neglect of duty by the depositor are susceptible of proof and measurement as in any other case of breach of duty imposed by contract. (Del.) *National Dredging Co. v. Farmers' Bank*, 158.

10. BANKING—Payment of Checks Fraudulently Altered, Failure of Depositor to Give Notice.—As to all the subsequent payments, the bank is entitled to invoke the equitable doctrine of estoppel. As to these it may be fairly said the bank was induced to pay, and did pay, in consequence of the silence of the plaintiff when it was his duty to speak. The bank was misled to its injury by the fault of the depositor. (Del.) *National Dredging Co. v. Farmers' Bank*, 158.

11. BANKING—Depositor's Failure to Give Notice of Fraudulently Altered Checks, When the Proximate Cause of a Loss.—Where the acts and conduct and methods of conducting business or filling up of checks on the part of a depositor were such as to warrant a bank in paying forged or fraudulently altered checks, held, that such conduct on the part of the depositor was the proximate cause of the loss, and the bank is not liable for payments made on such checks. (Del.) *National Dredging Co. v. Farmers' Bank*, 158.

12. BANKS—Depositor's Duty to Examine Passbooks and Return Checks.—Where forged or fraudulently altered checks have been paid and charged in the account returned to a depositor, he is under no duty to the bank so to conduct the examination that it will necessarily lead to the discovery of the fraud. If he examines the forgeries personally and he is himself deceived by the skillful character of the forgery, his failure to discover it will not shift upon him the loss which in the first instance is the loss of the bank. (Del.) *National Dredging Co. v. Farmers' Bank*, 158.

13. BANKING—Depositor, When Guilty of Negligence in not Examining Passbooks and Discovering Forgeries.—Where the fraudulent alterations of the checks, for the payment of which suit is brought by the depositor, were apparent, and it is obvious that if the treasurer of the depositor, a dredging company, had at any time looked over the checks or vouchers returned with the passbook their alteration to "or bearer" would have stared him in the face and disclosed the fraud at once; and where it is admitted that he did not look over them, but assigned the duty to the secretary of the com-

pany, depositor, who was himself the perpetrator of the fraud, held, that no question of fact arises in regard to what amount of diligence was exercised or required by the plaintiff in order to detect the forgeries, and that inasmuch as it is apparent that any, even a cursory, examination by an honest clerk or employé would have discovered the alterations, therefore, although the knowledge of the forgeries possessed by the secretary, from the fact that he himself was the forger, to whom the examination was intrusted, is in no respect to be attributed to the dredging company, yet it is chargeable with such knowledge as an examination of the checks would have imparted to an honest clerk or employé previously unaware of the forgeries. And as it would have been chargeable with negligence or failure of such clerk or employé to discover and report such palpable alterations, it must be equally chargeable with the default of its secretary. Its position may be no worse because of the knowledge possessed by the forger, qua forger, but it can be no better off. (Del.) *National Dredging Co. v. Farmers' Bank*, 158.

14. **BANKING**—Negligence on the Part of a Bank in Paying Fraudulently Altered Checks, When a Question for the Jury.—Where the depositor, a dredging company, whose business was conducted in different parts of the United States widely remote from each other, had its chief place of business and office in the city of Wilmington, Delaware, where was situated the bank which was its sole depository and banker, and the secretary of the dredging company made all the deposits and filled up all the checks of the company, which the treasurer signed, and under a by-law of the company was alone authorized to sign, which by-law was known to the bank; and the secretary fraudulently altered checks filled up and sent by him to the treasurer, who signed and returned them to him for distribution, by striking out the words "or order" or "to the order of" in the checks, and inserting the words "or bearer" in such a manner that the alterations were plain and palpable, so as to indicate that they were made after the checks were made out and signed, and got the cash on those checks; and where there was furthermore evidence that such alterations excited the suspicions or curiosity of the bank officers sufficiently to cause them to ask why they were made, and the only reason given by the secretary who got the money was that "the payee desired the currency," held, that it was not for the court to say whether the evidence bearing upon the question of the negligence or want of due and reasonable care on the part of the bank in the payment of the altered checks was strong or weak, when taken in connection with other evidence tending to show that the method in which the business of the dredging company was conducted was such as to justify the officers of the bank in believing that the secretary was authorized to so alter checks and get the money on them, was such conduct as was calculated to mislead the bank, and so facilitate the perpetration of the fraud, and constituted the proximate cause of the loss, but that the evidence should go to the jury under careful instruction from the court. (Del.) *National Dredging Co. v. Farmers' Bank*, 158.

See Bills and Notes, 22-24.

BENEFIT SOCIETY.

See Insurance, 26, 27; Railroads, 33, 34.

BIDS FOR PUBLIC WORK.

See Conspiracy.

BIGAMY.

1. **BIGAMY—Evidence.**—In a Prosecution for Bigamy a Conversation between a witness and the first wife of the defendant, not held in his presence or hearing, is inadmissible, for it is hearsay, and also the testimony of a wife against her husband. (Tex. Cr.) Knapp v. State, 903.

2. **BIGAMY—First Wife as Witness.**—In a Prosecution of a Man for bigamy, his first wife cannot be used as a witness against him. (Tex. Cr.) Knapp v. State, 903.

BILLS AND NOTES.*In General.*

1. **BILLS AND NOTES—Amount of Recovery.**—The Rule of the Iowa Statute that a bona fide holder may not recover against the maker of negotiable paper a greater sum than the holder paid for the instrument, if it has been procured by fraud on the maker, has reference to recovery on instruments to which the maker has a defense. (Iowa) Voss v. Chamberlain, 331.

2. **BILLS AND NOTES—Reason of Negotiability.**—Money, bills and notes are negotiable, not because they have no earmarks, but on account of their currency. (Iowa) Voss v. Chamberlain, 331.

3. **PROMISSORY NOTE Promising to Pay as Soon as Maker can—Construction of.**—A written instrument by which the maker acknowledges an indebtedness and agrees to pay it as soon as he can is to be construed as a promissory note payable within a reasonable time. (Kan.) Benton v. Benton, 376.

4. **PLEADING A PROMISSORY NOTE Payable as Soon as Maker can.**—In an action upon such an instrument the plaintiff is not required to plead that the defendant has the financial ability to pay it. (Kan.) Benton v. Benton, 376.

5. **PROMISSORY NOTE, When will Sustain a Recovery in Favor of the Payee Only.**—A promise to pay to a designated payee and to no other person, executor, trustee or assignee is available to the payee only, and becomes unenforceable at his death. (Vt.) Bedford v. Chandler, 1057.

6. **BILLS AND NOTES—Separate Counts in Declaration.**—A plaintiff may declare in one count upon a promissory note, and in another upon the original indebtedness or consideration for which the note was given; the two claims are not inconsistent, and no election is required if but one recovery is sought. (Iowa) Farmers' Sav. Bank v. Arispe Mercantile Co., 324.

Consideration.

7. **PROMISSORY NOTE, Consideration for, Contradicting Statement of.**—A statement of consideration made in a writing may ordinarily be contradicted. (Kan.) Benton v. Benton, 376.

8. **PROMISSORY NOTE, Plea of Want of Consideration for, When Sufficient.**—A promissory note recited as its consideration a personal indebtedness owing by the defendant to the plaintiff. In an action thereon the answer alleged that the note was given without consideration, and set out additional facts showing that at the time of its execution the defendant held the amount of the note in trust for the plaintiff and another person. Held, that the answer was good as a plea of want of consideration, and that the recital of a personal indebtedness in the note did not conclusively establish a settlement of the trust. (Kan.) Benton v. Benton, 376.

9. **BILLS AND NOTES—Consideration—Collateral by Substitution.**—One who takes collateral by way of substitution for other

collateral surrendered becomes a holder for value. (Iowa) *Voss v. Chamberlain*, 331.

10. BILLS AND NOTES—Consideration—Pre-existing Debt.—One who takes negotiable paper by way of security for a pre-existing indebtedness is a holder for value under the Iowa negotiable instrument act. (Iowa) *Voss v. Chamberlain*, 331.

11. BILLS AND NOTES—Pleading Want of Consideration.—A mere denial of indebtedness upon a promissory note or written promise to pay does not put the consideration of the promise in issue. (Iowa) *Farmers' Sav. Bank v. Arispe Mercantile Co.*, 324.

Invalid Renewals.

12. BILLS AND NOTES—Effect of Invalid Renewal.—The giving of a renewal note does not discharge either the makers or the indorsers of the original obligation, if, for any reason not chargeable to the wrong or fraud of the holder, the renewal proves to be invalid. (Iowa) *Farmers' Sav. Bank v. Arispe Mercantile Co.*, 324.

Sureties.

13. BILLS AND NOTES, Parties to, When may be Shown to have Signed as Sureties.—Under section 1994 of the Civil Code of South Dakota, where two or more persons sign a promissory note, it is competent to prove by parol evidence that all but one were in fact sureties, except as against persons who have acted on the faith of their apparent characters as principals. (S. D.) *Windhorst v. Bergendahl*, 715.

14. SURETIES, When Discharged by the Taking of a New Note. If the principal two days before anything could be collected on the original note pays the interest thereon in full and executes another note for the same amount as the original, due one year from date, it may be inferred that there was an agreement for an extension of the time of payment of the original note, based on a sufficient consideration, which will discharge the sureties who did not consent to the extension. (S. D.) *Windhorst v. Bergendahl*, 715.

Indorsement.

15. BILLS AND NOTES.—The Indorsement, by the Payee of a Note, under a guaranty of payment combined with waiver of demand, notice and protest, constitutes a blank indorsement, and the subsequent delivery of the instrument to one in due course passes title. (Iowa) *Voss v. Chamberlain*, 331.

16. BILLS AND NOTES—Indorsement by "Trustee."—Where a water certificate is offered to a bank as collateral security, bearing the indorsement of the person to whom it was issued, followed by the indorsement of another person as "Trustee of . . . Land Trust," and the bank accepts it without any inquiry, except from the borrower, as to the actual ownership of the paper, it is not entitled to protection against the real owners. (Ill.) *Henshaw v. State Bank of West Pullman*, 241.

Bona Fide Holders—Wrongful Pledge.

17. BILLS AND NOTES—Purchaser from One Without Title.—Where current money, or negotiable paper payable to bearer or indorsed in blank which is considered as standing for money, comes into the hands of the holder before maturity for value and without notice of defect in title, his title is not dependent upon that of the person from whom the money or paper has been obtained. (Iowa) *Voss v. Chamberlain*, 331.

18. BILLS AND NOTES—Unauthorized Pledge by Banker.—Where a banker abstracts, from a private receptacle of a customer,

negotiable paper indorsed in blank, pledges it for his own indebtedness, subsequently recovers it from the pledgee ostensibly for collection, and then returns it to the receptacle, the owner, who has had no knowledge of these transactions, is not a new holder in due course with rights superior to the pledgee. (Iowa) *Voss v. Chamberlain*, 331.

19. **BILLS AND NOTES—Wrongful Pledge—Bona Fide Holder.**—Where a bank takes notes as collateral security in due course of business, its title is not affected by the fact that the pledgor banker has unlawfully abstracted them from the private receptacle of a customer to whom they belonged. (Iowa) *Voss v. Chamberlain*, 331.

20. **BILLS AND NOTES—Showing of Diligence by Holder.**—One who takes negotiable paper as collateral security is not required to prove diligence in ascertaining the right of the pledgor, who was in actual possession of the paper indorsed in blank. To defeat the title of the pledgee, the owners of the paper have the burden of proving want of good faith on his part. (Iowa) *Voss v. Chamberlain*, 331.

21. **BILLS AND NOTES—Innocent Holder.**—Between a Holder of Negotiable Paper and a person who has given it approved validity in the hands of one transferring it without right, the rule applies that when one of two innocent persons must suffer by reason of the wrongful act of a third person, that one must bear the loss who made it possible for the third party to commit the wrong. (Iowa) *Voss v. Chamberlain*, 331.

Presenting Check for Payment.

22. **BANKING—Indorsers—Check, Effect of Delaying and Presenting.**—The considerations on which the holder of a check drawn without funds is permitted to excuse his neglect as against the drawer are not applicable to an indorser. (Vt.) *Start v. Tupper*, 1015.

23. **BANKING—Indorser of Check, Release of by Failure to Promptly Present for Payment.**—An indorser's liability is impliedly conditioned on the prompt presentment of the check for payment, and the failure to so present releases him from liability, though presentment in due course would have been unavailing. (Vt.) *Start v. Tupper*, 1015.

24. **BANKING—Indorser of Check, What Necessary to Liability of Where There has been a Failure to Promptly Present for Payment.** In default of presentment and notice, an indorser of a check can be charged only by proof that he knew when he passed the check that there were or would be no funds in the bank to meet it. (Vt.) *Start v. Tupper*, 1015.

BILLS OF LADING.

See Carriers, 33-42.

BOUNDARIES.

BOUNDARY—Establishing by Acquiescence.—A line between adjoining owners may be established by recognition and acquiescence, as where they erect a permanent fence to mark the division line and for over ten years regard it as the true line, although neither of them intends to claim more than his deed gives him. The doctrine of adverse possession, strictly speaking, does not apply to such a case. (Iowa) *Bradley v. Burkhart*, 328.

BROKERS.

BROKER, Authority of to Enter into a Contract for the Sale of Real Property.—The owner of land executed a contract to a real estate agent, authorizing him to sell certain real estate within a

certain period, at a certain price, and upon certain terms, and agreed to convey the property to the purchaser. Held, following *Jackson v. Badger*, 35 Minn. 52, and distinguishing *Larson v. O'Hara*, 98 Minn. 71, that the agent was authorized to enter into a contract with a prospective purchaser for the sale of the land. (Minn.) *Peterson v. O'Connor*, 618.

BUILDING CONTRACTS.

See Contracts, 10-22.

CANCELLATION OF INSTRUMENTS.

See Deeds, 2.

CARRIERS.

Carrier of Passengers in General.

1. **CARRIERS OF PASSENGERS, Remedies Against for Carelessness or Negligence.**—A person injured through the negligence or carelessness of a carrier may proceed either upon contract, alleging the careless or negligent acts of the defendant as a breach of the contract, or in tort, making the carelessness or negligence ground of his right of recovery, and if he proceeds in tort, must show that he stands in the relation of a passenger to the carrier. (Ala.) *Malcolm v. Louisville & N. R. R. Co.*, 52.

2. **CARRIERS OF PASSENGERS, Care and Skill Due from.**—A railroad company owes to its passengers the duty to exercise the highest degree of care, skill and diligence known to very careful, skillful and diligent persons in like business. (Ala.) *Louisville & N. R. R. Co. v. Church*, 29.

Starting and Stopping Car.

3. **NEGLIGENCE—Emergency.**—In the Sudden and Unexpected Starting of a Street-car, while a passenger is attempting to board it, there is presented an "emergency." (Iowa) *Burger v. Omaha & C. B. St. Ry. Co.*, 343.

4. **CARRIER'S NEGLIGENCE in Failing to Stop Train at Station—Proximate Cause of Injury from, What is not.**—Where an intending passenger goes to a railway station and purchases a ticket for his transportation to another station, and, through the negligence of the carrier in not stopping its train, he is unable to be transported and thereupon walks to the intended point of destination, any injury suffered from such walking is not a natural consequence of the train's failing to stop, and he cannot recover beyond the price of his ticket. (Ala.) *Malcolm v. Louisville & N. R. R. Co.*, 52.

5. **STREET RAILWAY—Starting Car Before Passenger is Aboard.**—It is negligence for a street railway company to start a car which has stopped on signal, before passengers have an opportunity to board it; and in case a passenger, while attempting with due care to board the car, is thrown to the ground, such negligence is the proximate cause of his injury. (Iowa) *Burger v. Omaha & C. B. St. Ry. Co.*, 343.

6. **STREET RAILWAY—Starting Car Before Passenger is Aboard.**—Where a street railway company starts a car while a passenger is boarding it, but he does not immediately relinquish his hold on the hand-rail, but runs alongside the moving car until thrown to the ground, the negligence in starting the car is the proximate cause of the injury. (Iowa) *Burger v. Omaha & C. B. St. Ry. Co.*, 343.

7. NEGLIGENCE—Acts in Emergency.—Whether or not a Person, brought to face an emergency, has acted with due care for his own safety is to be determined in all cases by the method of conduct. If what was done was no more than might have been expected from an ordinarily prudent person, placed under the like circumstances, then due care is not wanting. And if in the situation presented there is room for reasonable minds to differ as to the proper conclusion to be drawn, the question is one for a jury. (Iowa) *Burger v. Omaha & C. B. St. Ry. Co.*, 343.

8. STREET RAILWAY—Starting Car Before Passenger is Aboard. Where a street railway company starts a car when a passenger has partially effected a boarding, and he does not immediately relinquish his hold but runs alongside the car attempting to regain his footing, the question whether he is guilty of contributory negligence in so doing is for the jury. It cannot be said as a matter of law that due care requires him to release his hold upon the car the moment he is aware that it is in motion. (Iowa) *Burger v. Omaha & C. B. St. Ry. Co.*, 343.

9. STREET RAILWAY—Starting Car Before Passenger is Aboard. Where one who sustains the relation of passenger is thrown from his position by a negligent starting of the car while he is boarding it, he is not negligent per se if he attempts, either as a result of impulse or in the reasonable belief that he can succeed, to regain his position and board the car. (Iowa) *Burger v. Omaha & C. B. St. Ry. Co.*, 343.

Ticket Agent Misinforming Passengers.

10. RAILROAD, AGENT OF, When Acting Within the Scope of His Authority in Giving Information Respecting the Best and Quickest Route.—A complaint alleging that the defendant railway had two routes over which a passenger might travel between designated points, and that the defendant maintained an office for giving information to travelers in reference to routes of travel, and that the plaintiff, not knowing the best and quickest routes to travel, applied to defendant's agent for information and was by him misinformed as to such routes, shows that the agent was acting within the scope of his authority and that the plaintiff had a right to rely upon the information given. (Ala.) *Southern Ry. Co. v. Nowlin*, 91.

11. RAILROAD COMPANY'S LIABILITY to Passenger Misdirected as to Best and Quickest Route.—If an intending passenger applies at a railway station to its agent for the best and quickest route between designated points, and, being by such agent misdirected, on the following day purchases a ticket according to his direction over a route which is not the best nor quickest, the company is liable for the resulting injury. This remains true though such passenger had an opportunity to consult the official railway guide as to routes and schedules. (Ala.) *Southern Ry. Co. v. Nowlin*, 91.

Invitation to Passenger to Use Premises.

12. RAILROAD—Station Agent, Invitation by to Use Premises, When not Binding on His Principal.—If the station agent of a railroad tells a passenger seeking a hotel that if he will hurry he can catch up with the representative of the hotel, who is then going from the depot to the hotel along the premises and right of way of the railroad, this does not bind the company, nor amount to a license to use its track as a highway to go to the hotel from the depot. (Ala.) *Alabama Great Southern Ry. Co. v. Godfrey*, 76.

13. RAILROADS—Approach to Platform of Station of, What is not.—A culvert on the main line of a railway track and distant

two hundred and twenty-five feet from the depot is not an approach to the platform nor a portion of the station grounds reasonably near the platform where passengers would naturally or ordinarily be likely to go, within the meaning of the rule requiring a railway company to keep in safe condition all portions of its platforms and approaches thereto to which the public would naturally resort, and all portions of its station grounds reasonably near the platform where the passengers would naturally and ordinarily be likely to go. (Ala.) Alabama Great Southern Ry. Co. v. Godfrey, 76.

14. RAILWAY COMPANY, Duty of to Passenger Leaving Its Cars and Station.—The duty of a railway company to make it safe for passengers to leave its cars and station continues until the passenger has left the depot grounds or had a reasonable time to do so. (Ala.) Alabama Great Southern Ry. Co. v. Godfrey, 76.

15. RAILROADS—Licenses, Use of Premises of—Right to Presume Their Safety.—One acting on an invitation, express or implied, has a right to presume the premises he is invited to use are kept at least reasonably safe, and is not called upon to look out for pitfalls. (Ala.) Alabama Great Southern Ry. Co. v. Godfrey, 76.

16. RAILROADS—Persons Using Premises Without Knowledge of an Invitation so to do.—One who acts without knowledge of an invitation to use premises must ordinarily be regarded as negligent in presuming safety in premises the nature and condition of which he is ignorant, especially at night. (Ala.) Alabama Great Southern Ry. Co. v. Godfrey, 76.

17. RAILROADS, Invitation to Use Premises of, Who Entitled to Rely upon.—The term "invitation," within the rule that the owner of the property who has held out an invitation or inducement for others to come upon his property must keep his premises in safe condition, imports that the person injured did not act merely for his own convenience or pleasure, and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession or control of the premises, but was in accordance with the intention or design with which the place or way was adapted and prepared or allowed to be so used. (Ala.) Alabama Great Southern Ry. Co. v. Godfrey, 76.

18. RAILROAD RIGHT OF WAY, Use of by Passengers and Licensees.—Ordinarily, the right of way of a railroad company is its exclusive property. Mere acquiescence in the use of such right of way does not confer on the public the right to use it nor create any obligation to look out for persons using it, other than the general duty to look out for obstructions. (Ala.) Alabama Great Southern Ry. Co. v. Godfrey, 76.

19. RAILROAD RIGHT OF WAY, Use of by Passenger for the Purpose of Reaching a Hotel.—A passenger leaving the train and station of a railway company and desiring to reach a hotel two hundred and twenty-five yards or more from the depot, and using the right of way as a place on which to walk, cannot be regarded as doing so by the invitation of the railroad company, because there were steps leading from a path from the hotel down to the railway track and passengers going to and from the hotel and depot had for a number of years used a well-beaten path upon the main line of the railroad track from the depot across the culvert and up the steps to the hotel, and the steps, though once removed by the railroad foreman, had been put back by one of its supervisors, and the company is not liable to such passenger if injured by falling from such pathway into a ditch. (Ala.) Alabama Great Southern Ry. Co. v. Godfrey, 76.

20. RAILROAD COMPANY, Duty of to Passenger as to Reaching His Hotel.—It is not part of a carrier's duty to see the passenger safely landed at his hotel. When he has been furnished safe and sufficient egress from the depot grounds, the relation of carrier and passenger ceases. (Ala.) *Alabama Great Southern Ry. Co. v. Godfrey*, 76.

Intoxicated Passenger on Street-car.

21. STREET RAILWAY—Death of Passenger—Evidence.—In an action against a street railway company for the death of an intoxicated passenger which occurred after he was permitted to alight at a dangerous place, evidence is not admissible to show that he attempted to get off the car at a point where the streets were safe, but was restrained by the railway employes. (Wash.) *Sullivan v. Seattle Electric Co.*, 1082.

22. STREET RAILWAY—Death of Passenger—Inadmissible Exclamations.—In an action for the death of an intoxicated passenger permitted to alight at a dangerous place, an exclamation by another passenger that "it was murder" to allow him to get off there is the expression of an opinion and not admissible in evidence. (Wash.) *Sullivan v. Seattle Electric Co.*, 1082.

23. STREET RAILWAY—Evidence of Intoxication of Passenger. In an action against a street railway company for the death of an intoxicated passenger permitted to alight at a dangerous place, evidence that when he got on the car he was all muddy and bloody about the face is admissible, as showing his then condition. (Wash.) *Sullivan v. Seattle Electric Co.*, 1082.

24. STREET RAILWAY—Intoxication of Passenger.—A conductor has a right to presume that every passenger entering his car is sane and sober until he has actual notice to the contrary; he is not required to make a mental or physical examination to ascertain his condition, with a view to protecting him. (Wash.) *Sullivan v. Seattle Electric Co.*, 1082.

25. STREET RAILWAY—Death of Intoxicated Passenger.—Where a passenger, who has been permitted by the conductor to alight from a car at a lake station, falls from the platform or trestle and is drowned, the fact that he fell by reason of intoxication does not preclude a recovery against the carrier if its employes had notice of his intoxication and the place was dangerous for a person in his condition. (Wash.) *Sullivan v. Seattle Electric Co.*, 1082.

26. STREET RAILWAYS—Duty Toward Intoxicated Passengers. A street railway company is not bound to accept an unattended passenger so intoxicated that he cannot take care of himself; but if it does accept such a passenger, it must render him such special care and assistance as his condition requires in order that he may be safely transported. (Wash.) *Benson v. Tacoma Ry. & P. Co.*, 1096.

27. STREET RAILWAYS—Intoxicated Passenger—Question for Jury.—Where the evidence shows that the intoxication of a passenger was apparent when he boarded a street-car, or must have been apparent almost immediately thereafter, and that the conductor afterward stated that the passenger was drunk when he got on the car and kept getting drunker, it is for the jury to determine, in an action for his death by falling from the outside platform of the car to the ground, whether he was unable properly to care for himself, and if so whether his condition was known to the conductor, and whether the latter exercised due care. (Wash.) *Benson v. Tacoma Ry. & P. Co.*, 1096.

Sleeping-car Companies.

28. RAILWAY COMPANIES, Liability of for Negligence of a Sleeping-car Company and Its Employés.—A railway company cannot escape liability for injuries inflicted upon a passenger upon the ground that they were sustained in a sleeping-car owned by another company, which furnished its own agents or servants, notwithstanding the passenger paid an additional fare to the sleeping-car company for the privilege of riding in one of its cars, when it appears that such car was a part of the railway company's train. (Ala.) *Louisville & N. R. R. Co. v. Church*, 29.

29. RAILROAD COMPANY—Porter of Pullman Car, Liability of Railroad Company for.—It is presumed that a porter employed by the Pullman Company and assigned by it to the control of the interior of a sleeping-car exercised his control with the assent of the railroad company. (Ala.) *Louisville & N. R. R. Co. v. Church*, 29.

30. RAILROAD COMPANY—Instruction as to Accident on a Pullman Car, When Properly Refused.—An instruction that if the jury believe from the evidence that a table fell because of an unforeseen accident, which could not have been anticipated by reasonable care and foresight on the part of the defendant or the Pullman Company, the jury must find for the defendant, is properly refused, because it might lead the jury to believe that there must have been corporate negligence regardless of the acts or omissions of servants. (Ala.) *Louisville & N. R. R. Co. v. Church*, 29.

Carrier of Livestock.

31. CARRIER OF LIVESTOCK—Extent of Liability.—Railroad Companies are common carriers of livestock, with substantially the same duties and responsibilities that exist at common law with respect to the carriage of goods, except that they are not insurers against loss or injury resulting from the inherent nature or propensities of the animals themselves. (Ky.) *Stiles v. Louisville & N. R. R. Co.*, 429.

32. CARRIER OF LIVESTOCK—Destruction of Animals by Fire. A common carrier is liable as an insurer for the destruction by fire of animals it is transporting, which is not caused by the act of God or the public enemy. (Ky.) *Stiles v. Louisville & N. R. R. Co.*, 429.

Carrier of Freight—Bills of Lading.

33. CARRIERS, Contract of, When Controlled by the Law of the Place of Delivery.—A contract made with a carrier in New York to ship a package and to deliver it in Alabama is, so far as delivery is concerned, to be wholly performed in the latter state, and cannot be enforced, if invalid, by its laws. (Ala.) *Southern Express Co. v. Gibbs*, 24.

34. A RAILROAD COMPANY cannot, Under the Constitution of Nebraska, by Contract with Another Shipper, limit its liability as a common carrier, nor relieve itself from the consequences of its negligence to such shipper. (Neb.) *Whitnack v. Chicago B. & Q. Ry. Co.*, 692.

35. CARRIER OF FREIGHT—Common-law Liability.—The Common-law Rule that a common carrier of inanimate freight is an insurer of its safe delivery, except where the loss results from the act of God or the public enemy, or from the inherent infirmity of the goods, prevails in Kentucky. (Ky.) *Stiles v. Louisville & N. R. R. Co.*, 429.

36. CARRIERS, Stipulations Limiting the Liability of.—A carrier cannot limit its liability for the negligence of itself or its agents by an agreed valuation upon consideration of reduced charges for the

carriage of goods, where such valuation is disproportionate to the real value of the goods, although neither the contents of the package or its value is disclosed to the carrier. (Ala.) *Southern Express Co. v. Gibbs*, 24.

37. CARRIERS, Bills of Lading, When Deemed Parts of Contract of.—When the letters passing between a carrier and a shipper set forth merely the rates at which the goods will be carried and the time within which any claim for damages will be settled, it must be assumed that the well-known usage and custom of issuing bills of lading was within the contemplation of the parties, and such bills of lading, when issued, must be regarded as parts of the contract. (Md.) *Merchants' & Miners' Trans. Co. v. Eichberg*, 524.

38. CARRIERS, Negligence, Contract Creating a Presumption Against.—A provision in a bill of lading that negligence shall not be presumed against any carrier must be given full force, and the shipper must therefore assume the burden of proving not only the injury, but the negligence that caused it. (Md.) *Merchants' & Miners' Trans. Co. v. Eichberg*, 524.

39. CARRIER, Power of to Contract as to Burden of Proof of Negligence.—Though a carrier may not contract against its own negligence, it may contract so as to put the burden of proving the negligence upon the shipper. (Md.) *Merchants' & Miners' Trans. Co. v. Eichberg*, 524.

40. CARRIERS—Reduced Rates, Acceptance of by Shipper, What Amounts to.—Where a contract of carriage provides that the shippers elect to accept reduced rates for transportation on the terms contained in the bill of lading, that they shall give notice to the agent of the carrier in writing, and, on obtaining a somewhat higher rate, that the carrier's common-law liability will attach, one who ships at reduced rates and without giving such notice is bound by the stipulation in a bill of lading providing that the shipper shall assume the burden of proving negligence on the part of the carrier. (Md.) *Merchants' & Miners' Trans. Co. v. Eichberg*, 524.

41. CARRIERS—Bill of Lading, Parol Evidence to Vary.—When a bill of lading has been issued by a common carrier, and signed and accepted by the shipper, it constitutes the contract for the shipment of merchandise therein described, and its terms cannot be altered or varied by parol testimony. (Neb.) *Whitnack v. Chicago etc. Ry. Co.*, 692.

42. CARRIERS—Bill of Lading, Construction of.—The language used in a bill of lading is subject to the same rules of construction which govern other contracts, and while the instrument is to be construed as a whole, invalid conditions will not necessarily render the contract invalid, and it may be enforced so far as it is valid. (Neb.) *Whitnack v. Chicago etc. Ry. Co.*, 692.

Inspection of Cars.

43. CARRIERS—Duty to Inspect Car.—It is not the Duty of a Railroad Company receiving a loaded car from a connecting line to inspect the manner of loading to ascertain whether the freight is so arranged as to be safe to persons who may be called upon to remove it from the cars. (Tex.) *Gulf, W. T. & Pac. Ry. Co. v. Wittnebert*, 858.

44. CARRIER.—When the Consignor Loads Freight on a Car or Packs Articles for shipment, the carrier that receives the car as loaded or the package as prepared is not liable for damages arising from defects in the loading or packing. (Tex.) *Gulf, W. T. & Pac. Ry. Co. v. Wittnebert*, 858.

45. CARRIER—Inspection of Oil-car.—It is the Duty of a Railway Company, upon receiving a tank-car loaded with oil from another line, to make a reasonable inspection of its condition with reference to its fitness for transportation, but this does not require it to unscrew the cap on the dome of the car to discover whether a check valve has been properly set in loading the car so as to protect persons who may unload it. (Tex.) Gulf, W. T. & Pac. Ry. Co. v. Wittnebert, 858.

Discrimination by Carrier.

46. COMMON CARRIERS, Common-law Right of to Discriminate. At the common law, common carriers of freight were not bound to treat all shippers alike. They were bound only to carry for every shipper at a reasonable rate, and might favor any shipper or class of shippers where the circumstances warranted the distinction, as where the preferred shipper offered goods in larger quantities or under such conditions that they could be transported with less expense. (Vt.) State v. Central Vermont Ry. Co., 1065.

47. COMMON CARRIERS, Limitation upon Common-law Right of to Discriminate.—At the common law, there was always a limitation that the discrimination or preference must be reasonable and the terms not unreasonably unequal. (Vt.) State v. Central Vermont Ry. Co., 1065.

48. RAILWAYS, Statute Respecting Discrimination, When Declaratory of the Common Law.—A statute providing that carriers by railroad shall give to all persons reasonable and equal rates, benefits, privileges, facilities and accommodations for transportation of freight and passengers is merely declaratory of the common law, and does not forbid discrimination in rates which were permitted by that law, and a complaint charging that the defendant railway company discriminated in favor of a designated person by charging him between specified points on its line fifty cents less per ton than charged to plaintiff or any other person does not charge a forbidden discrimination, because the charge, though unequal, may have been reasonable and equal within the meaning of the statute. (Vt.) State v. Central Vermont Ry. Co., 1065.

Regulation of Rates.

49. COMMON CARRIERS, Right to Prescribe Rates of.—It is within the powers of state legislatures with respect to commerce within the state, and of Congress with respect to interstate commerce, to prescribe rates to be charged by public carriers for their services, so long as the charges fixed do not require the services to be without reasonable compensation. (Vt.) State v. Central Vt. Ry. Co., 1065.

50. COMMON CARRIERS, Limitation upon Powers to Prescribe Rates for.—The power to fix the rates of common carriers is not a power to destroy, to compel the doing of service without reward, or to take private property for public use without just compensation or without due process of law. (Vt.) State v. Central Vt. Ry. Co., 1065.

Connecting Carriers.

51. CARRIERS, Connecting, Action of Tort Against, When Proper.—If goods transported by connecting carriers are delivered in a damaged condition, an action of tort is properly brought against both. (Md.) Merchants' & Miners' Trans. Co. v. Eichberg, 521.

52. CARRIERS, Connecting, Dismissal as to One, When Proper.—If connecting carriers are sued for goods delivered in a damaged condition, and there is a stipulation in the bill of lading that negligence

shall not be presumed against any carrier, the action is properly dismissed as to the initial carrier, if there is no evidence of its negligence. (Md.) *Merchants' & Miners' Trans. Co. v. Eichberg*, 524.

53. CARRIERS, Connecting, Negligence of the Last Carrier, When must be Affirmatively Proved.—If a bill of lading stipulates that negligence shall not be presumed against any carrier on goods being delivered in a damaged condition, and an action is brought against both the initial and the last carrier, the latter is entitled to an instruction to the jury to find in its favor, unless there is affirmative evidence of negligence on its part other than that the goods were received at their destination from the terminal carrier in a damaged condition. (Md.) *Merchants' & Miners' Trans. Co. v. Eichberg*, 524.

54. CARRIERS, Initial and Connecting.—A common carrier is not liable for the negligence or default of a connecting carrier in the absence of a contract making it liable therefor. (Neb.) *Whitnack v. Chicago B. & Q. Ry. Co.*, 692.

55. CARRIERS, Initial, Liability of for Loss Occurring After the Goods have Left Its Line, but Due to Its Negligence.—Where a common carrier accepts goods for shipment to be delivered to a connecting carrier, the first carrier will be liable for any damages to the goods resulting directly from the negligence of such carrier, although the loss may not actually occur until after the goods are delivered to the second carrier. (Neb.) *Whitnack v. Chicago B. & Q. Ry. Co.*, 692.

56. CARRIER, Liability of for Loss of Potatoes by Freezing After Leaving Its Line.—A common carrier undertook during extreme cold weather to carry two carloads of potatoes and deliver them to a connecting carrier. The contract provided that the shipper should furnish a caretaker to accompany the shipment and keep fires in the car to prevent the potatoes from freezing. The carrier separated the two cars while they were in transit and on its lines of railway, so that the caretaker was prevented from attending to one car of the potatoes, and they were thereby permitted to freeze. Held, that the first carrier was liable, even though the potatoes may not have frozen until after they were delivered to the second carrier. (Neb.) *Whitnack v. Chicago B. & Q. Ry. Co.*, 692.

57. JURY TRIAL—Instruction Respecting Concurrent Negligence When None is Pleaded.—If, in an action against an initial carrier to recover damages claimed to be due to negligence, it attempts to shift the responsibility to a connecting carrier, it is proper to instruct the jury respecting the liability for the concurrent negligence of the two carriers, though such negligence is not referred to in the pleadings. (Neb.) *Whitnack v. Chicago B. & Q. Ry. Co.*, 692.

Damages Against Carrier.

58. CARRIER, Waiver by of Failure to Make Claim for Damages Within a Time Specified.—If a bill of lading requires any claim for loss or damage to be made in writing within thirty days after delivery of the property, this stipulation is waived if the agent of the carrier, having full knowledge, fails to object to a claim on these grounds. (Md.) *Merchants' & Miners' Trans. Co. v. Eichberg*, 524.

59. CARRIERS—Measure of Damages, Stipulation Respecting, When Controlling.—If a bill of lading provides that the amount of loss or damage for which any carrier shall be liable shall be computed at the value of the property at the place and time of shipment, such stipulation is valid, and the value must be ascertained at the place and date of shipment. (Md.) *Merchants' & Miners' Trans. Co. v. Eichberg*, 524.

60. CARRIERS, Burden of Proof of the Cause of Damage to Property by Freezing.—Where a common carrier's contract contemplates

keeping two carloads of merchandise together in charge of a caretaker, and it separates the two cars, so that the caretaker is prevented from attending to one of them, and loss thereby ensues, the burden of proof is upon the carrier to prove that there was sufficient cause for separating the two cars. The fact of the separation of the two cars under the circumstances imports negligence. (Neb.) *Whitnack v. Chicago B. & Q. Ry. Co.*, 692.

61. VERDICT, When not Excessive.—A verdict for fifteen hundred dollars in favor of a passenger who, on applying to a railroad agent as to the best and quickest route of travel between designated points, was misdirected and thereby caused to take a route involving four or five extra stops and changes of cars, traveling part of the distance by a freight train and being compelled to stand and be greatly shaken, and occupying two or three days in making the trip, she being in ill-health at the time, and the agent being informed of that fact before giving the information, is not excessive. (Ala.) *Southern Ry. Co. v. Nowlin*, 91.

See Railroads, 25-32.

Note.

Carriers, common and private, distinctions between, 34.

common, definitions of, 34.

common, presumption is that common-law liability attaches for acts of, 34.

common, when and to what extent insurers, 34.

common, when become private carriers, 34.

private, right of to contract for exemptions from liability, 34, 35.

Carriers of Livestock are common carriers, 433-435.

burden of proof as to cause of loss of or injury to, 442.

care which must exercise over while in transit, 450.

common-law rules of liability, when not applicable to, 433.

common carriers, rules respecting where they are not regarded as, 435.

delay in transportation, liability for loss or injury to, 455-460.

delays due to failure to exercise due care, 458.

delays, excuses for which are insufficient to relieve from liability, 459, 460.

delivery of, improper, what is and liability for, 460.

diligence which must be used to transport within a reasonable time, 456.

diligence required of, 444.

duties of are those of common carriers, 434.

duties of, limitations upon, from what arise, 434.

duty of to deliver within a reasonable time, 457.

duty of to furnish food and water, 452-455.

duty of to furnish proper loading and unloading facilities, 448-450.

duty of to furnish safe and suitable cars, 446, 462.

duty of to supply safe and suitable machinery and appliances, 461.

duty of to supply stock-cars, 461.

feeding and watering, contracts casting the duty of upon the shipper, 453, 454.

feeding and watering during carriage, 452-455.

feeding and watering during carriage, duty of, when assumed by the shipper, 452.

injuries due to the manner of transportation, when assumed by the shipper, 462, 463.

injuries during and in the mode of transportation, 450-452.

injuries for which liable, 440.

injuries due to the condition of the cars, 446-448.

injuries while unloaded and being fed, 451.

Carriers of Livestock, injury burden of proving cause of, 443.

injury, burden of proving cause of when the shipper accompanies, 444.

injury, burden of proving that it was the act of God, 443.

insurers, liabilities of as, 435, 436.

insurers, reasons for liability as, 436.

liabilities of, exemptions from, 433-435.

liability of and reasons for exemption from, 440.

liability of, burden of proof respecting, 441, 442.

liability of due to the mode of transportation, 450.

liability of for exposing to contagious and infectious diseases, 452.

liability of for failure to furnish cars, 455, 456.

liability of for failure to run trains on time, 457.

liability of for injury sustained while loading and unloading, 448-450.

liability of for loss or damage to due to improper delivery of, 460.

liability of for loss due to natural propensities of, 438, 440.

liability of for loss or injury due to unsafe cars, 446.

liability of, reasons affecting, 439.

liability of, special contracts limiting, when valid, 445.

liability of where sickness is contracted en route, 437.

liability of where the owner or his agent accompanies, 439.

limitations upon liability due to the nature of the business, 439.

negligence of while loading and unloading, liability for, 448-450.

negligence, contributory on the part of the shipper, what amounts to, 461-464.

negligence, failure to comply with interstate statute is, 455.

negligence of with respect to cars causing delay, 456.

notice which must take of the ordinary weakness and character of, 442.

risk, assumption of on the part of the shipper, 461.

safe delivery of, when insurers of, 436.

shippers, negligence on the part of, contributory, what amounts to, 461-464.

sickness contracted en route, nonliability for, 437.

were unknown at the common law, 433.

CHARITIES.

See Wills, 5, 6.

CHATTEL MORTGAGES.

1. CHATTEL MORTGAGE, Right of Mortgagee to Take Possession Because He Deems Himself Insecure.—Under a clause in a chattel mortgage providing that the mortgagee may take possession of the property if he deem himself insecure, it is immaterial whether the mortgagee has good cause to believe that he is insecure, if he in fact deem himself to be so. (Kan.) *Thorp v. Fleming*, 366.

2. CHATTEL MORTGAGE of Future Earnings, When Void.—A chattel mortgage is void, at least against creditors without actual notice, which purports to assign, to secure a specified debt, all the future earnings of a threshing-machine, therein described, also of any other threshing-machine operated by the mortgagor, and of the crew, including men and teams, operating them, which may accrue for threshing during the then ensuing two years within three designated townships. (Minn.) *Dyer v. Schneider*, 615.

3. CHATTEL MORTGAGE, Description in, When too Vague to Give Notice to Third Persons.—A mortgage of the earnings of a designated threshing outfit and of any other threshing outfit owned and operated by the mortgagor, and of the crew, including men and

teams, used with such outfit, which may accrue for threshing during the ensuing two years is too vague and uncertain to afford protection to third persons dealing with the mortgagor and having no actual notice of the claim of the mortgagee. (Minn.) *Dyer v. Schneider*, 615.

4. MORTGAGE OF CHATTELS—Destruction of Mortgage Lien, Purchase of Property does not Amount to.—The purchase from a renter of his crop while it is subject to a mortgage is not wrongful, nor destructive of the lien. (Ala.) *Windham & Co. v. Stephenson*, 102.

5. MORTGAGE OF CHATTELS, Existence of at the Time of the Mortgage, to What Extent Essential.—The property mortgaged need not have identity or separate entity, but it must, at least, be the product or growth or increase of property which has at the time a corporeal existence and in which the mortgagor has a present interest, not a mere hope or expectation that he will in future acquire such interest. (Ala.) *Windham & Co. v. Stephenson*, 102.

6. MORTGAGE OF CHATTELS.—A mortgage of subsequently acquired property, especially by general terms of description, which is not the product, increase or accretion of something already owned by the mortgagor, amounts to nothing more than a mere agreement to give a future mortgage, and confers no lien on such after-acquired property. (Ala.) *Windham & Co. v. Stephenson*, 102.

7. CHATTEL MORTGAGE, When Void Because Mortgagor had No Potential Interest.—A mortgage of an entire crop raised or to be raised by the mortgagor during a year designated and also crops raised each successive year until the debt is paid cannot affect crops raised in the future on lands in which the mortgagor had no interest and which had not been leased to him when the mortgage was executed. (Ala.) *Windham & Co. v. Stephenson*, 102.

CHECKS.

See Bills and Notes, 22-24.

Notes.

Children, adoption of, implied revocation of wills resulting from, 632.

COLLATERAL SECURITY.

See Pledge.

COMMERCE.

1. INTERSTATE COMMERCE, Contracts cannot be Prohibited Because of.—A contract of an Indiana corporation by which it sells a water-tank and tower and agrees to put them up as a part of a waterworks plant in South Dakota, is within the interstate commerce clause of the constitution of the United States, and a statute of the last-named state cannot prevent the maintenance of an action, based upon such contract, though the corporation plaintiff had not filed its articles of incorporation nor appointed a resident agent, as required by the laws of the state. (S. D.) *Flint & Walling Mfg. Co. v. McDonald*, 735.

2. INTERSTATE COMMERCE and the Police Power.—When the subjects upon which the power is to be exercised are local and limited in their nature or sphere of operation, the state may prescribe rules until Congress intervenes; but when they are national in character and require uniformity of regulation, affecting all the states alike, the power of Congress is exclusive, and its nonaction is tantamount to a declaration that all commerce within its control shall remain

free of the burdens imposed by state legislation. (Vt.) *State v. Peet*, 998.

3. **INTERSTATE COMMERCE.**—Regulations of the Secretary of Agriculture under authority conferred on him by an act of Congress and not inconsistent with its provisions have the force of law. (Vt.) *State v. Peet*, 998.

4. **INTERSTATE COMMERCE**—Construction of Regulation.—The rule that the exclusion of one subject or thing is the inclusion of others applies to regulations of interstate commerce prescribed by the secretary of agriculture. (Vt.) *State v. Peet*, 998.

5. **INTERSTATE COMMERCE**—Action of Congress, When Conclusive.—Articles recognized by Congress as subjects of interstate commerce cannot be held to be otherwise. (Vt.) *State v. Peet*, 998.

6. **INTERSTATE COMMERCE.**—Commerce Among the States Comprehends intercourse for the purposes of trade in any and all of its forms, including transportation, purchase, sale and exchange of commodities between citizens of different states, and the power of regulation conferred upon Congress is without limitation. (Vt.) *State v. Peet*, 998.

7. **INTERSTATE COMMERCE.**—To Regulate Commerce is to Prescribe the Rules by which it shall be governed—that is, the conditions upon which it shall be conducted; to determine how far it shall be free and untrammelled, how far it shall be subject to duties and other exactions, and how far it shall be prohibited. (Vt.) *State v. Peet*, 998.

8. **INTERSTATE COMMERCE**—Right of State to Forbid Sale or Shipment of Animals not so Immature as to Fall Within Federal Regulation.—The secretary of agriculture, having by his regulations formulated pursuant to authority conferred on him by act of Congress, required the condemnation of the carcasses of certain animals not three weeks old when killed, it is beyond the power of the state to forbid the sale or shipment of carcasses of such animals on the ground that they were less than four weeks of age and did not weigh fifty pounds. (Vt.) *State v. Peet*, 998.

9. **INTERSTATE COMMERCE**, Regulations Imposed by and the Police Power.—Whatever may be the extent of the police power respecting the domestic order, morals, health or safety, it cannot be exercised over a subject confided exclusively to the commercial power of Congress. (Vt.) *State v. Peet*, 998.

COMMUNITY PROPERTY.

See Husband and Wife, 8-12.

COMPETITION.

See Conspiracy; Constitutional Law, 11-13.

CONCURRENT NEGLIGENCE.

See Negligence, 4.

CONDITIONS.

CONDITIONS SUBSEQUENT, Effect of.—The failure of a condition subsequent does not ordinarily confer the right to rescind an executed contract where there has been no fraud or misrepresentation, but the party must rely upon an action to recover the consideration, or damages for breach of the agreement. (S. D.) *Roy v. Harney Peak Min. & Mfg. Co.*, 706.

CONFLICT OF LAWS.

See Contracts, 7-9.

CONSIDERATION.

See Bills and Notes, 7-10; Contracts, 5, 6.

CONSPIRACY.

1. **CONSPIRACY to Stifle Competition Among Bidders for Public Work.**—One who introduces third persons to each other with the intention of bringing them together to form a conspiracy to prevent competition in letting bids for a public contract is guilty of conspiracy upon their entering into the unlawful transaction contemplated. (Ill.) *People v. Strauch*, 255.

2. **CONSPIRACY to Stifle Competition Among Bidders for Public Work.**—One who assists or encourages others to conspire and agree together to prevent competition in the letting of a contract to do public work is equally guilty with those who actively participate in the unlawful agreement. (Ill.) *People v. Strauch*, 255.

3. **CONSPIRACY to Stifle Competition Among Bidders for Public Work.**—The offense of preventing competition in the letting of a contract for public work may be by bids, the amounts of such having been previously agreed upon between parties to the conspiracy, or by an agreement not to bid. (Ill.) *People v. Strauch*, 255.

4. **CONSPIRACY to Stifle Competition Among Bidders for Public Work.**—The offense of preventing competition in the letting of a public contract to construct a bridge may be complete, although the price at which the bridge is in fact constructed is not excessive. If the unlawful combination is entered into, it is not a circumstance of mitigation that the contract is in fact let at a reasonable price. (Ill.) *People v. Strauch*, 255.

5. **CONSPIRACY.—All Who Take Part in a Conspiracy**, after it has formed and while it is in execution, and all who with knowledge of the facts concur in the plans originally formed and aid in executing them, are fellow-conspirators. Their concurrence, without proof of an agreement to concur, is conclusive against them; they commit the offense when they become partners to the transaction or further the original plan. (Ill.) *People v. Strauch*, 255.

6. **CONSPIRACY—Absence of Agreement.**—If One Concurs in a Conspiracy, no proof of agreement to concur is necessary in order to make him guilty. (Ill.) *People v. Strauch*, 255.

7. **CONSPIRACY to Stifle Competition Among Bidders for Public Work.**—In a prosecution for conspiracy in preventing competition in the letting of contracts for public work, the state is not required to prove the existence of competition on the day the contracts were let. (Ill.) *People v. Strauch*, 255.

CONSTITUTIONAL LAW.*In General.*

1. **CONSTITUTION—Effect on Prior Special Legislation.**—The Kentucky constitution does not repeal or make inoperative special laws passed before its adoption. (Ky.) *Smith v. Simmons*, 426.

2. **CONSTITUTIONAL LAW—Statutes, When will be Upheld.**—No act of the law-making power of the state can be unconstitutional unless it is clearly violative of the provisions of the constitution. If it is legally possible to sustain legislative enactments, they should not be held void. (Neb.) *State v. Drayton*, 671.

3. CONSTITUTIONAL LAW—Severability of a Statute.—A statute making it unlawful to sell certain articles or to ship them without the state, though invalid with respect to such shipments, because of its attempted interference with interstate commerce, may be treated as severable and sustained, to the extent of making unlawful sales within the state. (Vt.) *State v. Peet*, 998.

Police Power.

4. CONSTITUTIONAL LAW.—The Police Power is Inherent in Every Government and does not depend on legislative grant or limitations, and unless the act under consideration is open to attack as a violation of the provisions of the fundamental law or an illegal effort to extend the police power over a subject which cannot be brought within the rightful exercise of that power, the law must stand. (Neb.) *State v. Drayton*, 671.

5. CONSTITUTIONAL LAW—Powers of the Legislature.—Within constitutional limits, the legislature is the sole judge as to what laws should be enacted for the protection and welfare of the people, and as to when and how the police power of the state is to be exercised. (Neb.) *State v. Drayton*, 671.

Regulation of Right to Labor and Wages.

6. CONSTITUTIONAL LAW.—The Right to Labor for and to Render services to another, and the right to dispose of the compensation to be received for so doing, are property rights within the meaning of the rule that no person shall be deprived of life, liberty or property without due process. (Ill.) *Massie v. Cessna*, 234.

7. CONSTITUTIONAL LAW—General Scope of Police Power.—The laws which the legislature may enact in the exercise of the police power are those that have a tendency to promote the public comfort, health, safety, morals or welfare, or that have a tendency to prevent some recognized evil or wrong. (Ill.) *Massie v. Cessna*, 234.

8. CONSTITUTIONAL LAW—Regulating Assignment of Wages.—A statute providing that no assignment of wages or salaries shall be valid unless in writing, signed and acknowledged by the assignor, and unless a copy of the assignment and acknowledgment is served upon the person, firm or corporation from which the wages or salary is due, and further providing that if the assignor is a married person, the assignment must be executed and acknowledged by the assignor's wife or husband, is an unconstitutional abridgment of property rights, especially as applied to large salaries, the recipients of which cannot be said to be in need of protection against usurers. (Ill.) *Massie v. Cessna*, 234.

9. CONSTITUTIONAL LAW—Regulating Assignment of Wages.—A statute which makes an assignment of wages or salary void when given as security for a loan tainted with usury is unconstitutional when the law of the state makes no such provision with reference to other instruments or conveyances given to secure usurious debts. (Ill.) *Massie v. Cessna*, 234.

Regulation of Employment Agencies.

10. EMPLOYMENT AGENCIES—Unconstitutional Regulation.—A municipal ordinance making it a misdemeanor for the keeper of an employment agency to make willful misrepresentations to or willfully deceive persons seeking employment through him, is unconstitutional class legislation in making such acts criminal by persons in one kind of business while not so in others. (Wash.) *Spokane v. Macho*, 1100.

Regulation of Business—Discrimination and Competition.

11. CONSTITUTIONAL LAW—Police Power, Prevention of Discrimination, When Within.—The prevention of discrimination in

particular localities, in prices of commodities in general use, "for the purpose of destroying the business of a competitor," by selling such commodities at a lower rate in such locality than is charged for the same elsewhere, is within the police power of the state. (Neb.) *State v. Drayton*, 671.

12. CONSTITUTIONAL LAW—Statute Prohibiting Discrimination for the Purpose of Destroying Competition, When not Invalid.—A statute declaring that any person, firm or corporation engaged in the production, manufacture or disposition of any commodity in general use, which shall, for the purpose of destroying the business of a competitor in any locality, discriminate between different sections, communities or cities of the state by selling such commodity at a lower rate in one section than is charged by such party in another section or community, after making due allowance, if any, in the grade and quality and in the actual value of transportation, shall be guilty of unfair discrimination, is not unconstitutional. (Neb.) *v. Drayton*, 671.

13. CONSTITUTIONAL LAW—Statute Against Discrimination to Destroy Competition, When not Class Legislation.—The said act does not prevent persons and corporations dealing in commodities in general use from selling them at such price as such person or corporation may see proper to demand, nor is it class legislation within the constitutional prohibition. (Neb.) *State v. Drayton*, 671.

See Statutes.

CONTRACTS.

Construction and Validity.

1. CONTRACTS.—In Construing a Contract the First Point to ascertain is what the parties meant, intended and understood by the words employed, and as an aid in this respect the object in making the agreement may be taken into consideration. (Colo.) *Jennings v. Brotherhood Accident Co.*, 109.

2. CONTRACT Requiring Satisfaction of One of the Parties, Lawfulness of.—Parties to a contract may lawfully stipulate that performance by one of them shall be satisfactory to the other. The obligation of the contract is not destroyed by this stipulation. (Kan.) *Hollingsworth v. Colthurst*, 382.

3. CONTRACTS, When Void.—Contracts are void which provide for doing a thing contrary to law, morality or public policy. (Tenn.) *Heart v. East Tennessee Brew. Co.*, 753.

4. CONTRACTS, Effect of Statute Making Their Execution Unlawful.—If a lease of property is made for the purpose of carrying on thereon a business then lawful, which is subsequently by statute made unlawful, the lease thereupon becomes void and unenforceable at the instance of either party. (Tenn.) *Heart v. East Tennessee Brew. Co.*, 753.

Consideration.

5. CONSIDERATION, What is not.—A promise which involves nothing but what the promisor is already legally holden for affords no consideration. (Vt.) *Bedford v. Chandler*, 1057.

6. PROMISE Given in Consideration of a Promise not to Sue for a Reasonable Time.—If a promissory note is executed in such form that it can be collected only by the payee in her lifetime, and the maker, on being applied to to pay it or give a new note, asks that the matter be permitted to rest until a designated future day, to which the payee agrees, and the maker agrees to pay at that day, but after the making of a partial payment only, the payee dies, her agreement to forbear was not founded on any consideration,

and does not support the promise to pay at the later date, and no action can be sustained either on the note or the promise to pay at such later day. (Vt.) *Bedford v. Chandler*, 1057.

Conflict of Laws.

7. **CONTRACTS, Place of Performance, When Controls.**—If a contract is expressly or tacitly to be performed in another place, its validity, nature, obligation and interpretation are governed by the law of that place. (Ala.) *Southern Express Co. v. Gibbs*, 24.

8. **THE LAW OF ANOTHER STATE** Wherein a Contract was Executed will be presumed to be the same as that of the forum. (S. D.) *Windhorst v. Bergendahl*, 715.

9. **CONFLICT OF LAWS—Defense, by What Law Controlled.**—Though the validity and interpretation of a contract may be controlled by the laws of a sister state, in determining what shall be a good defense to actions instituted in this state, its courts must administer its own laws and not those of another state. (S. D.) *Windhorst v. Bergendahl*, 715.

Building Contracts.

10. **BUILDING CONTRACT—Defective Plans—Obligation of Contractor.**—When a building nearly finished falls down solely because of defects in the plans and specifications prepared for the owner by an architect, and made a part of the building contract, the contractor is not relieved from his obligation to restore and complete the building. (Tex.) *Loneragan v. San Antonio etc. Co.*, 803.

11. **BUILDING CONTRACT—Defect in Plans.—A Property Owner is not Bound** as guarantor of the sufficiency of the specifications for the erection of a building as a legal consequence of submitting them for bids on the work and entering into the contract. If there is any such obligation on his part, it must be found in the language of the contract. (Tex.) *Loneragan v. San Antonio etc. Co.*, 803.

12. **BUILDING CONTRACT—Duty to Restore Fallen Building.**—When builders fail to comply with their contract to construct and complete a building in accordance with the contract and specifications, they are responsible for the loss, notwithstanding the building fell when nearly finished by reason of its weakness arising out of defects in the specifications and without any fault on their part. (Tex.) *Loneragan v. San Antonio etc. Co.*, 803.

13. **BUILDING CONTRACT—Guarantee of Plans.—The Sufficiency** of the specifications prepared by an architect for the construction of a building are not guaranteed, as a matter of law, by either party to the building contract. (Tex.) *Loneragan v. San Antonio etc. Co.*, 803.

14. **BUILDING CONTRACT—Change in as Discharging Surety.**—A material change in the terms of a building contract, made without the consent of the contractor's sureties, discharges them from liability. (Tex.) *Loneragan v. San Antonio etc. Co.*, 803.

15. **BUILDING CONTRACT—Changes in as Affecting Surety.**—A stipulation in a building contract that changes therein must be agreed upon and indorsed on the contract is for the benefit of the surety as well as the owner of the property, and changes made without the consent of the surety discharges him from liability. (Tex.) *Loneragan v. San Antonio etc. Co.*, 803.

16. **BUILDING CONTRACT—Extra Work—Architects' Certificate, Necessity for to Authorize Recovery.**—If a contract provides that no new work or any work of any kind shall be considered extra unless written order for the same shall have been given to the contractors by the architects and their signature obtained thereto, no recovery,

in the absence of a waiver by the owner, can be had for work claimed to be extra, but done without such order in writing. (Tenn.) *Bannon v. Jackson*, 778.

17. BUILDING CONTRACTS, Power of Architect to Waive Provision Requiring Written Order for Extras.—A provision in a building contract to the effect that no work shall be considered as extra unless a written order therefor is given by the architect to the contractors is not so modified by another provision making the architects supervisors of the building, with authority to direct its construction, that the owners can be bound by an oral order of the architects. (Tenn.) *Bannon v. Jackson*, 778.

18. BUILDING CONTRACTS—Order of Architects in Writing, When may not be Given After the Work is Done.—If a building contract provides that no work shall be considered extra unless a written order therefor is given to the contractors by the architect, such order cannot be given after the work is done. (Tenn.) *Bannon v. Jackson*, 778.

19. BUILDING CONTRACT—Requirement of Architects' Orders in Writing, Validity and Enforcement of.—A provision in a building contract that no work shall be considered extra unless a written order therefor shall have been given to the contractors, signed by the architects, is valid, and unless waived by the owner, must be strictly complied with. (Tenn.) *Bannon v. Jackson*, 778.

20. BUILDING CONTRACTS—Architects' Certificate as Condition Precedent.—A provision in a building contract that in each case of payment a certificate shall be obtained from and signed by the architects to the fact that the work is done in strict compliance with the plans and specifications, and that they consider the payment properly due, creates a condition precedent to the maintenance of suit by the contractor against the owner. (Tenn.) *Bannon v. Jackson*, 778.

21. BUILDING CONTRACTS, Provisions in Exonerating Owner from Liability for Acts and Negligence of Other Contractors.—A provision in a building contract that where there are different contractors employed on the work, each shall be responsible to the other for damage to work or person or for loss caused by neglect or by failure to finish work at the proper time, precludes the contractor from maintaining an action against the owner for damage claimed to be due to the negligence of the other contractors. (Tenn.) *Bannon v. Jackson*, 778.

22. BUILDING CONTRACTS—Waiver of Nonliability for Acts of Other Contractors.—If a building contract provides that each contractor shall be responsible to the other for damage or for loss caused by neglect or by failure to finish work at the proper time, a payment by the owner of a part of a claim for such damage cannot be regarded as an implied promise to discharge the remainder, nor as a waiver of the protection of the provision. (Tenn.) *Bannon v. Jackson*, 778.

See Conspiracy; Public Lands.

Note.

Conveyances for the Support of the Grantor, breach of, waiver of by the grantor, when arises, 1050.

breach of, what constitutes, 1048-1050.

breaches of by third persons, 1051.

conditions of may be treated as covenants, 1046-1048.

condition subsequent, whether implied from, 1044-1046.

consideration, failure of from failure to keep the agreement, 1055, 1056.

construction of as to the support which must be given, 1048.

covenants, cases treating them as, 1046-1048.

creditors of the grantor, rights of as against, 1056.

Conveyances for the Support of the Grantor, damages for breaches
 of, actions for, 1051.
 defeasances implied in, 1041, 1042.
 equity, relief in from, 1040, 1053.
 extrinsic evidence of the consideration for, 1042.
 fraud as a ground for relief from, 1054, 1055.
 heirs of the grantee are bound by, 1056.
 liability for breach of, 1053.
 lien or charge imposed by, 1041, 1042.
 mortgages, whether may be treated as, 1041-1043.
 purchasers with notice of, 1056.
 relief from, grounds of, 1054.
 relief from, nature and kinds of, 1051, 1052.
 rescission by the grantor, how may be accomplished, 1053.
 rescission of by suits in equity, 1053, 1054.
 rights of third persons as against, 1056.
 signature of the grantee not necessary to, 1040, 1041.
 specific performance of agreements implied under, 1052.
 trusts, whether created by, 1043, 1044.
 undue influence as a ground for relief from, 1054, 1055.
 waiver of, what amounts to, 1050, 1051.

CORONER'S RECORD.

See Evidence, 9.

CORPORATIONS.

Board of Directors.

1. CORPORATIONS—Hold-over Board of Directors, Power of to Elect New Officers.—The articles of a corporation provided that a board of directors should serve for one year, and until their successors were elected and qualified, and that the officers of the corporation should be chosen by the directors at their first meeting after their appointment or election, and hold office for one year, or until their successors are elected and qualified. Held, the stockholders having failed to elect a board of directors at the annual meeting, the hold-over directors were authorized, at a meeting called for that purpose, subsequent to the annual meeting, to elect new officers as the successors of those holding over. (Minn.) *State v. Guertin*, 610.

2. CORPORATIONS, Parol Evidence of Proceedings of.—The minutes of corporation meetings are prima facie evidence only of the proceedings, and parol testimony is admissible for the purpose of proving what actually occurred. (Minn.) *State v. Guertin*, 610.

Subscriptions to Stock—Stockholders' Liabilities.

3. CORPORATIONS—Stock Subscriptions—Payment in Property. An Unpatented Formula is not property within the constitutional provision that corporations shall issue stock only for property actually received. (Tex.) *O'Bear-Nester Glass Co. v. Antiexplo Co.*, 865.

4. STOCK SUBSCRIPTIONS—Responsibility to Creditors.—Persons receiving stock issued in violation of the constitutional provision that corporations shall issue stock only for property actually received are responsible to creditors of the corporation for the face value of the shares received by them. (Tex.) *O'Bear-Nester Glass Co. v. Antiexplo Co.*, 865.

5. CORPORATIONS, Subscriptions to Stock of, When Become Due.—Where the capital stock and the number of shares are fixed by the act or certificate of incorporation, no assessment can be made on the shares of any subscriber until the whole number of shares have been taken. (Md.) *Morgan v. Landstreet*, 531.

6. CORPORATION—Subscription, Only Unconditional can be Considered.—For the purpose of considering whether all the shares of stock of a corporation have been subscribed so as to make the subscribers liable on their subscription, only unconditional subscriptions, payable in cash, can be considered. (Md.) *Morgan v. Landstreet*, 531.

7. CORPORATION—Subscription to Stock When the Corporation is Doing Business and the Whole Capital has not been Paid in.—The fact that a corporation was doing business when a subscription to its capital stock was made does not deprive a subscriber of the benefit of the rule that his subscription does not become enforceable until the whole capital stock has been subscribed. (Md.) *Morgan v. Landstreet*, 531.

8. CORPORATION—Subscription to Capital Stock, Estoppel Against Denying Liability, When does not Exist—Waiver.—The fact that a subscriber to the capital stock of a corporation knows it has been doing business in a small way and that he was afterward elected a director does not estop him from denying liability on his subscription until the whole of the shares are subscribed for, if he never qualified as director, nor attended a directors' or shareholders' meeting, nor participated in any business carried on by the corporation. (Md.) *Morgan v. Landstreet*, 531.

9. CORPORATIONS—Stockholders' Liability, When Contractual.—A liability created against stockholders of a corporation under a constitution or statute for its debts is contractual in its nature, though statutory in its origin, and an action therefor can be maintained thereon in any court of competent jurisdiction. (Del.) *Pusey & Jones Co. v. Love*, 144.

10. CORPORATIONS—Stockholders' Liability, Statutes Impairing are Prospective Only.—A statute undertaking to deprive creditors of a corporation of their right to maintain actions against its stockholders is, if applied to pre-existing indebtedness, in violation of the constitution of the United States declaring that no state shall pass any law impairing the obligation of contracts. (Del.) *Pusey & Jones Co. v. Love*, 144.

See *Mandamus*.

COTENANCY.

See *Entireties*; *Joint Tenancy*; *Tenants in Common*.

COUNTERCLAIM.

See *Setoff and Counterclaim*.

COURTS.

COURTS.—There may be a *De Facto Court*, the validity of whose acts cannot be questioned in collateral proceedings, though there is no court *de jure*. (Minn.) *State v. Bailey*, 592.

CRIMINAL LAW.

Construction of Statutes.

1. CRIMINAL STATUTES, Construction of, When Restricted to the State.—A statute is considered as not intended to have an extra-territorial effect with respect to general words used therein, unless they clearly indicate a different intent. (Vt.) *State v. Peet*, 998.

2. A CRIMINAL STATUTE must be Construed as Applying Only to Acts Within the State.—A statute making it unlawful to sell designated articles must be considered as applying only to their sale within the state. (Vt.) *State v. Peet*, 998.

Evidence.

3. **EVIDENCE**—*Res Gestae in Criminal Prosecution.*—A statement made the next day after an assault by the person assaulted that he did not know whether he cut his assailant or not, but he struck at him two or three times, is not part of the *res gestae*, and is not admissible against the state in a prosecution for a felonious assault. (Tenn.) *Thomas v. State*, 756.

Testimony of Absent Witness.

4. **CRIMINAL LAW.**—*The Uncorroborated Testimony of an Accomplice may sustain a conviction in Vermont.* (Vt.) *Taft v. Taft*, 984.

5. **CRIMINAL TRIAL**—*Testimony of Absent Witnesses.*—On a trial for theft from the person the testimony of witnesses residing without the state, taken on the examining trial, is admissible if a sufficient predicate has been laid. The constitutional guaranty that the accused shall be confronted with the witnesses against him is not thereby violated. (Tex. Cr.) *Somers v. State*, 901.

6. **CRIMINAL TRIAL**—*Testimony of Absent Witnesses.*—Upon a trial for theft from the person the testimony of witnesses residing out of the state, taken in an examining trial before a magistrate on a charge of a different offense, is not admissible. (Tex. Cr.) *Somers v. State*, 901.

Remarks of Prosecutor.

7. **CRIMINAL TRIAL**—*Remarks of Prosecutor.*—What is proved by direct testimony or is fairly inferable from facts and circumstances proved, which has a bearing upon the issues, may be a fair subject for comment by counsel; and if such deductions or inferences tend to fix upon a defendant the wickedness of the crime charged against him, it is within the scope of proper and fair argument to denounce him accordingly. (Ill.) *People v. Strauch*, 255.

See *Jury*.

DAMAGES.

DAMAGES—*Measure of for Personal Injuries.*—A verdict of seven thousand five hundred dollars is not excessive where a stevedore, twenty-eight years old, with an earning capacity of twelve hundred dollars a year, has his knee-cap and elbow-joint fractured so that it becomes necessary to remove parts of the bone, thereby practically destroying his capacity for manual labor. (Wash.) *Pearson v. Alaska Pac. Steamship Co.*, 1117.

See *Carriers*, 58-61; *Death*.

DEATH.*Actions for Death.*

1. **DEATH**—*Measure of Damages.*—A Verdict of Four Thousand Dollars is reasonable for the death of a healthy man twenty-four years of age. (Ky.) *Gould Construction Co. v. Childers*, 473.

2. **DEATH.**—*A Nonresident Alien Widow may Maintain an Action in Washington for the wrongful death in that state of her husband.* (Wash.) *Anustasakas v. International Contract Co.*, 1089.

Presumption as to Survivorship.

3. **SURVIVORSHIP**, *Determining Where There is No Proof Respecting.*—Where there is no evidence to show which of two persons survived a common disaster, the question of actual survivorship is regarded as incapable of determination, and descent and distribution

take the same course as if the deaths had been simultaneous. (Tenn.) *Walton & Co. v. Burchel*, 788.

4. SURVIVORSHIP, Presumption of.—In the absence of statute, there is no presumption as to the survivorship of two persons perishing in a common disaster. Hence, for the purpose of settling property rights, it will be presumed that all such persons, irrespective of age or sex, died at the same time. (Tenn.) *Walton & Co. v. Burchel*, 788.

5. SURVIVORSHIP Where Two or More Persons Perish at the Same Time—Descent.—Where a father and son perish at the same time and from the same disaster, the right of action for the death of the latter survives to his mother, brothers and sisters. (Tenn.) *Walton & Co. v. Burchel*, 788.

DEEDS.

Validity—Avoiding or Canceling Deed.

1. CONVEYANCES—Void and Voidable Acts, Who may Take Advantage of.—Of a void act or deed every stranger may take advantage, but not of a voidable one. (Vt.) *Tudor v. Tudor*, 977.

2. PUBLIC POLICY, Canceling a Deed Which is Founded on an Agreement Against.—Neither law nor equity will ordinarily aid a party who has knowingly entered into a contract void as against public policy by canceling an executed deed made in pursuance of such contract, and restoring to him the property which he has voluntarily parted with in execution of the contract. (S. D.) *Roy v. Harney Peak Min. & Mfg. Co.*, 706.

Quitclaim Deed.

3. QUITCLAIM DEED, Notice Implied from Taking.—Whoever takes a quitclaim deed is notified by the very limitations in the conveyance that the grantor does not undertake to convey a full title to the premises. As a general rule, the grantee takes the lands subject to all outstanding interests and equities shown by the records and such as are discoverable by the exercise of reasonable diligence. (Kan.) *Ennis v. Tucker*, 352.

4. A QUITCLAIM DEED Vests All Present Interest of the Grantor in the premises as effectually as any other conveyance. (Kan.) *Ennis v. Tucker*, 352.

5. QUITCLAIM DEED, Interests Over Which will Take Precedence.—If there are outstanding unrecorded equities and interests which are unknown to the purchaser and which cannot be ascertained by a reasonably diligent search, and the purchase is made in good faith and for value, then the conveyance will take precedence thereof. (Kan.) *Ennis v. Tucker*, 352.

6. QUITCLAIM DEED, When Vests Title as Against Prior Unrecorded Deed.—An unrecorded quitclaim deed will be held to be inferior and subordinate to a subsequent quitclaim deed from the same grantor, where the holder of the later deed is a purchaser in good faith, for value, is ignorant of the former conveyance, and when the existence of the prior deed was so concealed that it could not be discovered by the exercise of reasonable diligence on the part of the subsequent grantee. (Kan.) *Ennis v. Tucker*, 352.

7. QUITCLAIM DEED—Purchase for Value Need not be at an Adequate Price.—One acquiring title in good faith by a quitclaim deed is protected from a prior unrecorded deed, though the price paid by him is not adequate. (Kan.) *Ennis v. Tucker*, 352.

Conveyance in Consideration of Support.

8. **CONVEYANCE in Consideration of Support, Relief in Equity Against the Violation of.**—Equity will afford relief from a conveyance given for support on the nonperformance of the agreement to support. (Vt.) *Abbott v. Sanders*, 974.

9. **A CONVEYANCE for the Support of the Grantor is Treated as a Mortgage in Vermont**, whatever the form in which the support is to be furnished, and the rights of the grantee may be foreclosed by a suit in equity. (Vt.) *Abbott v. Sanders*, 974.

10. **CONVEYANCE for Support, Suit to Foreclose, When not Defeated by Failure to Do Equity.**—If a conveyance is made in consideration of the support by the grantee of the grantor, and the bill in a suit to foreclose sets up persistent and aggravated abuse of the complainant with intent to drive her from the premises without excuse or palliation, the suit will not fail because of a want of offer to do equity, though it appears that the defendants had expended money in discharge of a mortgage on the premises. (Vt.) *Abbott v. Sanders*, 974.

See **Acknowledgment; Escrows; Mortgages; Public Lands; Vendor and Vendee.**

DEFINITIONS.

See **Words and Phrases.**

Note.

Definition of ademption of legacies, 650.
 of delivery of an escrow, 911, 912.
 of escrows, 911, 912.

DETECTIVES.

See **Evidence**, 11, 12.

DEVISES.

See **Wills.**

DIVORCE.

1. **DIVORCE—Effect of Reversal on Purchaser of Dower.**—A decree of divorce deprives the party at fault of dower in the lands of the other party; and one who purchases in good faith while the decree is in force will be protected against the dower right, although the decree is subsequently reversed on writ of error pending when he purchased without a supersedeas. (Ill.) *Chicago & N. W. Ry. Co. v. Garrett*, 229.

2. **DIVORCE, Decree of, Effect of on Property Given by Wife to Husband.**—If a wife voluntarily, during coverture and without fraud or undue influence on the part of her husband, conveys her property to him, a decree of divorce subsequently granted to her does not vest in her any equitable title to such property. (Md.) *Reed v. Reed*, 552.

Note.

Divorce, suits by and against insane persons for, 853.
 wills, implied revocation of resulting from, 632.

DOCKS.

See **Trespass.**

DOWER.

See **Divorce**, 1.

DYING DECLARATIONS.

See Homicide, 9, 10.

EJECTMENT.

1. EJECTMENT—Parties—Persons Concluded by Judgment.—Where a contest in the land department has been decided in favor of a railroad company as against an entryman under the homestead law, his wife is not a necessary party in an action of ejectment against him by the railroad company, and she and the other members of the family are concluded by the judgment therein. (Wash.) *Delacey v. Commercial Trust Co.*, 1112.

2. EJECTMENT.—The Plaintiff must Recover, if at All, upon the Strength of his own title rather than upon the weakness of his adversary's. (Wash.) *Delacey v. Commercial Trust Co.*, 1112.

ELECTION.

See Pleading, 11.

ELECTRIC COMPANIES.

1. ELECTRIC RAILWAY—Negligence in Maintaining Wires.—Although an ordinance granting the right to an electric railway company to construct its line, and imposing certain conditions as to the manner of erecting and maintaining its wires is for some purposes a contract between the city and the railway company, this does not prevent a person, not a party thereto, from suing the company for personal injuries sustained through its violation of such conditions. (Ill.) *Conrad v. Springfield Ry. Co.*, 251.

2. ELECTRIC COMPANY—Failure to Guard Wires as Required by Ordinance.—An ordinance requiring a street railway company to place guards above its electric wires at points where they cross other wires is a valid exercise of the police power, and the violation thereof is prima facie negligence. (Ill.) *Conrad v. Springfield Ry. Co.*, 251.

3. ELECTRIC COMPANY—Failure to Provide Guard Wires as Required by Ordinance.—In an action by a telephone lineman against a railway company for injuries received from a wire coming in contact with unguarded wires of the company at a point where an ordinance requires guard wires to be maintained, the defendant may show as a defense that a compliance with the ordinance would not have prevented that particular injury, but it cannot make the general defense that the use of guard wires is a menace rather than a protection and has generally been discontinued in recent years. (Ill.) *Conrad v. Springfield Ry. Co.*, 251.

4. ELECTRIC COMPANIES—Liability to Trespassing Children.—Where an electric light company stretches wires eighteen feet above the ground, and a telephone company attaches to one of its poles near by two guy wires, which pass within eight inches of the electric light wires and run to the ground at an angle of forty-five degrees, being four feet apart at the ground and coming together at the top of the pole, neither company is liable to a child who in playing runs up the guy wires and is killed by coming in contact with the electric wires. (Ky.) *Mayfield Water & L. Co. v. Webb*, 69.

EMINENT DOMAIN.

1. EMINENT DOMAIN—Property Subject to Condemnation.—Rights in real estate, whether cognizable at law or in equity only, may be condemned. (Ill.) *Chicago & N. W. Ry. Co. v. Garrett*, 229.

2. EMINENT DOMAIN—Claims that may be Adjudicated.—In condemnation proceedings the court has jurisdiction to adjudicate upon all claims of interest in the property sought to be taken or damaged, including an unassigned dower interest. (Ill.) Chicago & N. W. Ry. Co., 229.

EMPLOYER'S LIABILITY.

See Master and Servant.

EMPLOYMENT AGENCIES.

See Constitutional Law, 10.

ENTIRETIES.

See Husband and Wife, 7.

EQUITY.

1. EQUITY—Maxim "He Who Seeks Equity must Do Equity."—A court of equity will not give equitable relief unless the complainant concedes corresponding equitable rights to the defendant, but a court cannot deny to a complainant his rights unless he will do something to which the defendant is not justly entitled by the principles of equity. (Ill.) *Manternach v. Studt*, 282.

2. LACHES—Time to Raise as a Defense.—Laches, to be available as a defense, should be set up in the trial court. (Ill.) *Henshaw v. State Bank of West Pullman*, 241.

3. CHANCERY PRACTICE—Supplemental Pleadings, Necessity for.—If, during the pendency of a suit, some event happens affecting the matters in issue, the court cannot consider it unless presented by a supplemental pleading, and hence an architects' certificate necessary for the maintenance of a suit and not given until after its commencement cannot be given in evidence in the absence of such pleading. (Tenn.) *Bannon v. Jackson*, 778.

ESCROWS.

1. ESCROW—Unauthorized Delivery.—When a deed is deposited with a third person to be delivered to the grantee only upon performance of some condition precedent, and the depository delivers it without such performance, there is in law no delivery, and the deed does not take effect. (Vt.) *Dunlevy v. Fenton*, 1009.

2. ESCROW, Unauthorized Change in Conditions Preceding.—Where parties agree that a conveyance shall be executed and deposited in escrow, the grantor may, nevertheless, annex conditions to his deposit not agreed upon, even to the extent of withdrawing the instrument from the depository after a specified time. The fact that in so doing he violates the terms of the contract does not change the situation in this respect, nor give the deed any force which it would not otherwise have. (Vt.) *Wilkins v. Somerville*, 906.

3. ESCROW.—Title cannot be Passed by the Escrow Without Complying with the conditions of its deposit. (Vt.) *Wilkins v. Somerville*, 906.

4. ESCROW, Injunction Against Violating Conditions of.—If a conveyance is deposited in escrow and the grantor is about to withdraw, or permit the withdrawing of, the instrument before the expiration of the time during which it was to remain on deposit, and has conveyed to a purchaser with notice, a court of equity will grant relief, and, if necessary, an injunction keeping the title in statu quo and placing the grantor in the same situation that the vendor agreed

he should be, by giving the right to perform the condition and receive the deed according to the terms of the contract. (Vt.) Wilkins v. Somerville, 906.

5. ESCROW, Time for Performance of When None is Specified.—Where a deed is placed in escrow with no specified time within which the condition shall be performed, this does not constitute any uncertainty, since by implication the performance must be within a reasonable time. (Vt.) Wilkins v. Somerville, 906.

6. ESCROW.—A purchaser taking title to property with knowledge that a deed thereof is in escrow will be compelled to convey the land in the same manner and to the same extent as the vendor would have been liable to do had he not transferred the legal title. (Vt.) Wilkins v. Somerville, 906.

Note.

Escrows, agreements for, what amount to, 913.

are irrevocable, 936.

bonds, conditions annexed to delivery of in unknown to the obligees, 930, 931.

bonds, delivery of in, 929, 930.

chattel mortgages, delivery of in, 922.

conditions accompanying the deposit, effect of, 913-917.

conditions annexed by one party without the consent of the other, 934, 935.

conditions of, breach of and its effect, 961, 962.

conditions of, death preventing the performance of, 960.

conditions of, how to be expressed, 950, 951.

conditions of may rest in parol, 950.

conditions of, nonperformance of and its effect, 959.

conditions of, performance of and its effect, 965.

conditions of, proof of, 950, 951.

conditions of, when strictly construed, 958, 959.

conditions of, which must be known to the depository, 932.

conditions, performance of, sufficiency of and time for, 958-965.

conditions, what insufficient to create, 956-958.

conditions which are fatal to, 914, 915.

constable's bonds, delivery of in, 973.

contracts of purchase, delivery of in, 922.

control by the depositor over the possession of the deposit, 919.

death, delivery after, effect of, 921.

death of the depositor and its effect, 920.

creation of, what sufficient evidence of, 951-955.

definitions of, 911, 912.

delivery, effect of, 973, 974.

delivery, second, whether necessary to the passing of the title, 967.

delivery of contrary to conditions, 912.

delivery of, definitions of, 911, 912.

delivery of, effect of, 935.

delivery of instrument for inspection does not create, 933, 934.

delivery of must be to a stranger, 912.

delivery of on condition that other parties will unite in, 928.

delivery of procured by theft or fraud, 942.

delivery of subject to recall, effect of, 938.

delivery of to or by an agent, 918.

delivery of to take place after the grantor's death, 920, 921.

delivery of to the depository, necessity for, 923.

delivery of to the grantee, 923-925.

delivery of, what amounts to and sufficiency of proof of, 933, 937.

deposit of must be irrevocable, 912.

deposit of, no particular form of words need be connected with, 913.

- Escrows**, deposit of on condition that other signatures be procured, 913, 914.
 deposit of, when not deemed unconditional, 912.
 depositaries, agents and attorneys as, 925.
 depositaries, agents and servants of corporations as, 926.
 depositaries, agents, cases where may act as, 932.
 depositaries, co-obligor or agent as, 931.
 depositaries, control of must be unconditional, 918.
 depositaries, decision of that the condition has been performed, 941-943.
 depositaries, delivery of by generally, 940-943.
 depositaries, delivery of by, when may be made, 941.
 depositaries, delivery of by, when valid, 963.
 depositaries, duties of, 942.
 depositaries, duty of to deliver according to the conditions, 939.
 depositaries, grantee of a bill of sale as, 932.
 depositaries, grantees as, 923-925.
 depositaries, grantee's refusal to accept, 932.
 depositaries, knowledge by of the conditions, whether essential, 932.
 depositaries, liability of, 949.
 depositaries, obligees of bonds as, 927.
 depositaries, payee of note as, 927.
 depositaries, principal obligors as, 930.
 depositaries, promisees or payees of simple contract as, 932.
 depositaries, redelivery by, when authorized, 948.
 depositaries, unauthorized delivery by and its effect, 943-948.
 depositaries, whether may be regarded as agents of either party, 923.
fraudulent abstraction or delivery of, 970.
 grantee, agent or attorney, delivery to, effect of, 925, 926.
 grantee, delivery of to is absolute, 923, 924.
 grantee, delivery of to where another person is still to execute, 924, 925.
 grantor's power to recall, 939.
 guaranty, contracts of, delivery of in, 923.
 intention of the parties and its effect, 917.
 negligence in taking an unauthorized, 944.
 parol evidence to show conditions of, 913, 915, 924, 950.
 payee of note, delivery of to, 927.
 pleading of, 973.
 promissory notes, delivery of in, 922.
 ratification of wrongful delivery in, 971, 972.
 remedy for depositary's refusal to deliver, 973.
 requisites of, 912.
 reservation of control by the grantor is fatal, 919.
 revocation of, 939.
 sealed and unsealed instruments, differences between, 918.
 specific performance in aid of, 973, 974.
 sureties, delivery by of bonds in, 930.
 tests of, 917, 918.
 time when instrument deposited in becomes operative, 965, 967.
 title does not pass by the unauthorized delivery of, 943, 946.
 title, relation of back to the first delivery, 968, 970.
 title to property before delivery of, 935, 936.
 title under, at what time deemed to vest, 936.
 title under, when passes, 965.
 title, when vests under, 916.
 to be delivered after the death of the grantor, 915.
 voluntary conveyances, recall of before delivery, 939.
 what may be deposited in, 922.

Escrows, writing need not accompany the deposit of, 913, 915, 916, 950.
writings which may be delivered in, 922.
wrongful procurement of the instrument by a party, 970.

ESTATES OF DECEDENTS.

See Executors and Administrators; Wills.

ESTOPPEL.

See Municipal Corporations.

EVIDENCE.

In General.

1. **EVIDENCE—Second Objection to Introduction.**—If evidence properly admitted over objection afterward on cross-examination appears incompetent, a further objection should be interposed in order to secure a review on appeal. (Iowa) *Burger v. Omaha etc. Ry. Co.*, 343.

2. **EVIDENCE—Statement from Books of Account.**—A statement made from books of account is not admissible where there has been no foundation laid for the books themselves. (Md.) *Richardson v. Anderson*, 543.

3. **APPEAL AND ERROR—Evidence, Error in Admitting, When Rendered Harmless.**—If a statement compiled from certain account-books is admitted without proper foundation, its admission becomes harmless, when it appears from other evidence that the defendant admitted such statement to be correct. (Md.) *Richardson v. Anderson*, 543.

4. **EVIDENCE of Knowledge of a Given Fact by a Third Person, What not Proper.**—It is not proper to ask a witness whether another person knew of a specified fact at a given time. The proper practice is for the witness to state the circumstances relied upon to show such knowledge. (Ala.) *Layton v. Campbell*, 17.

5. **EVIDENCE to Support Surplusage Allegation.**—If the averment of facts in an answer constitutes surplusage, testimony to support such averment is properly excluded. (Ala.) *Layton v. Campbell*, 17.

6. **EVIDENCE, Production of Incompetent, When Waives Objection to Like Incompetent Evidence in Rebuttal.**—If defendant in a criminal prosecution, against the objection of the state, insists upon offering and having the court receive incompetent evidence, he will not be allowed to avail himself, as a ground for a new trial or reversal, of the fact that equally incompetent evidence of like character and on the same point was, against his objection, received against him. (Tenn.) *Thomas v. State*, 756.

7. **EVIDENCE.**—It is not Erroneous to receive irrelevant evidence to rebut evidence of like character offered by the other. (Tenn.) *Thomas v. State*, 756.

Records and Copies Thereof.

8. **EVIDENCE.**—Certified Copies of the Records of the Collector of Internal Revenue are admissible in prosecutions for unlawful sales of intoxicating liquors. (Kan.) *State v. Pigg*, 387.

9. **EVIDENCE.**—The Record of a Coroner's Inquest is not admissible in civil actions to show the cause of death. (Wash.) *Sullivan v. Seattle Electric Co.*, 1082.

Parol to Vary Writing.

10. **EVIDENCE—Parol to Vary Contract.**—Extrinsic Evidence is not admissible either to contradict, subtract from, add to or vary a written instrument. (Colo.) *Harvey v. Denver etc. R. R. Co.*, 120.

Testimony of Detective.

11. **EVIDENCE.**—The Testimony of a Private Detective is entitled to as much weight as that of an accomplice. (Vt.) Taft v. Taft, 984.

12. **EVIDENCE**—Detectives, Testimony of.—The evidence of a private detective hired by a husband to watch his wife with a view of learning facts upon which to base a suit for divorce, where it does not appear that his pay does not depend on the successful result of his evidence, should be awarded a consideration like other testimony and treated by the same tests, and the fact that the person is a hired witness should be considered by the triers. (Vt.) Taft v. Taft, 984.

Expert Testimony.

13. **EVIDENCE.**—Expert Testimony is not Admissible on the question of the proper or competent operation of a winch in an action by a hatch-tender of a vessel for injuries sustained through the incompetence of the winch-driver in operating the winch while the vessel was being loaded, since the inquiry does not involve the mysteries of any particular science or trade, and the jurors are as competent to draw correct inferences in relation thereto as witnesses. (Wash.) Pearson v. Alaska Pacific Steamship Co., 1117.

See Criminal Law, 3-6; Homicide, 5-13.

Note.

Evidence, escrows, parol to show conditions of, 913, 915, 924, 950.

estoppel arising from offering incompetent, 759.

in rebuttal of irrelevant or incompetent, 761-763.

incompetent, estoppel arising from offering, popular rule on the subject, 759-766.

incompetent, party first offering waives objection to when offered by his adversary, 759.

incompetent, right of the court to rule out though the other party has offered like evidence, 766.

illegal, admission of on one side, cases holding it does not warrant the admission of like evidence on the other, 766, 767.

irrelevant, right to introduce, whether may be founded on the introduction of like evidence by the adversary, 767.

irrelevant to rebut irrelevant, 759.

objection to, failure to make, whether waives right to object to evidence of like character, 767, 768.

objection to, waiver of by offering evidence of like character, 759-766.

EXECUTION.

1. **EXECUTION SALE**—Title Acquired by Purchaser.—When the vendor of land under an executory sale obtains judgment against the vendee on a purchase money note and causes the property to be sold, the purchaser acquires not only the title of the vendee, but also the legal title that remained in the vendor as security for the purchase price. (Tex.) Brown v. Canterbury, 824.

2. **EXECUTION SALE.**—The Purchaser at an Execution Sale may Acquire the Title of the Plaintiff as well as that of the defendant, if essential to accomplish the purpose of the sale. (Tex.) Brown v. Canterbury, 824.

EXECUTORS AND ADMINISTRATORS.*Special Administrators.*

1. **IT IS THE DUTY OF A SPECIAL ADMINISTRATOR** to simply conserve and save the estate, and have it ready to be turned over to the regularly appointed administrator when he is appointed. (Mich.) Zimmer v. Saier, 575.

Claims Against Estate.

2. ESTATE OF DECEDENT—Amendment of Claim—Limitations. Where a claim against an estate is stated informally and so as to be apparently barred by the statute of limitations, a subsequent statement referring to the first, which sets forth the claim with more formality, shows that it is founded on an express contract, and alleges additional matter preventing the bar of the statute of limitations, will be regarded as an amendment of the original statement, rather than a new one, and hence seasonably filed, although since the filing of the original claim the time for presenting claims has expired. (Iowa) *Wise v. Outtrim*, 301.

3. ESTATE OF DECEDENT—Amendment of Claim—Limitations. Where a claim against an estate is so stated that it apparently is barred by the statute of limitations, an amendment alleging additional matter which prevents the application of the statute does not destroy the identity of the claim within the meaning of the rules of amendment. (Iowa) *Wise v. Outtrim*, 301.

4. ESTATE OF DECEDENT—Amendment of Claim—Notice.—When the notice of the filing of a claim has been given, and the administrator appears to resist or defend, a further notice of an amendment to the claim is not necessary. (Iowa) *Wise v. Outtrim*, 301.

5. ESTATE OF DECEDENT—Statement of Claim—Appearance. The question whether the administrator appeared in resistance to a claim filed against the estate is so peculiarly within the knowledge of the trial court that the supreme court is not disposed to interfere with its finding. (Iowa) *Wise v. Outtrim*, 301.

6. ESTATE OF DECEDENT—Sufficiency of Statement.—The statutory provisions requiring a claim to be entitled in the name of the plaintiff and defendant and to be verified are directory only, and a failure to observe these formalities affects neither the jurisdiction of the court nor the plaintiff's right of action. (Iowa) *Wise v. Outtrim*, 301.

7. ESTATE OF DECEDENT—Amendment Avoiding Statute of Limitations.—The allowance of an amendment to the statement of a claim, the effect of which is to avoid the bar of the statute of limitations, but which leaves the essential grounds of recovery substantially unchanged, is favored by the courts. (Iowa) *Wise v. Outtrim*, 301.

8. ESTATE OF DECEDENT—Enforcement of Claim—Security for Costs.—The statute providing that a nonresident plaintiff may be required to give security for costs has no application to a proceeding to establish a claim against the estate of a decedent. (Iowa) *Wise v. Outtrim*, 301.

9. ESTATE OF DECEDENT—Claim for Personal Services.—Services rendered by a girl in a man's family wherein she has gone to live will, upon his death, support a claim against his estate. (Iowa) *Wise v. Outtrim*, 301.

Executor's Power of Sale—Foreign Will.

10. EXECUTORS, When have a Power of Sale.—Under a devise to sell, executors have a common-law authority by which they can vest the legal title in the purchaser, and the purchaser under the power takes the estate in the same manner as if the power and the instrument executing it had been incorporated in one instrument. (Vt.) *Tudor v. Tudor*, 977.

11. EXECUTORS, Foreign, Power of Sale, When Vested in.—If, by a will executed in another state, the executors are given power to sell real property, they may exercise the power in this state, though

the will has not been admitted to probate here, for if it is subsequently admitted to probate in this state, it has the same effect as if originally proved and allowed in the same court, though letters testamentary are granted only in the primary jurisdiction. (Vt.) *Tudor v. Tudor*, 977.

Administrator's Sale.

12. **PROBATE SALE—Minor not Estopped to Avoid.**—Where an administrator's sale is void as to a minor heir for want of due service of process, he is not estopped to disregard the sale and enforce partition by the fact that his mother, who purchased the property as the principal creditor of the estate, has furnished him care, maintenance and education. (Ill.) *Manternach v. Studd*, 282.

13. **PROBATE SALE—Avoidance by Minor—Parties.**—An administrator who made a sale of real property, void as to a minor heir, is not a necessary party to an action of partition brought by the minor fifteen years after the settlement of the estate and the discharge of the administrator, when no relief is sought against him and his interest is not affected by the decree. (Ill.) *Manternach v. Studd*, 282.

14. **PROBATE SALE.**—The Rule of *Caveat Emptor* applies to administrators' sales of real estate. (Ill.) *Manternach v. Studd*, 282.

15. **PROBATE SALE—Doctrine of Subrogation.**—Where the title of a purchaser at an administrator's sale to pay debts which are not liens on the land fails for want of jurisdiction, he is not entitled in equity to be subrogated to the claims of creditors paid by the purchase money. (Ill.) *Manternach v. Studd*, 282.

16. **PROBATE SALE—Avoidance by Minor Without Restitution.** Where an administrator's sale is void on its face for want of due service on a minor heir, he is entitled to disregard the sale and have partition of the land, without reimbursing grantees of his mother (she having purchased at the sale as principal creditor of the estate) for his share of the purchase money received by her, but not by him unless in the way of care and maintenance. (Ill.) *Manternach v. Studd*, 282.

Account of Administrator.

17. **AN ADMINISTRATOR** may be Allowed in His Final Account for fees incurred on an attempt to sell real property, where the heirs have agreed that he should have his fees out of the estate. (Mich.) *Zimmer v. Saier*, 575.

Estoppel of Heirs After Administration.

18. **ADMINISTRATION—Estoppel of Heirs Who Conceal Their Rights.**—Where a vendee dies, leaving his contract incomplete, and his widow, appointed administratrix, pays the purchase price of the land and takes the conveyance to herself, and also pays debts of the estate without their formal approval, making the payments in both cases from her own funds, supposing herself to be the sole heir, and she does not have her widow's allowance formally allowed by the court, when if the claims she paid had been approved and her widow's award set apart by the court in the formal manner prescribed by statute, the estate would have been insolvent, heirs of whose existence she was ignorant, but who knew of the contract and of the pending administration, yet concealed their rights until the estate was closed, cannot maintain an action for damages against her grantor for conveying the land. (Colo.) *Lewis v. Jerome*, 131.

19. **ADMINISTRATION—Heirs Concealing Their Rights.**—Where an action is brought by heirs, who concealed their rights until the

estate was closed, against one who had contracted to convey land to their ancestor and who subsequently conveyed to his widow after her appointment as administratrix, she is the proper party defendant, and in her answer may apply to have the estate reopened. (Colo.) *Lewis v. Jerome*, 131.

See Partition, 8-10.

Note.

Executors and Administrators, claims against estate, affidavits in support of, when sufficient, 315, 317.

claims against estate, amendment, right of, 323, 324.

claims against estate, capacity of person, whether must be stated, 315.

claims against estate, contingent, statements of, 317.

claims against estate, copy of instrument relied upon, when necessary, 317.

claims against estate, credits, how must be set forth in, 316.

claims against estate, description of claim must be sufficient to distinguish it from similar claims, 312.

claims against estate, facts, statement of in may be general, 311.

claims against estate, facts, what disclosure of necessary, 312.

claims against estate, formality in is not required, 311.

claims against estate, indefiniteness in may be aided by affidavit, 312.

claims against estate, itemizing accounts in, 314.

claims against estate, justness of must appear, 315.

claims against estate, liens or securities, references to, when necessary and what sufficient, 318.

claims against estate, limitations, statute of, effect of upon, 324.

claims against estate, married women, services of, claims for, by whom may be made, 314.

claims against estate, note due, statement of, 317.

claims against estate, offsets, must be negated in, 315, 316.

claims against estate, oral statement of is not permissible, 313.

claims against estate, original instruments in support of, when must be exhibited, 317.

claims against estate, pleadings, rules of need not be followed in, 312.

claims against estate, services of married woman, claim for should be presented by her husband, 314.

claims against estate, services, statement of claims for, 314.

claims against estate, statements of, offsets must be negated in, 315, 316.

claims against estate, sufficient, illustrations of, 312.

claims against estate, verification of by persons other than the claimants, reasons for, whether must be stated, 323.

claims against estate, verification of, form and contents of, 318.

claims against estate, verification of, necessity for, 318-320.

claims against estate, verification of, persons who may verify, 322, 323.

claims against estate, verification of, sufficiency of, 320-322.

claims against estate, verification of, whether may be made after the claim is filed, 321.

claims against estate, verification of, waiver of, 320.

claims against estate, verification, what claims must be supported by, 320.

claims against estate, waiver of defects in, 314, 315.

claims against estate, waiver of verification of, 320.

claims against estate, writing, must be in, 313.

trusts, right of to execute, 523.

EXPERT TESTIMONY.

See Evidence, 13; Homicide, 7, 8.

EXPLOSIVES.

See Negligence, 3.

FAIRS IN STREET.

See Municipal Corporations, 9-12.

FELLOW-SERVANTS.

See Master and Servant.

FIRES.

See Railroads, 3-12.

FOREIGN LAW.

See Pleading, 9, 10.

FOREIGN WILLS.

See Executors and Administrators, 10, 11; Wills, 17.

FRAUDS, STATUTE OF.*Sale of Goods.*

1. **STATUTE OF FRAUDS**, Goods, What are Within the Meaning of.—Shares of stock in an incorporated company, the shares having been issued, are goods within the meaning of the statute of frauds, and a contract for their sale must, therefore, satisfy the provisions of the statute applicable to the sale of other goods. (Mich.) Sprague v. Hosie, 558.

Sale of Timber.

2. **STATUTE OF FRAUDS**—Contract for the Sale of Standing Timber.—Present title to standing timber cannot be transferred by an oral contract, though such may have been the intention of the parties, but a license to enter and remove such timber may rest in parol. (S. D.) Polk v. Carney, 719.

3. **TIMBER**, Written Contract to Cut and Deliver, When Revocable as a Parol License.—A contract in writing between a land owner and another that the latter is to cut timber on a specified tract and deliver a specified amount thereof at a place designated merely creates a license, revocable by the subsequent sale of the land to another person. (S. D.) Polk v. Carney, 719.

Pleading Statute.

4. **STATUTE OF FRAUDS**—Pleading.—A complaint which fails to show whether the contract relied on was or was not obnoxious to the statute of frauds, is, nevertheless, good. (Mich.) Sprague v. Hosie, 558.

5. **STATUTE OF FRAUDS**, Pleading of, When Unnecessary.—It is not necessary in an answer to specifically plead the statute of frauds or to show that the contract did not comply with that statute. The plaintiff, having alleged a valid contract in his complaint, must prove it as against the motion or objection of the defendant. (Mich.) Sprague v. Hosie, 558.

FRAUDULENT CONVEYANCE.

1. **CONVEYANCES**, Fraudulent are not Void, but Voidable.—A statute providing that all fraudulent conveyances of land shall be,

as against a party whose right, debt or duty is attempted to be avoided, null and void, must be construed as making such conveyances voidable only. (Vt.) *Tudor v. Tudor*, 977.

2. A FRAUDULENT CONVEYANCE is Good Between the Parties and Against the Grantor. (Vt.) *Tudor v. Tudor*, 977.

FREEDOM OF PRESS.

See Libel and Slander.

GARNISHMENT.

1. JUDGMENT, Order in Garnishment, When Amounts to.—An unconditional order, made under the provisions of section 249 of the Code, that a garnishee pay money into court, is a judgment within the meaning of the statutes making judgments, when docketed in the office of the clerk of the district court, a lien upon the lands of the debtor situated within the county. (Neb.) *Johnson v. Samuelson*, 666.

2. GARNISHMENT, Loss of Jurisdiction in Proceedings for, When Takes Place and Its Effect.—Where a garnishee, summoned by a justice of the peace under the provisions of section 249 of the Code, makes a disclosure denying any indebtedness or liability to the judgment debtor, and the justice, without announcing any decision or any adjournment of the hearing, informs the garnishee that he is excused, said justice thereby loses jurisdiction of the case; and an order afterward entered requiring the garnishee to pay the amount of the judgment into court is constructively fraudulent. (Neb.) *Johnson v. Samuelson*, 666.

GIFTS.

GIFT INTER VIVOS, What Sufficient, and Reservation Which does not Destroy.—One who receives a note payable to himself alone and not to any executor, trustee or assignee may be regarded as making a gift inter vivos of so much of the note as shall not have been collected in his lifetime. The title of the gift passes to the maker of the note, subject to the right of defeasance in the payee or donor, at whose death the right of defeasance terminates. The reservation of this right did not make the gift invalid, and the limitation of the right was such that nothing was left in the donor to pass at his death. (Vt.) *Bedford v. Chandler*, 1057.

See Husband and Wife, 4-6.

GUARDIAN AD LITEM.

GUARDIAN AD LITEM—Failure to Appoint.—The fact that a guardian ad litem is not properly appointed for minors in an action brought by them and their mother for wrongful death does not authorize a nonsuit if the complaint states a cause of action in her favor. (Wash.) *Anustasakas v. International Contract Co.*, 1089.

HABEAS CORPUS.

1. HABEAS CORPUS—Inquiry into Corporate Existence.—A person in custody for violating a city ordinance cannot, on habeas corpus, inquire into the legality of the corporate existence of the city and the election and incumbency of its officers. Such attack can be made only by proceedings in the nature of quo warranto. (Tex. Cr.) *Ex parte Keeling*, 884.

2. HABEAS CORPUS, Scope of Inquiry upon.—The scope of habeas corpus when directed to an inquiry into the cause of imprisonment in judicial proceedings extends to questions affecting the jurisdiction of the court, the sufficiency in point of law of the proceedings,

and the validity of the judgment or commitment under which the prisoner is restrained. It cannot be employed as a writ of quo warranto to inquire into the title of the person to the office of judge of the court whose judgment or commitment is assailed, nor as a writ of error, appeal or certiorari. (Minn.) *State v. Bailey*, 592.

3. HABEAS CORPUS—Judgment of the Court, When the Only Subject of Inquiry.—If a prisoner is detained under a judgment rendered or commitment issued by a court of competent jurisdiction, fair on its face, nothing further than the jurisdiction of the court will be inquired into. (Minn.) *State v. Bailey*, 592.

4. HABEAS CORPUS, Attack upon Municipal Court by, When not Permissible.—Even though defectively organized, the organization being authorized by law, the municipal court of Bemidji is at least a de facto court and the judge and clerk thereof de facto officers, and the right of the court to exercise judicial functions can be inquired into only at the instance of the state in direct proceedings brought for that purpose. (Minn.) *State v. Bailey*, 592.

5. HABEAS CORPUS, Questioning the Legality of the Court.—The legal existence of a court organized and created under color of law cannot be questioned in habeas corpus sued out by a person convicted and sentenced to imprisonment in proceedings had before it. (Minn.) *State v. Bailey*, 592.

HIGHWAYS.

See Animals.

HOMESTEAD.

1. HOMESTEAD—Estoppel of Wife to Contest Transfer by Husband Alone.—If a husband has a contract for the purchase of a parcel of land on which he and his family reside, and which constitutes their homestead, and he and his wife agree to exchange it for real property, but she fails to join in the assignment of the contract because the scrivener who drew the assignment advised that her joinder was unnecessary, and she and her husband, without any objection on her part, remove to the property so acquired by exchange and without any intention to return to their former home, this amounts to an abandonment of the homestead, and precludes her from maintaining a suit to assert her homestead rights, and entitles the defendant to a decree vesting title in him against her claim, especially where large expenditures have been made by him in improving the property, and liens have been placed thereon in good faith by way of mortgage. (Mich.) *Bovine v. Selden*, 579.

2. MORTGAGE of a Homestead Executed by the Husband Alone, followed by a foreclosure to which the wife was a party, does not affect the homestead interest. (Vt.) *Davis v. Davis*, 1035.

3. HOMESTEAD, Subrogation to Claim Against.—The mere fact that money was furnished and used to satisfy a claim secured by a homestead does not entitle the party furnishing it to subrogation to such claim. (Vt.) *Davis v. Davis*, 1035.

4. HOMESTEAD RIGHTS, When not Barred by a Foreclosure.—The foreclosure of a mortgage signed by the husband alone and purporting "to bar all equity of redemption in the premises" does not affect the wife's homestead rights, though she was a party to it, because the decree of foreclosure relates only to such rights and interests as are inferior to the mortgage foreclosed, and not to such as are superior. (Vt.) *Davis v. Davis*, 1035.

5. HOMESTEAD RIGHTS, Where There are Two Mortgages, One of Which was Paramount to Them and the Other was not.—If, in a suit to establish homestead rights, it appears that the defendant holds

two mortgages, one of which is paramount to the homestead interests and the other is not, the complainants cannot be granted any relief, for the reason that the mortgagee has the right to hold the whole property until his mortgage, which is paramount to the homestead rights, has been redeemed from. (Vt.) *Davis v. Davis*, 1035.

HOMICIDE.

Pointing Gun at Another.

1. **MANSLAUGHTER Through Pointing a Gun at Another Without Intent to Shoot.**—Under the statutes of Alabama making it a misdemeanor to present at another person any gun, pistol or other firearm, whether loaded or not, one who intentionally points a gun at another, though without the intention of shooting at him, is guilty of manslaughter in the second degree if the gun is accidentally discharged, producing the death of such other. (Ala.) *McDaniel v. State*, 74.

2. **CRIMINAL LAW—Presenting a Gun at Another.**—There can be no unlawful presentation of a gun at another unless the presentation is intentional. (Ala.) *McDaniel v. State*, 74.

3. **MANSLAUGHTER, Through Presenting a Gun at Another—Instruction Ignoring Negligence, When Properly Refused.**—Under a prosecution for manslaughter brought about from presenting a gun at another and its unintentional discharge, the defendant is not entitled to an instruction that the jury must find from the evidence, beyond a reasonable doubt, that the defendant intentionally pointed a gun at the decedent, and if they are not so satisfied, they must find the defendant not guilty, if from the evidence it is open to the jury to find that the homicide occurred by reason of gross negligence in handling the gun. (Ala.) *McDaniel v. State*, 74.

Self-defense.

4. **HOMICIDE—Self-defense in Case of Assault with Gun.**—Where the evidence in a homicide trial shows that the deceased was in the act of assaulting the defendant with a gun at the time of the fatal shot, having previously made numerous threats and also an assault with an ax handle, from the effects of which the defendant was still suffering, it is error to limit the right of self-defense by an instruction that the defendant should use no more force to defend himself than the circumstances reasonably indicated to be necessary. (Tex. Cr.) *Huddleston v. State*, 875.

Evidence—Res Gestae, Opinions, Threats, Dying Declarations, Character.

5. **HOMICIDE—Res Gestae—Competency of Witness.**—Where the daughter of the deceased was near the scene of the homicide, heard the shots, ran to the place, and found her brother (who was ten years of age and has since died from his wounds) standing there, his reply to her question as to who did the shooting is admissible as part of the *res gestae*, and his competency as a witness if he had lived is immaterial. (Tex. Cr.) *Hunter v. State*, 887.

6. **HOMICIDE—Evidence of Threats and Abuse.**—In a homicide case the declaration of one of the defendants, who co-operated in the crime, made five or six days before the homicide, in which he threatened and abused the deceased, is admissible as showing inferential malice. (Tex. Cr.) *Hunter v. State*, 887.

7. **HOMICIDE—Opinion as to Report of Gun.**—A witness who testifies that he has heard guns fired and can tell the difference between the report of a Winchester and a shotgun may give his opinion as to what kind of a gun was used in firing shots which he heard at the time of a homicide. (Tex. Cr.) *Hunter v. State*, 887.

8. **HOMICIDE—Opinion as to General Character of Deceased.**—While it is permissible to prove the general character of the deceased in a prosecution for homicide in which the right of self-defense is interposed, a witness may not state whether the deceased was a man likely to resent with violence an insulting message sent him by the accused. (Tex. Cr.) *Hunter v. State*, 887.

9. **HOMICIDE.—To Make a Dying Declaration Admissible**, it is not necessary that the deceased should indicate that he is going to die in an hour or in a few hours; but he must be conscious of impending death. (Tex. Cr.) *Hunter v. State*, 887.

10. **HOMICIDE.—The Dying Declarations of a Boy Ten Years of Age** are admissible. (Tex. Cr.) *Hunter v. State*, 887.

11. **MANSLAUGHTER—Prior Threats and Difficulties—Adequate Cause.**—Where the evidence in a homicide trial shows that the deceased made threats against the defendant which had been communicated to him, that a few days previously he had made an assault upon the defendant, and that less than two hours before he had made a vigorous assault on the defendant with an ax handle, from the effect of which the defendant was still suffering, and that the deceased was in the act of making an assault upon the defendant with a gun at the time of the fatal shot, the court should not select one particular fact as a basis for "adequate cause" and charge that the provocation must arise at the time of the killing. (Tex. Cr.) *Huddleston v. State*, 875.

12. **MANSLAUGHTER—Proof of Prior Assault—Reasonable Doubt.**—Where the defendant in a homicide case introduces evidence, in mitigation of the offense, that a short time before the homicide the deceased assaulted him with an ax handle, he is not required to establish this fact beyond a reasonable doubt, and an instruction requiring him to do so is erroneous. The reasonable doubt is resolved in his favor. (Tex. Cr.) *Huddleston v. State*, 875.

13. **HOMICIDE—Uncommunicated Threats.**—Where the Question of Self-defense is raised in a homicide case, the court in its instruction should not limit the effect of communicated threats to disclosing the condition of the mind of the deceased at the time of the homicide; they are important in solving the question who began the difficulty. (Tex. Cr.) *Huddleston v. State*, 875.

14. **HOMICIDE.—If the Accused had been Informed that Threats had been Made by the Deceased**, and believed this to be true, he would be equally justifiable in acting thereon though the deceased had not in fact made them. (Tex. Cr.) *Huddleston v. State*, 875.

HUSBAND AND WIFE.

Actions Between—Statute of Limitations.

1. **HUSBAND AND WIFE—Action by Her Against Him.**—A wife has a right of action against her husband for a debt due her from him. (Iowa) *Rice v. Crozier*, 340.

2. **HUSBAND AND WIFE—Limitation of Actions.**—The statute of limitations begins to run against a right of action by a wife against her husband upon a promissory note at the date of its maturity. (Iowa) *Rice v. Crozier*, 340.

3. **HUSBAND AND WIFE—Limitation of Actions.**—Upon the removal by statute of the disability of a wife to sue her husband for her separate property, her right of action becomes complete and the statute of limitations then begins to run against her. (Iowa) *Rice v. Crozier*, 340.

Gifts from One to the Other.

4. **A GIFT from a Wife to Her Husband of Property Belonging to Her Separate Estate**, in the absence of all evidence that it had been given to him to be held in trust for her use or of a promise on his part to repay it, is presumed to be intended as an absolute gift, and she has, therefore, no claim against him or his estate. (Md.) *Reed v. Reed*, 552.

5. **GIFT from Husband to Wife, Power of Court to Cancel on Granting a Divorce**.—A provision of the code of Maryland authorizing the court, in granting a divorce, to award to the wife such property or estate as she had when married, does not confer on the court power to cancel gifts made by her to him during their coverture. (Md.) *Reed v. Reed*, 552.

6. **GIFTS from a Wife to Her Husband are Closely Inspected by the Courts** on account of the danger of improper influences, and will not be allowed effect if due to such influences, but if free therefrom will be sustained. (Md.) *Reed v. Reed*, 552.

Tenancy by Entireties.

7. **TENANCY by the Entireties, Effect of a Divorce upon**.—If husband and wife hold property as tenants by the entireties, the result of their divorce is that they thereafter hold it as tenants in common. (Md.) *Reed v. Reed*, 552.

Community Property.

8. **COMMUNITY PROPERTY**.—The Character of the Title to Property, as separate or community, depends upon the existence or non-existence of the marriage at the time of the incipency of the right in virtue of which the title is finally extended, and the title when extended relates to that time. (Tex.) *Creamer v. Briscoe*, 869.

9. **COMMUNITY PROPERTY—Homestead in Public Land**.—Where a man and wife enter a homestead donation, and she dies and he remarries before the expiration of the requisite time for perfecting title, the land is the community property of the first marriage upon his subsequent performance of the legal requirements for acquiring title. (Tex.) *Creamer v. Briscoe*, 869.

10. **COMMUNITY PROPERTY**.—Where a Man Enters Land as a Homestead which is not subject to entry because within a grant to a railroad company, he acquires no interest therein, community or otherwise, and hence his wife can assert no community interest in the property. (Wash.) *Delacey v. Commercial Trust Co.*, 1112.

11. **COMMUNITY PROPERTY**.—The Community is an Entity. The rights of the wife cannot be disassociated from those of the husband; the right of each is dependent upon the other, and unless it exists in the one it cannot exist in the other. (Wash.) *Delacey v. Commercial Trust Co.*, 1112.

12. **COMMUNITY PROPERTY—Settlement on Public Land**.—No community interest results to the spouses by reason of a settlement on government land. (Wash.) *Delacey v. Commercial Trust Co.*, 1112.

Alienation of Affections.

13. **ALIENATION OF AFFECTIONS—Hearsay Evidence**.—In an action by a wife against the mother of her husband for alienating his affections, statements made by the husband to the wife or to third persons in the absence of the defendant, indicating the defendant's purpose to effect a separation, are hearsay evidence, and not admissible to establish the offense. (Ky.) *Leucht v. Leucht*, 486.

14. **ALIENATION OF AFFECTIONS—Admissibility of Evidence**. In an action by a wife for the alienation of her husband's affections,

she may prove by his declarations and conduct, and by third persons who can testify from their knowledge or from statements made by him, the affectionate relations that existed between them before the estrangement, and his conduct and declarations indicating a loss of his affections. (Ky.) *Leucht v. Leucht*, 486.

15. ALIENATION OF AFFECTIONS—Admissibility of Evidence. In an action by a wife against the mother of her husband for the alienation of his affections, declarations made by the defendant to or in the presence of the plaintiff or other persons, manifesting a purpose upon her part to alienate the affections of the husband or bring about a separation, are admissible. (Ky.) *Leucht v. Leucht*, 486.

16. ALIENATION OF AFFECTIONS—Hearsay Evidence.—In an action by a wife for the alienation of her husband's affections, she cannot make out her case by relating statements purporting to have been made by the defendant to the husband and repeated by him to her in the absence of the defendant, nor by declarations of third persons who relate statements purporting to have been made to them by the husband that he said were made to him by the defendant. (Ky.) *Leucht v. Leucht*, 486.

17. ALIENATION OF AFFECTIONS—Privileged Communications. In an action by a wife against the mother of her husband for alienating his affections, evidence of statements made by him to her by virtue of the marriage relation, in the absence of the defendant, which indicated that the defendant was trying to separate them, are not admissible. (Ky.) *Leucht v. Leucht*, 486.

18. ALIENATION OF AFFECTIONS—Admissibility of Evidence. In an action by a wife for the alienation of her husband's affections, a witness may testify that he heard her make a slighting or disrespectful remark about him. (Ky.) *Leucht v. Leucht*, 486.

19. ALIENATION OF AFFECTIONS—Absence of Wrong on Part of Defendant.—There is no ground for an action where a spouse voluntarily gives his or her affections to another, the latter doing nothing wrongfully to win them. To support an action for alienating a husband's or wife's affections, it must be established that the defendant is the enticer. Mere proof of abandonment, and that the husband or wife maintains improper relations with the defendant, is not sufficient. (Ky.) *Scott v. O'Brien*, 419.

20. ALIENATION OF AFFECTIONS—Voluntary Act of Husband. It is proper for a woman to show, in an action against her by another woman for alienating the affections of the latter's husband, that the alienation was his voluntary act, and not due to any wrongful or intentional act on her part. (Ky.) *Scott v. O'Brien*, 419.

21. ALIENATION OF AFFECTIONS—Grounds for Action.—In an action by a wife against another woman for alienating her husband's affections, it is necessary, not only to show the alienation, but that it has been due to the intentional conduct of the defendant. (Ky.) *Scott v. O'Brien*, 419.

22. ALIENATION OF AFFECTIONS—Evidence Admissible Under General Denial.—In an action by a wife for the alienation of her husband's affections, the defendant may show under a general denial that the alienation was not due to any wrongful or intentional act on her part, but was the voluntary act of the husband. (Ky.) *Scott v. O'Brien*, 419.

23. ALIENATION OF AFFECTIONS—Admissibility of Declarations.—In an action by a wife for the alienation of her husband's affections, the defendant may introduce in evidence, as part of the *res gestae*, conversations between her and him, prior to the time of the abandonment, to show that he first sought her and made love to her, that he was himself a seducer, that she endeavored to get him to

leave her alone and return to his wife and children, and that he really sought her for the purpose of getting her money, and not because of any affection for her. (Ky.) *Scott v. O'Brien*, 419.

24. ALIENATION OF AFFECTIONS—Admissibility of Declarations.—In an action by a wife for the alienation of her husband's affections, evidence is admissible that he remarked shortly after the death of the defendant's husband, "That the little widow with her money would be a good catch." Evidence is also admissible of conversations and letters showing his constant demands on her for money. (Ky.) *Scott v. O'Brien*, 419.

25. ALIENATION OF AFFECTIONS—Evidence of Wealth as Showing Motive.—In an action by a wife for the alienation of her husband's affections, the defendant may prove her financial condition, not for the purpose of increasing or diminishing the damages, but for the purpose of showing the motive of the husband in seeking her society. (Ky.) *Scott v. O'Brien*, 419.

26. ALIENATION OF AFFECTIONS—Right of Wife to Bring Action.—An action may be maintained by a wife against another woman who intentionally alienates her husband's affections, and such damages may be recovered as will compensate her for injury to her feelings and loss of his society and support. (Ky.) *Scott v. O'Brien*, 419.

27. ALIENATION OF AFFECTIONS—Exemplary Damages.—A Wife may Recover exemplary damages against a woman who alienates her husband's affections, if the wrongful conduct has been wanton and malicious, with the design of humiliating the wife. (Ky.) *Scott v. O'Brien*, 419.

See Acknowledgment, 2; Homestead.

IDEM SONANS.

See Names.

IMPUTED NEGLIGENCE.

See Negligence, 9.

INDICTMENT AND INFORMATION.

INFORMATION, When Construed as Applying to Acts Within the State.—If an information charges that the accused, at a designated county within the state, did then and there keep, with intent to sell, certain designated articles, it will not be construed as charging an intent to sell beyond the state. When the offense charged is a misdemeanor, if time and place be added to the first act alleged, it shall be deemed to be connected with all the facts subsequently alleged. (Vt.) *State v. Peet*, 998.

INDORSEMENT.

See Bills and Notes, 16-19.

INFANTS.

See Guardian ad Litem.

INFORMATION.

See Indictment and Information.

INJUNCTION.

INJUNCTION to Restrain Enforcement of a Reassessment of Property.—An injunction will lie to restrain the city council from
Am. St. Rep., Vol. 130—75

proceeding under color of right to reassess special taxes and relevy the same upon property when they have no authority to do so. (Neb.) *Barkley v. Lincoln*, 659.

INSANE PERSONS.

See Judgments, 9.

Note.

Insane Persons, actions against, mode of proceeding in, 842, 844.

actions against, restraining in equity, 845.

are wards of the court, 843.

commencing actions against without ascertaining capacity of, 843.

contracts of, enforcement of by suit, 851.

courts, power of over, 842.

difference between and infants, 842.

divorce, suits against for are maintainable, 853.

divorce, suits by for, 853.

estates of, when deemed to be in the possession of the court, 844, 845.

guardians ad litem, appointment of, for, 843, 850.

judgments against, appellate proceedings upon, 854.

judgments against, are not void, 847.

judgments against, collateral attack upon, 851.

judgments against, effect of, 847.

judgments against, equity, proceedings in for relief from, 856, 858.

judgments against, innocent purchasers are protected by, 849.

judgments against, knowledge by plaintiff of the insanity of, 852.

judgments against, remedies for relieving from, 854-856.

judgments against, remedies for void, 848.

judgments against, setting aside because of, 853.

judgments against, whether illegal, 848.

judgments against, whether voidable, 849.

judgments against, without the appointment of a guardian, 849.

judgments against, writs of coram nobis to avoid, 855.

judgments against, writs of error to revise, 856.

jurisdiction over, how to be obtained, 845.

leave of the court, when necessary to authorize actions against, 844.

may appear and prosecute or defend by attorneys, 842.

may sue and be sued, 842, 852.

power of courts to protect, 842.

presumption is in favor of sanity, 843.

presumption of the continuance of insanity, 843.

process against, how may be served, 850.

service of process on must comply with the statute, 845.

INSTRUCTIONS.

See Trial, 1-8.

INSURANCE.

Construction of Policy.

1. **INSURANCE—Liberal Construction.**—Having Indemnity for Its Object, a policy of insurance is to be construed liberally to that end, and for this reason conditions and provisos are construed strictly against the insurer. (Colo.) *Jennings v. Brotherhood Accident Co.*, 109.

Life Insurance—Warranties—Physicians.

2. **INSURANCE, LIFE**—Answer as to Consultation with Physician, When Immaterially False.—An applicant for life insurance

who, from motives of his own, has sought and obtained a professional interview with a physician regarding the state of his health cannot truthfully answer the question referred to in the negative merely because the interview concerned some temporary ailment or indisposition slight in character and not seriously affecting health. The fact of a consultation with a physician does not depend upon the gravity of the subject of the interview. (Kan.) Metropolitan Life Ins. Co. v. Brubaker, 356.

3. INSURANCE, LIFE, Warranty by Applicant, What Amounts to.—If an applicant for life insurance warrant the truthfulness of his answer to the question, "Have you consulted any other physician?" and agree that the policy issued in consideration of the warranty shall be void if the answer be false, the liability of the insurer depends upon the truthfulness of the answer. (Kan.) Metropolitan Life Ins. Co. v. Brubaker, 356.

4. INSURANCE, LIFE, Minor's Warranty and False Answers.—The beneficiary of a life insurance policy based upon a warranty of the character described cannot disaffirm the warranty on the ground that the applicant was a minor and still enforce the policy. (Kan.) Metropolitan Life Ins. Co. v. Brubaker, 356.

5. INSURANCE, LIFE, Waiver by Applicant of Right to Exclude Physician's Testimony.—An applicant for life insurance may make a valid contract with the insurer waiving the privilege afforded him by section 323 of the Code of Civil Procedure, which renders a physician incompetent to testify to professional communications from his patient and knowledge of his patient obtained in a professional way. (Kan.) Metropolitan Life Ins. Co. v. Brubaker, 356.

Premiums on Life Policy.

6. INSURANCE, LIFE—Premium, Payment of, What is not.—The taking by an agent of a life insurance company of a promissory note of the assured for the amount of the first premium is not, in law, a payment of such premium within the meaning of the contract, where it expressly provides that no agent has power to grant credit or to extend the time for the payment of any premium. (Ala.) Batson v. Fidelity etc. Ins. Co., 21.

7. INSURANCE, LIFE—Premium, Receipt for, Parol Contradiction or Explanation of.—A receipt delivered by an agent to the assured for the first premium may be explained and avoided by parol evidence showing that no actual payment took place, and that the agent, without the authority of his principal, took the promissory note of the assured, which was never paid, the receipt containing a condition that the failure to pay the note at maturity ended the policy. (Ala.) Batson v. Fidelity etc. Ins. Co., 21.

Accident Policies in General.

8. INSURANCE AGAINST ACCIDENT.—An Exception of Uncertain Import must be Construed most strongly against the insurer. (Vt.) Furry v. General Acc. Ins. Co., 1012.

9. INSURANCE AGAINST ACCIDENT.—An Exception Containing a Plain, Simple and Unambiguous Provision pointing clearly to a just and practicable criterion is not to be so construed as to deprive the insurer of the protection for which it stipulates. (Vt.) Furry v. General Acc. Ins. Co., 1012.

10. INSURANCE AGAINST ACCIDENT—Injury While Under the Influence of an Intoxicant.—If a policy insuring against accident limits the amount of the liability when a loss was "while under the influence of any intoxicant or narcotic," a finding that the assured was not under the influence of intoxicating liquor, "so as to prevent

him from being fairly able to take care of himself," does not entitle him to recover, except to the extent to which the policy authorized recovery while under the influence of an intoxicant. (Vt.) *Furry v. General Acc. Ins. Co.*, 1012.

11. ACCIDENT INSURANCE—Self-inflicted or Accidental Death. In an action upon an accident insurance policy the burden of proof is upon the plaintiff to show that the injuries which caused death were accidental and not self-inflicted; but the fact of accident may be established by circumstantial evidence. (Ill.) *Wilkinson v. Aetna Life Ins. Co.*, 269.

12. ACCIDENT INSURANCE—Accidental or Self-inflicted Death. In an action upon an accident insurance policy the plaintiff may invoke the presumption that all men are sane and do not ordinarily take their own lives; and this presumption, taken with evidence that the injuries which caused the death were violent and external, is sufficient to require the court to submit to the jury the question whether the injuries causing the death of the insured were accidental or self-inflicted. (Ill.) *Wilkinson v. Aetna Life Ins. Co.*, 269.

13. ACCIDENT INSURANCE—Burning of Building or Contents. An accident policy which provides for double indemnity in case of injuries "in consequence of the burning of a building in which the insured shall be at the commencement of the fire," covers accidental injuries from fire while he is in a building, perhaps from the burning of its contents, and not alone from the burning of the building itself. (Ill.) *Wilkinson v. Aetna Life Ins. Co.*, 269.

14. ACCIDENT INSURANCE—Self-inflicted or Accidental Death. Where the evidence in an action on an accident policy shows that the insured has suffered an injury which has caused death, and there is no proof in the record from which it can be determined whether the injury was accidental or self-inflicted, the presumption is that the injury was accidental and not self-inflicted. (Ill.) *Wilkinson v. Aetna Life Ins. Co.*, 269.

15. ACCIDENT INSURANCE,—Evidence of the Habits and Temperament of the insured is admissible, in an action on a policy for death caused by burning in a building, as bearing upon his mental condition at the time of the accident; and if the insurance company has filed a plea that the insured suicided, the introduction of such evidence in chief is proper in anticipation of such defense. (Ill.) *Wilkinson v. Aetna Life Ins. Co.*, 269.

16. ACCIDENT INSURANCE—Exposure to Danger.—To Constitute Voluntary or Unnecessary Exposure, the danger must either have been known to the insured in fact, or one which in the exercise of his faculties as an ordinarily prudent person should in reason have been known to him. (Iowa) *Correll v. National Accident Soc.*, 294.

17. ACCIDENT INSURANCE—Exposure to Danger—Burden of Proof.—The burden of proof that the danger was apparent and the exposure thereto voluntary or unnecessary, in an action on an accident insurance policy, rests upon the insurer. (Iowa) *Correll v. National Accident Soc.*, 294.

18. ACCIDENT INSURANCE—Death While on a Railroad Track. In an action on an accident insurance policy which exempts the insurer from liability for an injury sustained by the insured while on a railway roadbed, the insurer may rest his case when he proves that the insured met his death while on the track of a railroad by being struck by a moving train. (Iowa) *Correll v. National Accident Soc.*, 294.

19. ACCIDENT INSURANCE—Exposure to Danger.—Provisions in an accident insurance policy exempting the insurer from liability for an accident resulting from voluntary and unnecessary exposure, or while the insured is on a railway roadbed, present separate exemptions; and an instruction which recognizes them as constituting only one and as therefore presenting but a single defense, and which applies rules of proof thereto which are not applicable to both, is erroneous. (Iowa) *Correll v. National Accident Soc.*, 294.

Accident Policy—Notice and Proof of Death.

20. ACCIDENT INSURANCE.—The Preliminary Notice of Death contemplated by an accident insurance policy is no part of the proofs of death. It is intended to advise the insurer that an accident has happened on account of which a claim will be made, and to the end that the insurer may for himself make inquiry into the facts and circumstances thereof; "full particulars," as required by the contract, means sufficient of the particulars to enable the insurer intelligibly to prosecute such inquiry, and not all the details of the accident. (Iowa) *Correll v. National Accident Soc.*, 294.

21. ACCIDENT INSURANCE—Notice of Death, Waiver of Insufficiency.—If an accident association raises no objections to the sufficiency of the notice of a death, but merely calls for the names of witnesses to the accident, which the beneficiary is not bound to furnish, the association is thereafter in no situation to complain of the sufficiency of the notice. (Iowa) *Correll v. National Accident Soc.*, 294.

22. ACCIDENT INSURANCE—Proof of Death—Absence of Blanks. An accident insurance association that has agreed to furnish blanks on which to make proof is in no position to complain, if it does not furnish them, that proof is not made on time. (Iowa) *Correll v. National Accident Soc.*, 294.

23. ACCIDENT INSURANCE—Proof of Death—Absence of Blanks.—Where the beneficiary under an accident policy gives notice to the insurer of the death of the insured in a letter sufficient to present the idea that she wants to be put in position to prove her claim, she has the right to wait for the coming of the blanks which the insurer has agreed to furnish, and, if they are not received within the time limit, to thereafter proceed in her own way and within a reasonable time to make up the proofs. What is a reasonable time is a proper question for the jury. (Iowa) *Correll v. National Accident Soc.*, 294.

Sick Benefits.

24. INSURANCE—Sick Benefits—Time to Sue.—By Denying Its Liability for sick benefits and refusing to pay them, an insurance company waives a provision in the policy that no action shall be commenced against it until three months after the receipt of proof of loss. (Colo.) *Jennings v. Brotherhood Accident Co.*, 109.

25. INSURANCE—Sick Benefits—Time of Notice of Disability.—Under a policy requiring one claiming sick benefits to give notice "within ten days from the commencement of total disability," the time limited does not commence to run until he realizes that his illness is sufficiently serious to prevent him from following his usual vocation. Notice immediately given on the discovery of such serious condition is seasonable, although the illness, first diagnosed as a slight indisposition, commenced twenty days before, at which time the insured quit work by advice of his physician, and although the notice fixes the beginning of the disability at the time of the inception of the illness. (Colo.) *Jennings v. Brotherhood Accident Co.*, 109.

26. INSURANCE—Sick Benefits—Total Incapacity Defined.—A person may be regarded as totally incapacitated, within the meaning of a policy insuring him against sickness, notwithstanding he takes outdoor exercise by the advice of his physician, provided he is entirely incapacitated for work or business on account of his illness. It is not necessary that he should be helpless, or confined to his bed or house. (Colo.) *Jennings v. Brotherhood Accident Co.*, 109.

27. INSURANCE—Sick Benefits—Unknown Illness.—Under a policy insuring against sickness, the insured is not required, as a condition to recovery, to definitely name the illness on account of which his claim is made, or its origin or cause, but he must furnish evidence of a physical condition as the result of illness which incapacitates him for labor. (Colo.) *Jennings v. Brotherhood Accident Co.*, 109.

INTERSTATE COMMERCE.

See Commerce.

INTOXICATING LIQUORS.

Liability of Saloon-keeper.

1. SALOON-KEEPER—Liability for Act of Barkeeper.—The owners of a saloon who leave the place in charge of a bartender are liable for his act in pouring alcohol into the shoe of a patron and setting it on fire. (Wash.) *Beilke v. Carroll*, 1103.

Prosecution for Illegal Sales.

2. INTOXICATING LIQUORS, Prosecutions for Sales of by Agent.—In prosecutions for unlawfully selling intoxicating liquors the defendant may be found guilty though he did not himself perform the physical act of handing out the liquor to the customer. (Kan.) *State v. Pigg*, 387.

3. EVIDENCE—Judicial Notice.—A "Manhattan cocktail" is generally and popularly known as an intoxicating liquor, and no proof of its intoxicating character is necessary in prosecutions under the prohibitory law. (Kan.) *State v. Pigg*, 387.

4. LIQUORS—Illegal Sale by Mistake.—In a Prosecution for a violation of the local option law, it is proper to charge the jury that if the defendant intended to deliver ino, but through mistake and with no want of proper care delivered beer to the purchaser, he should be acquitted. (Tex. Cr.) *Coleman v. State*, 896.

JOINT TENANCY.

JOINT TENANCY, Statute Abolishing, When not Retrospective.—The act of 1891 abolishing the right of survivorship did not affect joint tenants who became such prior to the passage of the act. (Kan.) *Best v. Tatum*, 365.

Note.

Joint Tenancy, trust estates are held in, 508-512.

trust estates, exceptions to the rule that they are held in, 512-514.

JUDGMENTS.

In General—Parties.

1. DECREE Taken for Want of Answer, to What must be Restricted.—Where, in a suit to foreclose a mortgage, the defendant's wife does not answer, she has the right to assume that the decree will be limited, as against her, to petitioner's rights as stated in his bill. (Vt.) *Davis v. Davis*, 1035.

2. JUDGMENT AND DECREE, Persons not Parties not Affected by.—Where a conveyance is alleged to have been fraudulent as against the creditors of the grantor, and they have extended the property under execution, commenced a suit and obtained a decree for relief against the conveyance, but omitted to make the grantee of the original grantee a party, he is not affected by the decree, whether he is chargeable with notice of the fraud or not. (Vt.) *Tudor v. Tudor*, 977.

3. JUDGMENT—Misnomer in Parties.—One Who Voluntarily Makes Himself a Party to an action under a name not his own is in fact a real party to the suit, and parol evidence is admissible to identify him as such. (Tex.) *Haines v. West*, 839.

Service and Return of Process.

4. JUDGMENT.—The Statement of the Return of Service of summons controls the recital of service in the judgment when the only evidence of service is that contained in the return; hence a recital in the judgment showing proper service does not aid a return showing a want of proper service. (Iowa) *Stubbs v. McGillis*, 116.

5. JUDGMENT—Time to Vacate.—A Judgment Rendered Without Service upon the defendant is void, and subject to direct attack at any time. (Iowa) *Stubbs v. McGillis*, 116.

Judgment by Confession.

6. JUDGMENTS BY CONFESSION Without Antecedent Process have no basis other than the statute, and a full compliance with its provisions is necessary to their validity, and such provisions will be strictly construed. (Vt.) *Mason v. Ward*, 987.

7. JUDGMENT BY CONFESSION Without the Consent of the Creditor.—A judgment by confession made without the request or consent of the creditor and entered at the instance of the debtor alone is not valid unless ratified by the creditor. (Vt.) *Mason v. Ward*, 987.

8. JUDGMENTS BY CONFESSION—Specification to Support, Creditor cannot be Compelled to File.—A creditor cannot be compelled to file a specification in support of a judgment which his debtor desires to confess, but which the creditor has not agreed to accept, though the statute provides that a justice may accept and record the confession of a debt to the creditor made by the debtor personally, with or without antecedent process, as the parties shall agree, and render judgment upon such confession, but that the judgment shall not be rendered except upon a specification in writing filed with such justice setting forth the claim upon which the judgment is rendered. (Vt.) *Mason v. Ward*, 987.

Insane Persons.

9. JUDGMENT—Validity as Against Insane Person.—A judgment against an insane person is not void, and binds him in a subsequent action involving the right to the property determined by it. Hence, error by the trial court in finding him sane becomes immaterial in the second suit. (Tex.) *Haines v. West*, 839.

Unrecorded Judgment.

10. JUDGMENT.—An Unrecorded Judgment for the Recovery of Land is not void under the Texas statute, but simply inadmissible in evidence against an innocent purchaser. (Tex.) *Haines v. West*, 839.

11. JUDGMENT—Unrecorded Decree—Innocent Purchaser.—Under a statute providing that judgments for the recovery of land if not recorded shall not be admissible in evidence against an innocent pur-

chaser, a purchaser is not protected against a properly recorded judgment by the fact that through a mistake in the proceedings and judgment the record does not disclose the true name of the person against whom the judgment was rendered. (Tex.) *Haines v. West*, 839.

Res Judicata—Criminal Cases.

12. **RES JUDICATA**—Judgment in Garnishment, Discharging Garnishee Without Contest or Trial.—If the garnishee answers denying his indebtedness to the defendants, and the plaintiff, failing to file a contest to the answer, permits a judgment of discharge of the garnishee to be entered, this is a judgment on the merits, and conclusive between the plaintiff and the garnishee that the latter was not indebted to the defendant. (Ala.) *Roman v. Montgomery Iron Works*, 106.

13. **RES JUDICATA**.—A Judgment in a Criminal Case is generally admissible and conclusive evidence in another criminal case against the defendant as to any fact determined by the judgment. (Vt.) *State v. Sargood*, 992.

14. **JUDGMENT OF CONVICTION, Facts of Which Evidence in Another Prosecution**.—If, in a prosecution for attempt to poison certain persons, the state attempts to connect the accused with the offense of poisoning certain colts by showing the purposes and motives involving both offenses to be the same, the record of the conviction of the accused on the charge of poisoning the colts is admissible, and conclusive that he did poison them. (Vt.) *State v. Sargood*, 992.

15. **RES JUDICATA**—Judgment in One Criminal Prosecution, When not Admissible in Another.—A judgment in a criminal prosecution is not admissible in a subsequent prosecution to establish the guilt or innocence of the accused, unless the measure of proof required in the previous case was as great as in that on trial. (Vt.) *State v. Sargood*, 995.

16. **RES JUDICATA**—Judgment in One Criminal Prosecution, When not Admissible in a Subsequent Prosecution for Perjury.—If on a prosecution for committing an alleged crime, the accused, notwithstanding his testimony in his own behalf given as a witness for himself, is convicted and is subsequently placed on trial for perjury alleged to have been committed by him in giving such testimony, the record of his former conviction is not admissible against him to prove his commission of the crime and his consequent guilt of perjury, because his conviction on the former trial might have been sustained on the uncorroborated testimony of one witness, whereas he cannot be convicted of perjury on the uncorroborated testimony of a single witness. (Vt.) *State v. Sargood*, 995.

Vacation and Relief.

17. **JUDGMENT**—Vacating for Want of Service.—A judgment is properly set aside on motion when it is shown that no service of process was made upon the defendant. (Colo.) *Stubbs v. McGillis*, 116.

18. **JUDGMENT**—Motion to Vacate.—An Affidavit of Merits is unnecessary to vacate a judgment obtained without jurisdiction of the person of the defendant. (Colo.) *Stubbs v. McGillis*, 116.

19. **JUDGMENT**.—A Delay of Five Years in Moving to Vacate a Judgment for want of service on the defendant does preclude relief, in the absence of a showing that the plaintiff is in any different position than he otherwise would have been, or that the rights of innocent third persons will be violated. (Colo.) *Stubbs v. McGillis*, 116.

20. JUDGMENT—Effect of Vacating for Want of Service.—When a judgment is vacated for want of service, but the defendant has, by appearing in the proceedings after judgment, submitted himself to the jurisdiction of the court, the action does not abate, but he will be permitted to answer or demur. (Colo.) *Stubbs v. McGillis*, 116.

21. JUDGMENT, Relief from Because Obtained by Perjured Evidence.—Under section 4277, Revised Laws of 1905, providing for an action to set aside a judgment obtained by means of the perjury, subornation of perjury, or any fraudulent act, practice, or representation of the prevailing party, an action cannot be maintained upon the bare allegation that on an issue of fact, so squarely made that each party knows what the other will attempt to prove, and where neither has a right, or is under any necessity, to depend on the other to prove the fact to be as he himself claims it, there was a false or perjured testimony by the successful party or his witnesses. *Hass v. Billings*, 42 Minn. 63, followed and applied. (Minn.) *Hayward v. Larrabee*, 606.

Canceling Satisfaction.

22. JUDGMENT, Motion to Cancel Satisfaction of, by What Rules Controlled.—Whatever mode of procedure is pursued to cancel the record of the satisfaction of a judgment, the remedy sought is governed by equitable rules, the ultimate question being whether it is inequitable for the person relying thereon to avail himself of the entry of satisfaction. (S. D.) *Plano Mfg. Co. v. Thompson*, 722.

23. JUDGMENT, Satisfaction of, Produced by Sale of Exempt Property, When will not be Vacated on Motion.—Where a judgment creditor, after levying on exempt property, receives notice of a claim of exemption, and nevertheless proceeds with the sale, and knowingly and maliciously puts the defendant to great expense and inconvenience, and the officer making the sale is subjected to a suit for conversion of the property, and the judgment debtor and his indemnitor are compelled to pay the latter judgment, a motion to set aside the apparent satisfaction produced by the sale of the exempt property is properly denied. Under these circumstances, it would be inequitable to restore the satisfied judgment. (S. D.) *Plano Mfg. Co. v. Thompson*, 722.

Note.

Judgments Against Insane Persons. See *Insane Persons*.

JUDGMENT NOTWITHSTANDING VERDICT.

See *Trial*, 12.

JUDICIAL SALE.

See *Appeal and Error*, 11.

JURISDICTION.

See *Appearance*.

JURY.

1. JURIES—Summoning and Impaneling—Constitutional Law.—The act of the thirtieth legislature of Texas in regard to the manner of summoning and impaneling grand and petit juries in a county including a city or cities of twenty thousand inhabitants is constitutional. (Tex. Cr.) *Huddleston v. State*, 875.

2. CRIMINAL TRIAL—Previously Expressed Opinions of Jurors. A verdict will not be set aside because of previously expressed opin-

ions indicating bias or prejudice in the jurors unless the proof of bias or prejudice is clear and satisfactory. (Ill.) *People v. Strauch*, 255.

LACHES.

See Equity, 2.

LANDLORD AND TENANT.

1. **LANDLORD AND TENANT—Landlord's Liability for Parts of Premises Used in Common.**—Where a porch or stairway is used in common by the different occupants of a tenement house or flat building, the landlord will be presumed to have reserved possession thereof for the benefit of all the tenants, and he is under obligation to all parties having occasion to use the premises to exercise ordinary care to keep the same in repair. (Minn.) *Farley v. Byers*, 613.

2. **LEASE, Construction of as to Duration.**—A lease of real property executed in April, 1901, for the term of three years, with the privilege of two years additional from and after the first day of July, 1901, at a monthly rental to be paid monthly in advance on the first day of each month commencing July 1, 1901, is a lease for three years from the last-named date, with the privilege of two years additional. (S. D.) *Heffron v. Treber*, 711.

3. **LEASE with Privilege of Renewal with Guaranty of the Payment of Rent.**—If a lease purports to be for three years from a specified date, with the privilege of two years additional, and is accompanied with a guaranty for the payment of the rent during the term of the lease, the guarantor is liable for the additional term, if the tenants avail themselves of their privilege. (S. D.) *Heffron v. Treber*, 711.

4. **LANDLORD AND TENANT—Lessee, When Deemed to Remain in Possession Under Privilege for an Additional Term, and not as a Tenant Holding Over After Expiration of His Term.**—If, under a lease purporting to be for three years, with the privilege of two years additional, the tenants remain in possession after the expiration of the three years, they are to be deemed as electing to be tenants for the two years additional, and not to be tenants remaining in possession after the expiration of the hiring and who are, on the reception of rent by the landlord, deemed, under section 1437 of the Civil Code of South Dakota, to have renewed the hiring but for one year only. (S. D.) *Heffron v. Treber*, 711.

LARCENY.

LARCENY.—Where a Man has Sold His Wife's Personal Property without her consent, acquiescence or knowledge, no title passes to the purchaser, and there can be no theft of the property from him. (Tex. Cr.) *Hudspeth v. State*, 894.

LEGACIES.

See Wills.

LIBEL AND SLANDER.

1. **SLANDER—Words not Actionable Per Se.**—To call a woman a "damned old bitch" does not impute a want of chastity, and is not actionable per se. (Mich.) *Warren v. Ray*, 566.

2. **ATTORNEYS' FEES** are not Recoverable by the plaintiff in an action for slander. (Mich.) *Warren v. Ray*, 566.

3. **CONSTITUTIONAL LAW—Freedom of the Press—Publications Respecting Candidates for Office.**—There must be freedom to

canvass in good faith the worth of character and qualifications of candidates for office, whether elective or appointed, and by becoming a candidate, a man tenders as an issue, to be tried out publicly before the people or the appointing power, his honesty, integrity and fitness for the office to be filled. (Kan.) *Coleman v. MacLennan*, 390.

4. LIBEL BY NEWSPAPER of Candidate for Public Office, When Privileged, Though False.—If the publisher of a newspaper circulated throughout the state publish an article reciting facts and making comment relating to the official conduct and character of a state officer, who is a candidate for re-election, for the sole purpose of giving to the people of the state what he honestly believes to be true information, and for the sole purpose of enabling the voters to cast their ballots more intelligently, and the whole thing is done in good faith, the publication is privileged, although the matters contained in the article may be untrue in fact and derogatory to the character of the candidate. (Kan.) *Coleman v. MacLennan*, 390.

5. LIBEL BY NEWSPAPER of Candidate for Public Office Through Its Circulation in Another State.—Generally, publication should be no wider than the moral or social duty to publish. If it be designedly or unnecessarily or negligently excessive, privilege is lost. But if a state newspaper published primarily for a state constituency have a small circulation elsewhere, it is not deprived of its privilege in the discussion of subjects of state-wide concern because of that fact. (Kan.) *Coleman v. MacLennan*, 390.

6. APPEAL AND ERROR—Presumption that a Special Finding was Induced by Erroneous Instruction.—If on the trial of a suit for libel the jury should find specially from the evidence that the plaintiff suffered no damages from the publication complained of, it will not be presumed that the finding was induced by instructions regarding particular questions in the case not related to that of damages; and the question whether such instructions misstate the law becomes immaterial, because they could not affect the plaintiff's substantial rights. (Kan.) *Coleman v. MacLennan*, 390.

LICENSE.

See Constitutional Law, 10; Peddlers.

LIMITATION OF ACTIONS.

1. LIMITATION OF ACTIONS—Municipal Corporations, Exemption of from Statutes Concerning.—The rule that statutes of limitation do not apply to actions by the state unless a legislative intention that they shall do so is shown by express language or appears by the clearest implication also applies to subordinate political bodies, including municipal corporations, with respect to any litigation to enforce governmental rights. (Kan.) *City of Osawatomie v. Miami County*, 369.

2. LIMITATION OF ACTIONS by City to Recover Taxes Withheld.—Where a county diverts to its own treasury a part of the money it has collected upon taxes levied by a city, no statute of limitation runs against an action by the city to recover the amount so wrongfully withheld. (Kan.) *City of Osawatomie v. Miami County*, 369.

See Adverse Possession; Husband and Wife, 2, 3; Mortgages, 7.

LIQUORS.

See Intoxicating Liquors.

LIS PENDENS.

LIS PENDENS—Writ of Error.—Without a Supersedeas the doctrine of lis pendens has no application to a writ of error. (Ill.) *Chicago & N. W. Ry. Co. v. Garrett*, 229.

Note.

Livestock. See Carriers of Livestock.

LOTTERY.

LOTTERY—Suit Club.—A Tailor Carries on a Lottery where he conducts a suit club, whose members each pay a dollar a week and participate in a drawing every Saturday, at which the one getting a certain number receives a suit of clothes, the members being entitled to credit on merchandise for the amounts paid in, and the lucky ones having the privilege of withdrawing. (Tex. Cr.) *Grant v. State*, 897.

MANDAMUS.

MANDAMUS to Compel Delivery of Sealed Books and Papers of a Corporation.—Mandamus is the proper remedy to compel the delivery of the seal, books and papers of a corporation by a secretary, who refuses to deliver them to his successor in office, when it appears that he does not hold them under any color of right to the office. (Minn.) *State v. Guertin*, 610.

MANSLAUGHTER.

See Homicide.

MARRIAGE.

1. **MARRIAGE**—Effect of Second Marriage Between Same Parties.—Persons once married do not add to the legality of their marriage by a repetition of the marriage ceremony. The second marriage amounts to nothing. (Tex. Cr.) *Knapp v. State*, 903.

2. **MARRIAGE** Within a Prohibited Time After Divorce, Effect of.—If the statute makes it unlawful for a party to marry within three years after the granting of a divorce, and imposes a penalty for so doing, a marriage contracted within such time is absolutely void. (Vt.) *State v. Sartwell*, 1017.

See Husband and Wife.

MASTER AND SERVANT.

Selection of Competent Employés.

1. **EMPLOYER'S DUTY** to Select Competent Employés.—A master who places a servant in charge of dangerous machinery where special knowledge, skill, or experience is required for its safe and successful operation, must make reasonable effort to ascertain his qualifications. If he fails to do so, he cannot escape liability by showing that there was nothing in the conduct of the servant during the first two hours' employment to indicate his incompetency. (Wash.) *Pearson v. Alaska Pac. Steamship Co.*, 1117.

2. **MASTER'S DUTY** to Employ Competent Servants.—A master who employs a man as winch-driver in loading a vessel must make reasonable effort to ascertain his qualifications. He cannot escape liability for injury to other employés through the incompetency of the winch-driver by showing that there was nothing in his conduct during the first two hours of his employment indicating incompetency, or by showing that he belonged to a union with which the master had a contract to employ its members exclusively. (Wash.) *Pearson v. Alaska Pac. Steamship Co.*, 1117.

Vice-principal and Fellow-servants.

3. **MASTER AND SERVANT, Charging Master with Knowledge of the Recklessness of His Vice-principal.**—If a foreman is a drinking, reckless man, and his character and habits are known to his superior, they must be regarded as known to the common master. (Tenn.) *Walton & Co. v. Burchel*, 788.

4. **MASTER AND SERVANT—Charging a Minor with Knowledge of the Dangerous and Reckless Character of Another Employé.**—If a foreman, whose duty it is to supervise the use of dynamite, is reckless in such use and dissipated in his habits, his son, less than sixteen years of age and employed by the same master, is not to be adjudged to have assumed the risk of his father's recklessness, where the son was ignorant of the use and danger of dynamite and had been given no instruction in that line, and the father, notwithstanding the knowledge of his character and habits on the part of his employers, was retained by them and apparently had their confidence. (Tenn.) *Walton & Co. v. Burchel*, 788.

5. **VICE-PRINCIPAL—Temporary Foreman.**—Where a Foreman Puts another person in his place for a short time during his absence, such person is, for the time being, a vice-principal, for whose negligence in giving orders and signals in the execution of the work the master is liable to the other employés. (Ky.) *Gould Construction Co. v. Childers*, 473.

6. **MASTER AND SERVANT—Fellow-servants, Who are not.**—Two gangs of workmen were engaged in the construction of a telephone line, each under a different foreman; the first gang digging the holes and setting the poles therein, the second gang stringing the wires on the poles. Held, that the parties employed in such separate employment were not fellow-servants. (Neb.) *Ault v. Nebraska Tel. Co.*, 686.

Liability of Master to Servant.

7. **NEGLIGENCE, Master's Contract Against Liability for.**—A master cannot by contract with his servant escape liability for negligence. Such a contract is against public policy. (Neb.) *Ault v. Nebraska Tel. Co.*, 686.

8. **MASTER AND SERVANT—Negligent Operation of Winch.**—In an action by an employé for injuries received from the alleged negligent operation of a winch, evidence as to how a winch of a different make and of a more complicated kind is operated is properly excluded. (Wash.) *Pearson v. Alaska Steamship Co.*, 1117.

9. **NEGLIGENCE—Burden of Proof.**—In an action to recover for injuries and death due to the negligent acts of the foreman of the defendant, the plaintiff must assume the burden of proving by a preponderance of the evidence that the injury was due to the negligence of such foreman. (Tenn.) *Walton & Co. v. Burchel*, 788.

10. **NEGLIGENCE, Evidence of—Rashness.**—Where a foreman in charge of the blasting by dynamite is shown to have been reckless in using that explosive, and also to have been under the influence of strong drink and guilty of reckless conduct immediately preceding an explosion, this is some evidence from which the jury may conclude that the explosion was caused by his negligence. (Tenn.) *Walton & Co. v. Burchel*, 788.

11. **MASTER AND SERVANT—Liability for a Defective Pole, When not Avoided by Notice.**—A telephone company gave each of its linemen a printed notice setting forth their duties, and stating, among other things, that "all linemen and other employés of the company whose duties require them to work upon or about poles are especially charged with the duty of inspecting the implements with

which they work, all poles, cross-arms and wires, and must know that they are safe to work with or upon, before climbing or going upon such poles and cross-arms." Held, that, notwithstanding this notice, the company, in the construction of new lines in which it employed two gangs of workmen, one known as "groundmen," who set the poles, and one known as "linemen," who strung the wires, could not escape liability for setting a defective pole, from the breaking of which a lineman was precipitated to the ground and injured. (Neb.) *Ault v. Nebraska Tel. Co.*, 686.

12. **EMPLOYER'S LIABILITY—Kick by Mule—Assumption of Risk.**—Where an employé is kicked by a vicious mule the first trip the second day he has driven it, when he had no knowledge of the vicious propensities of the animal, nor any occasion previously to observe it while being driven by others, the instructions to the jury, in an action by the injured employé, are not required to negative the question of assumed risk. (Ill.) *Miller v. Kelly Coal Co.*, 245.

13. **EMPLOYER'S LIABILITY—Knowledge of Viciousness of Mule.**—In an action against an employer for personal injuries received by a driver from the kick of a mule, an instruction that if the defendant knew, or by the exercise of reasonable diligence would have known, the dangerous disposition of the animal, but that the plaintiff did not know it, and by reason of such disposition was injured while performing his usual duties in the exercise of due care, then the defendant is liable, is not erroneous because it submits to the jury the liability of the defendant if he had constructive knowledge, while the charge in the declaration is that he knew the mule was dangerous and unsafe. (Ill.) *Miller v. Kelly Coal Co.*, 245.

14. **EMPLOYER'S LIABILITY—Recovery for Medical Attendance.**—An instruction that an injured employé is entitled to recover the necessary expenses of nursing and medical care, "so far as these are shown by the evidence," is not reversible error because there is no evidence of any amount paid or indebtedness incurred on that account, where the defendant's instruction emphasizes that no damages can be recovered except such as can be measured in dollars and cents from the evidence in the case. (Ill.) *Miller v. Kelly Coal Co.*, 245.

Liability of Master for Servant's Torts.

15. **MASTER AND SERVANT—Liability of the Former for the Torts of the Latter.**—A master is responsible for the torts of his servant, done in the course of his employment with a view to the furtherance of his master's business, and not for a purpose personal to himself, whether the same be done willfully, but within the scope of his agency, or in excess of his authority, or contrary to the express instructions of the master. (Minn.) *Barrett v. Minneapolis etc. Ry. Co.*, 585.

See Constitutional Law, 6-10; Railroads, 13-24; Work and Labor.

MECHANICS' LIENS.

1. **MECHANIC'S LIEN, Denial of, Because Statement of was for an Excessive Amount.**—Where the statute requires the statement of a lien to be "a just and true statement of account of the demand due over and above all legal setoffs," and a sum is claimed in the statement from sixty to seventy per cent in excess of the amount due, the bill to foreclose the lien is properly dismissed. (Mich.) *Griff v. Clark*, 582.

2. **MECHANICS' LIENS.**—A Provision in a Building Contract that the fireproofing shall be left open to bidders for any good system, provided only the finest work will be allowed to go in, does

not take from the contractor power to control the fireproofing and make the owner the principal in the contract for it so as to give the subcontractor a direct lien on the property. (Tex.) *Loneragan v. San Antonio L. & T. Co.*, 803.

3. **MECHANICS' LIEN.**—A Proceeding by Which a Materialman fixes a lien for material furnished and used in an improvement does not create a debt against the owner of the property, but operates as a writ of garnishment to appropriate so much of the money in the hands of the owner as is then due or may become due to the contractor to the extent necessary to establish that claim. (Tex.) *Loneragan v. San Antonio L. & T. Co.*, 803.

MINING CLAIMS.

MINING CLAIMS, Relocation of Effected by Unlawful Threats.—If the employes of the claimants of a mine are in possession and proceeding with the assessment work, but are caused to leave such mine and discontinue the work by threats that if they continue work they will be arrested, a relocation based upon the failure to complete the work, and for the benefit of the persons making the threats will not be permitted to destroy the rights of the former claimants. (S. D.) *Garvey v. Elder*, 704.

MONOPOLY.

See Conspiracy; Constitutional Law, 11-13.

MORTGAGE.

In General.

1. **MORTGAGE, What Conveyances Treated as.**—In Vermont a Conditional Deed is treated as a mortgage to secure the grantee's performance of the conditions contained in it. (Vt.) *Abbott v. Sanders*, 974.

2. **A CONVEYANCE for the Support of the Grantor amounts to a mortgage only.** (Vt.) *Davis v. Davis*, 1035.

3. **A MORTGAGEE cannot be Compelled to Rely upon a Portion of the Mortgaged Property, though it is amply secured.** (Vt.) *Davis v. Davis*, 1035.

Rights of Mortgagee Paying Taxes.

4. **MORTGAGEE—Right to Equitable Lien on Payment of Taxes.** A mortgagee has an equitable lien for taxes and special assessments paid by him in good faith to protect his security under the belief that his mortgage is a subsisting lien, when in fact it has been barred by the statute of limitations. (Wash.) *Childs v. Smith*, 1107.

5. **MORTGAGEE—Subrogation on Payment of Taxes—Limitations.**—A mortgagee who pays the general taxes to protect his lien is subrogated to the rights and liens held by the county and state, and as against his equitable lien thus acquired the mortgagors can interpose the plea of the statute of limitations. (Wash.) *Childs v. Smith*, 1107.

6. **MORTGAGEE—Subrogation on Payment of Assessments—Limitations.**—A mortgagee who pays special assessments is subrogated to the rights of the city, but his equitable lien thus acquired may become barred by the statute pertaining to such assessments. (Wash.) *Childs v. Smith*, 1107.

Limitation of Actions.

7. **MORTGAGE—Limitation of Actions.**—A Provision in a Mortgage that if the note is not paid at maturity it may be renewed and

the mortgage continued a lien upon the premises does not bar the mortgagor from pleading the statute of limitations in an action of foreclosure. (Wash.) *Childs v. Smith*, 1107.

Foreclosure Under Power.

8. **MORTGAGE FORECLOSURE Under a Power—Statute of Frauds.**—To a sale made under a power contained in a mortgage it is not essential that there be a memorandum to satisfy the statute of frauds. Without such a memorandum and before any deed is executed, the equity of redemption is cut off, and if the want of a writing can be alleged as an objection, it is only by the mortgagee or the purchaser. (Ala.) *Drake v. Rhodes*, 62.

9. **MORTGAGE FORECLOSURE Under a Power—Purchase by the Mortgagee.**—A stipulation in a mortgage containing a power of sale conferring on the mortgagee the privilege of becoming a purchaser is valid, and renders a sale to him as efficacious as if made to a stranger. (Ala.) *Drake v. Rhodes*, 62.

10. **MORTGAGE Containing a Power of Sale—Mistake in the Notice of Sale in the Name of the Mortgagor.**—A notice of sale under a power giving the name of the mortgagor as A. J. P. D., when it was A. P. J. D., does not vitiate the sale where the notice in other respects correctly describes the mortgage, its date and place of record, and the lands included therein. (Ala.) *Drake v. Rhodes*, 62.

11. **MORTGAGE—Sale Under a Power.**—It is not necessary that the notice of a sale to be made under a power contained in a mortgage state that there had been a default in the payment of the debt secured thereby, when the mortgage itself does not require such statement. (Ala.) *Drake v. Rhodes*, 62.

See Chattel Mortgages; Homesteads.

MOVING PICTURE SHOWS.

See Theaters.

MUNICIPAL CORPORATIONS.

De Facto Corporation.

1. **A MUNICIPAL CORPORATION, Though not Legally Organized, is a De Facto Corporation,** and its acts and officers are, as to third persons, lawful and binding, and its legal existence and the right to continue to exercise its functions can be questioned only by the state in a direct proceeding. (Minn.) *State v. Bailey*, 592.

Ordinances.

2. **MUNICIPAL ORDINANCE—Sufficiency of Enacting Clause.**—An enacting clause to a municipal ordinance which follows the statute is sufficient. (Tex. Cr.) *Ex parte Keeling*, 884.

3. **MUNICIPAL CORPORATION—Acquisition of Corporate Name.**—A city may, by custom, usage and prescription, acquire a corporate name in fact, as where for more than thirty years it uses the name of "City of Calvert" in all official acts and proclamations; the addition of the word "Texas" occasionally or even continuously is immaterial. (Tex. Cr.) *Ex parte Keeling*, 884.

4. **MUNICIPAL ORDINANCE—Whether Void Because Unreasonable.**—An ordinance passed in pursuance of an express power to enact one of that character cannot be set aside by the courts because they deem it unreasonable. (Ill.) *Block v. Chicago*, 219.

5. **MUNICIPAL ORDINANCE—Special or Local Legislation.**—The constitutional prohibition against local and special laws does not

apply to ordinances adopted by a city within the powers conferred upon it. (Ill.) *Block v. Chicago*, 219.

Regulating Sale of Produce.

6. **MUNICIPAL ORDINANCE** Forbidding Sale of Products by Persons Who do not Raise or Produce Them.—If a municipal corporation is by statute authorized to restrain and punish forestalling and regrating, its ordinance forbidding and punishing the sale of produce by persons who do not raise it, but have purchased it for the purpose of sale, is valid. (Tenn.) *Dalton v. Knoxville*, 748.

7. **CONSTITUTIONAL LAW**—Classification, Discriminating Between Persons Who Produce Foodstuffs and Those Who Purchase for Resale.—A municipal ordinance discriminating between persons who produce provisions and sell them to consumers at first hand and persons who purchase them for resale by allowing the former to sell their products within the municipality and denying to the latter the right to make sales, does not make an unlawful discrimination. (Tenn.) *Dalton v. Knoxville*, 748.

Estoppel to Claim Street.

8. **MUNICIPAL CORPORATION**—Estoppel to Claim Street.—A municipal corporation that has led a person to erect permanent improvements upon a portion of a public street will be estopped after the lapse of many years to claim the property as part of the highway and remove the improvements. (Tex.) *Krause v. El Paso*, 831.

Street Fairs.

9. **MUNICIPALITY**—Granting Use of Streets for Fair or Carnival.—A city has no power to authorize the use of its streets for a carnival and street fair; and the occupancy of a street for that purpose by permission of the municipal authorities is unlawful and the tents and platforms are a nuisance per se. (Ill.) *Van Cleaf v. Chicago*, 275.

10. **MUNICIPALITY**—Liability for Nuisance Created by Street Fair.—A city that authorizes the occupation of its streets with the tents and platforms of a street fair becomes a participant in creating and maintaining a public nuisance, of whose existence or character it is not entitled to notice as a condition precedent to its liability to persons who receive personal injuries therefrom, although it does not itself put up the structures. (Ill.) *Van Cleaf v. Chicago*, 275.

11. **MUNICIPALITY**—Street Fair—Liability for Dangerous Platform.—Where a city permits the use of its streets for a fair or carnival, the negligence of one who constructs a platform does not exempt the city from liability to a person thereby injured if the permission of the city was a proximate cause. (Ill.) *Van Cleaf v. Chicago*, 275.

12. **MUNICIPALITY**—Liability for Structures Maintained by Street Fair.—Where a city permits the use of its streets for a fair or carnival, it assumes the obligation to use reasonable care to see that the structures erected for that purpose are reasonably safe. If it fails to do so, and a person attending the fair is injured in consequence of the negligent construction of a platform over which he must pass in reaching a tent show, he may recover from the city. (Ill.) *Van Cleaf v. Chicago*, 275.

Special Assessments.

13. **STREET ASSESSMENT**—Original Construction.—A city, in ordering a street to be graded and paved after a part of it has already been improved by an abutting owner, at his own cost, orders the

original construction of the street for which abutting owners may be taxed. (Ky.) Sparks v. Barber Asphalt Pav. Co., 492.

14. **STREET ASSESSMENT—Original Construction.**—A street is not constructed, within the meaning of the law, until its construction is prescribed by the city authorities; and until the construction is so prescribed and property holders required to pay therefor, the cost thereof as required by the city may be assessed against their property. (Ky.) Sparks v. Barber Asphalt Pav. Co., 492.

15. **SPECIAL ASSESSMENTS.**—A Municipality may Lay a Tax upon Abutting Land for purposes of local improvement, and assess it according to the frontage of the property without regard to its value. (Ky.) Owensboro v. Sweeney, 477.

16. **LOCAL ASSESSMENTS.**—Local Assessments are Based upon the Ground that the property subjected thereto is benefited by the improvement for which the assessment is made; they rest upon the theory that they may be imposed as an equivalent for benefits conferred that are not enjoyed by the general public. The right to impose them is not derived from the police power. (Ky.) Owensboro v. Sweeney, 477.

17. **LOCAL ASSESSMENTS.**—Special Taxes cannot be Levied unless the property charged receives a corresponding physical, material, and substantial benefit from the exaction. (Ky.) Owensboro v. Sweeney, 477.

18. **LOCAL ASSESSMENTS—Imposition for Street Sprinkling.**—The legislature cannot authorize a city to impose a frontage tax to defray the cost of sprinkling the streets upon which the property abuts, since sprinkling streets does not confer a special benefit upon the adjacent property in the sense of contributing to its value. (Ky.) Owensboro v. Sweeney, 477.

See Limitation of Actions; Telephones, 1-3.

MURDER.

See Homicide.

NAMES.

NAMES—Doctrine of Idem Sonans.—The names "Minnie E. Tilter" and "Minnie E. Tiller" are idem sonans. (Wash.) Kelly v. Kuhnhausen, 1093.

NATURALIZATION.

See Aliens.

NEGLIGENCE.

In General.

1. **NEGLIGENCE.**—Without Legal Duty There cannot be actionable negligence. (Ky.) Swartwood v. Louisville & N. R. R. Co., 465.

2. **NEGLIGENCE, What Essential to a Right of Recovery for.**—To sustain a recovery for alleged negligence, there must be established the legal relation of cause and effect between the negligence relied upon and the injury suffered. (Ala.) Malcolm v. Louisville & N. R. R. Co., 52.

3. **NEGLIGENCE in the Use of Dynamite.**—To have a whole box or case of dynamite brought out before the hole is ready, when only a few sticks are to be used, and leaving the whole thereof without returning it to a place of safety, is negligence, and may properly be found to be such when the explosion of the portion so failed to be returned has caused an injury and death. (Tenn.) Walton & Co. v. Burchell, 788.

4. NEGLIGENCE, Concurrent, Liability for.—If one suffers damage as the proximate result of the negligence of two others, and the damage would not have occurred from the negligence of either alone, both are held liable to the party injured. (Neb.) *Whitnack v. Chicago B. & Q. Ry. Co.*, 692.

5. NEGLIGENCE.—The Doctrine of Assumption of Risk is applicable only to cases arising between master and servant. (Ill.) *Conrad v. Springfield Ry. Co.*, 251.

6. NEGLIGENCE, Evidence of.—Negligence may be Proved by Circumstances where there is no positive, direct evidence of such negligence and no evidence to show what the act was which is claimed to be negligent. (Tenn.) *Walton & Co. v. Burchell*, 788.

7. NEGLIGENCE—Pleading Freedom from Contributory Negligence.—Where the complaint in an action for personal injuries alleges that the "accident and injury was not caused by any act of negligence on the part of this plaintiff," and the trend of fact specifications in the petition is to the effect that he was in the exercise of due care, the pleading is not wholly wanting in an allegation of freedom from contributory negligence, and if the defendant desires more he should move therefor. (Iowa) *Burger v. Omaha & C. B. St. Ry. Co.*, 343.

8. NEGLIGENCE, Averment of, When Sufficient.—When the gravamen of the action is the alleged nonfeasance or misfeasance of another, it is, as a general rule, sufficient for the complainant to aver the facts out of which the duty to act springs and which the defendant negligently failed to perform. It is not necessary to define the quo modo, nor to specify the particular acts of diligence the defendant should have employed in the performance of such duty. (Ala.) *Louisville etc. R. R. Co. v. Church*, 29.

Imputed Negligence.

9. IMPUTED NEGLIGENCE.—The Negligence of a Husband in Driving a Vehicle in Which His Wife is Riding is not imputable to her for the mere fact of the marital relation. (Ky.) *Louisville Ry. Co. v. McCarthy*, 494.

Proximate Cause.

10. PROXIMATE CAUSE—Intervening or Concurring Negligence. It is no defense to an action for injuries occurring by reason of the negligent act of the defendant that the negligence of a third person or any inevitable accident or any inanimate thing contributed to cause the injury, if the negligence of the defendant was an efficient cause without which the injury would not have occurred. (Ill.) *Miller v. Kelly Coal Co.*, 245.

11. PROXIMATE CAUSE—Kick of Mule—Concurring Negligence. Where the driver of a coal-car is kicked by a vicious mule and thrown down in front of the car and crushed by it, the kick is the proximate cause of the injury, although he could have escaped after receiving it if there had not been a gob next to the track which prevented his getting away. (Ill.) *Miller v. Kelly Coal Co.*, 245.

12. NEGLIGENCE—Proximate Cause.—Where One by His Negligent Act thrusts another into a position of danger, the act, and the negligence by which it is clothed, continue and control as long as the danger continues, unmodified by any independent, affirmative and voluntary act on the part of the person affected, or by some intervening controlling circumstance. (Iowa) *Burger v. Omaha & C. B. St. Ry. Co.*, 343.

13. NEGLIGENCE—Proximate Cause—Escape of Infected Cattle. A railway company which negligently permitted the escape from its

feeding-pens into a neighboring pasture of cattle it was transporting from a place south of the quarantine line is not liable for damages occasioned to the owner of the pasture due to the action of sanitary officers in placing the pasture under quarantine because of the cattle escaping into it, it not appearing that they were infected or communicated infection to the pasture. (Tex.) *Reynolds v. Galveston etc. Ry. Co.*, 799.

14. PROXIMATE and Remote Cause of Injury, Definitions of.—Where the result of an unlawful act is a natural one, and one which would naturally flow from the act done, it is not remote, but proximate. On the other hand, if the damages complained of would not usually or naturally flow from the negligent act or were brought about through some unforeseen casualty, they are remote. (S. D.) *Loiseau v. Arp*, 741.

Dangerous Premises—Trespassers.

15. TRESPASSERS, Land Owner's Duty to.—The owner of premises is not under any duty to make them safe for a trespasser. (Ala.) *Alabama Great Southern Ry. Co. v. Godfrey*, 76.

16. NEGLIGENCE—Premises Attractive to Children.—The fact that a railroad company has placed a pile of sand, attractive to children, in a lot adjacent to its road does not render it liable to a child who is attracted to the sand, and thereafter leaves it to board a moving car, in which last act he is injured. (Ky.) *Swartwood v. Louisville & N. R. R. Co.*, 465.

17. NEGLIGENCE—Structures Dangerous to Children.—The tendency of recent cases is to restrict rather than enlarge the principle of the turntable cases, and to hold the defendant not liable unless he knows, or in the exercise of ordinary care ought to know, that his structure is alluring to children and endangers them. (Ky.) *Mayfield Water etc. Co. v. Webb*, 469.

18. NEGLIGENCE—Liability to Trespassing Children.—Children, no less than adults, when they trespass upon the property of another, take the risk, unless he there maintains a dangerous instrumentality with the knowledge, actual or constructive, that it is alluring to children and endangers them. (Ky.) *Mayfield Water etc. Co. v. Webb*, 469.

See Death.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEW TRIAL.

1. NEW TRIAL—Newly Discovered Evidence—Evidence of a Person Released from Incompetency to Testify.—After his conviction an accused is not entitled to a new trial on the ground that since such conviction his wife has procured a divorce and has become competent to testify, and will testify in his favor. (Vt.) *State v. Sargood*, 992.

2. NEW TRIAL—Newly Discovered Evidence—Want of Diligence. A new trial will not be granted after conviction to permit the prisoner to offer testimony tending to discredit the testimony given by a witness at the trial of the charge, where the desirability of discrediting such testimony could not have been overlooked in the ordinary preparation of the defense. (Vt.) *State v. Sargood*, 992.

3. NEW TRIAL—Newly Discovered Evidence.—If, in an answer made to an interrogatory before the trial, the plaintiff gave the name of the physician who treated her, and the defendant could

have ascertained where he resided, a new trial will not be granted because of the supposed testimony of such physician, where there was no request to delay the trial until such time as his attendance could be procured. (Ala.) *Louisville etc. R. R. Co. v. Church*, 29.

4. NEW TRIAL, Granting for Excessive Damages for Personal Injuries.—The trial court did not err in granting a new trial on the ground that the damages were excessive. The amount awarded in this case was twenty-six thousand dollars, and the injuries suffered by the plaintiff were serious. (Minn.) *Barrett v. Minneapolis etc. Ry. Co.*, 585.

NOTARY.

See Acknowledgment.

OFFICERS.

1. OFFICER DE FACTO Where There is No Office De Jure.—There may be a de facto officer, though no de jure office exists, as in de facto municipal corporations or de facto courts. (Minn.) *State v. Bailey*, 592.

2. OFFICER DE FACTO, When cannot Exist.—If a person is appointed and acting solely by virtue of an unconstitutional statute, he is not an officer de facto. (Ala.) *King Lumber Co. v. Crow*, 65.

3. OFFICE AND OFFICER—Removal for Negligence of Duty.—A judgment of ouster was rendered against a mayor who neglected to notify the county attorney of known violations of the prohibitory liquor law or make a bona fide attempt to enforce the law, and who sanctioned the imposing of fines upon the joint keepers at regular intervals as a means of raising revenue for the city. (Kan.) *State v. Wilcox*, 385.

OPINION EVIDENCE.

See Homicide, 7, 8.

PARTIES.

PARTIES, Misjoinder of Complainants.—Persons representing antagonistic interests cannot join as co-complainants. (Ala.) *Flom-erfelt v. Siglin*, 67.

See Judgments, 1-3.

PARTITION.

1. PARTITION—Allowance for Improvements by One Cotenant.—In partition proceedings the court will, if possible, allow the portion improved by one cotenant to be set apart to him, without taking into account the value of the improvements; but if such a division cannot be made, the court will allow the one making the improvements the increased value of the premises caused thereby, and not the cost of the improvements. (Ill.) *Manternach v. Studt*, 282.

2. PARTITION.—A Life Tenant cannot Maintain a Suit for Partition against a remainderman and have the property sold for a division of the proceeds. (Tenn.) *McConnell v. Bell*, 770.

3. PARTITION—Unconstitutionality of Statute Authorizing Life Tenant to Maintain Suits for, Against Remainderman.—A statute authorizing a life tenant to maintain suit for the partition of the property by sale and the division of the proceeds among all parties interested, but denying such right to the remainderman, except with the consent of the life tenant, undertakes to establish a rule whereby one private citizen can use the property of another for his benefit

without the latter's consent, and is therefore unconstitutional. (Tenn.) *McConnell v. Bell*, 770.

4. **PARTITION—Misjoinder of Complainants, When does not Occur.**—The widow and administratrix of a decedent suing for a decree converting realty into personalty do not represent antagonistic interests, and their joinder is not improper. (Ala.) *Flomerfelt v. Siglin*, 67.

5. **PARTITION—Misjoinder of Complainants.**—If a widow and administratrix join in a suit for conversion of real property into personalty and also for the awarding of dower to her out of the proceeds, their interests are antagonistic, and there is a misjoinder. (Ala.) *Flomerfelt v. Siglin*, 67.

6. **PARTITION—Conversion of Realty into Personalty, Proceedings for, When Administratrix and Widow cannot Represent Creditors.**—If, in a bill by the complainant as administratrix and widow of the decedent for a decree declaring the conversion of the realty into personalty and also for an award to her of dower, it does not appear that the personal estate is sufficient to satisfy the debts due from the decedent, his creditors should be represented in the allotment of dower and in the ascertainment of the sum in lieu thereof. Their interests and those of the widow are antagonistic, and she cannot, as complainant, represent both. (Ala.) *Flomerfelt v. Siglin*, 67.

7. **PARTITION, Sale for Division—Attorney's Fee.**—On a bill to declare real property converted into personalty and for its sale and a division of its profits, an attorney's fee should be allowed. It should not be for the total price of the land, but should be based upon the common fund to be realized on the sale, after first deducting a charge imposed on the land and directed to be paid out of its proceeds. (Ala.) *Flomerfelt v. Siglin*, 67.

8. **PARTITION IN PROBATE, When not Prevented by an Adverse Claim.**—Under the code of Alabama, a partition in probate is not prevented by the assertion of an unsupported adverse claim of adverse possession or a hostile title. There must be a bona fide assertion of the hostile claim as a true, existing status. The court must investigate, and if it is clear that there has not been such adverse possession as to constitute a disseizin or ouster of the petitioner and that complainant's title is good, or that the court cannot entertain on the facts presented any serious doubt as to the title, it must proceed to hear the application. (Ala.) *Layton v. Campbell*, 17.

9. **PARTITION—Evidence—Cross-examination to Support Claim of Adverse Possession in Good Faith.**—Where the defendant in partition denies the title of the complainant and claims title and adverse possession in himself, and it appears that he had purchased the interest of the complainant's grantor and been let into possession before the making of the conveyance under which the complainant claimed, defendants should be permitted, on cross-examination of the complainant and the latter's grantor, to show that no consideration had been paid, and that there was an agreement between them that the litigation was to be conducted in the name of the grantee, but the fruits of any recovery should be shared between them. Such cross-examination, if permitted, might prove that the defendants claimed to be in the exclusive and adverse possession of the land. (Ala.) *Layton v. Campbell*, 17.

10. **PARTITION, Surplusage, Averments in, What are and Exclusion of Evidence Supporting.**—Where the circumstances of the execution of the deed under which one of the parties in partition claims are alleged in the pleading, and the deed itself is in evidence, the

avermment should be regarded as surplusage, and testimony tending to support it is properly excluded. (Ala.) *Layton v. Campbell*, 17.

PARTY-WALL.

PARTY-WALL—Covenants Running with Land.—Covenants for the erection of a party-wall run with the land, so that when one of the parties thereto conveys his lot, the grantee may enforce against the other party to the original contract the provision therein for payment. (Wash.) *Sandberg v. Rowland*, 1077.

PASSENGERS.

See Carriers.

PATENT RIGHT.

UNPATENTED FORMULA.—There is No Substantial Property in an unpatented recipe or formula, but only a qualified property right. (Tex.) *O'Bear-Nester Glass Co. v. Antiexplo Co.*, 865.

PAYMENT.

1. **PAYMENT**—Manner of Pleading.—Payment is an Affirmative Defense which must be specially pleaded. (Colo.) *Harvey v. Denver etc. R. R. Co.*, 120.

2. **PAYMENT**—Acceptance of Part as Satisfaction.—Where a claim is disputed and unliquidated, the acceptance of part in settlement thereof is a satisfaction of the demand, and a release in full given upon the settlement is conclusive. (Colo.) *Harvey v. Denver etc. R. R. Co.*, 120.

PEDDLERS.

MUNICIPAL ORDINANCES.—A License to Huckster granted by the state and county does not authorize the violation of a municipal ordinance by forestalling or regrating, when those acts are specially prohibited by such ordinance, and it will be possible to carry on the business of huckstering without engaging in them. (Tenn.) *Dutton v. Knoxville*, 748.

See Municipal Corporations, 6, 7.

PENNY ARCADES.

See Theaters.

PERJURY.

1. **AN INDICTMENT** for Perjury need not, in Vermont, set forth by what court, magistrate or person the oath was administered to the accused. (Vt.) *State v. Sargood*, 995.

2. **PERJURY**.—Knowledge of the Materiality of the Testimony is not an essential to the crime of perjury. (Vt.) *State v. Sargood*, 995.

3. **PERJURY**.—A Statement may be Regarded as Material within the law applicable to perjury if it may properly influence the jury in reaching its conclusion. (Vt.) *State v. Sargood*, 995.

PLEADING.

In General.

1. **PLEADING** the General Issue amounts to a denial of every material allegation of fact in the complaint. (Mich.) *Sprague v. Hosie*, 558.

2. **PRACTICE.**—A General Demurrer to Each Count by enumeration amounts to a separate demurrer to every count. (Vt.) *State v. Peet*, 998.

3. **PRACTICE.**—A Special Demurrer has only the force of a general demurrer as to the pleadings prior to the one specially challenged. (Vt.) *Dunlevy v. Fenton*, 1009.

4. **PLEADING.**—Argumentative Allegations, When Good as Against a General Demurrer.—A plea that the plaintiff by her deed released the defendant argumentatively alleges the delivery of the deed, and is hence good against a general demurrer. (Vt.) *Dunlevy v. Fenton*, 1009.

5. **PLEADING.**—The Plea of Confession and Avoidance must impliedly admit that the allegations sought to be avoided are true. (Vt.) *Dunlevy v. Fenton*, 1009.

6. **PLEADING.**—A Special Plea amounting to a general issue is bad. (Vt.) *Dunlevy v. Fenton*, 1009.

7. **PLEADING.**—A Pleading Which Sets Up in Reply a different contract from the one alleged is bad, because it is an argumentative denial of what the adverse pleader must prove to sustain his claim. (Vt.) *Dunlevy v. Fenton*, 1009.

8. **PLEADING.**—Replication to a plea that the plaintiff by her deed released the defendant from the cause sued upon, a replication that the plaintiff made the supposed deed and release pleaded by the defendant is not sufficient to give color. (Vt.) *Dunlevy v. Fenton*, 1009.

Law of Another State or Country.

9. **PLEADING LAW of Another State, What an Insufficient Averment of.**—A statement in a complaint that, at a designated time, it was the law of a specified state that a husband and wife might legally contract with each other, is a statement of a conclusion of law, and insufficient. (Vt.) *Jenness v. Simpson*, 1029.

10. **PLEADING.**—In Pleading the Law of Another State or Foreign Country, so much of such law as is material must be set forth by the pleader that the court may judge of its effect. (Vt.) *Jenness v. Simpson*, 1029.

Election Between Counts.

11. **PRACTICE, Right to have the Plaintiff Elect upon Which Ground He will Rely.**—If the plaintiff is entitled to recover upon both grounds of his complaint, it is not error to refuse to compel him to elect upon which he will rely. (Vt.) *McDuffee v. Boston & Maine R. R.*, 1019.

Variance Between Complaint and Evidence.

12. **TRIAL.**—Variance Between Complaint and Evidence.—Though the complaint against a railway company for the ejection of a trespasser from the train alleges that the brakeman had express authority, it is not indispensable to a recovery that such authority be shown. (Minn.) *Barrett v. Minneapolis etc. Ry. Co.*, 585.

PLEDGE.

1. **PLEDGOR AND PLEDGEE.**—Pretended Sale by the Latter to Himself, When not Ratified.—If a pledgee notifies the pledger that he has sold the pledged property and pays him the balance claimed to be left after paying the debt for which the property was pledged, but, as a matter of fact, the pledgee retains possession and has not made any sale, unless to himself, such sale is not ratified by the

receipt of such balance without knowledge of the true facts. (Neb.) *Moyer v. Leavitt*, 682.

2. PLEDGE, Tender of Debt as a Destruction of the Lien.—A tender of the amount secured by pledge of personal property made upon the maturity of the debt, although not accepted nor kept good, will release the property from the lien of the pledge. (Neb.) *Moyer v. Leavitt*, 682.

3. INTEREST MONEY Paid to Consummate a Fraud on the Receiver.—The pledgee of personal property fraudulently represented that he had sold the property pledged and sent twenty dollars to the pledger as a part of the purchase price, which the latter, relying upon the fraudulent representations, retained until he discovered the fraud. Held, that the pledger was not liable for interest on the twenty dollars. (Neb.) *Moyer v. Leavitt*, 682.

See Bills and Notes, 18-21.

POLICE POWER.

See Constitutional Law.

PRESUMPTION.

See Death, 3-5.

PRINCIPAL AND AGENT.

See Brokers.

PRINCIPAL AND SURETY.

SURETYSHIP—Compensated or Voluntary Surety.—There is No Difference between the rights of a compensated and the rights of a voluntary surety; a material alteration in the principal contract, made without the consent of the surety, will discharge him although he received compensation for his undertaking. (Tex.) *Lonergan v. San Antonio L. & T. Co.*, 803.

See Bills and Notes, 13, 14.

PROBATE LAW.

See Executors and Administrators; Wills

PROCESS.

1. PROCESS—Amendment to Correct Name.—The court does not abuse its discretion in refusing the amendment of a return of service of summons to correct the defendant's initial, if he testifies positively that the summons was not served on him, and the officer has no recollection of such service. (Colo.) *Stubbs v. McGillis*, 116.

2. PROCESS, Return of, Necessity for.—An officer cannot justify under returnable process unless he shows its return, whether in a civil case or a criminal prosecution. (Vt.) *Wright v. Templeton*, 990.

See Judgments, 4-20.

PROMISSORY NOTES.

See Bills and Notes.

PROXIMATE CAUSE.

See Negligence, 10-14.

PUBLIC LANDS.

1. PUBLIC LANDS, Contract Respecting, When Void.—An agreement not to protest against an application for a homestead on the

public lands is against public policy and void, because a protest in such a case is giving the land department information that the applicant has concealed facts which he ought to have disclosed, or is proceeding to make an entry on false testimony or some other fact which would show the department that the applicant was not entitled to a patent. (S. D.) *Roy v. Harney Peak Min. & Mfg. Co.*, 706.

2. **PUBLIC LANDS—Deed Given in Pursuance of a Contract not to Protest Against Application for, Canceling of.**—If an applicant for a homestead on the public lands enters into an agreement with a third person that if the applicant will convey a portion of such homestead to such person, he will not contest, protest nor in any manner oppose a claim of such homestead or the issuance of a patent therefor, and the conveyance is accordingly made, but the grantee does, nevertheless, protest against the entry of the homestead, a court of equity will not cancel such conveyance. It is founded on a contract void as against public policy, and the courts will not aid either party. (S. D.) *Roy v. Harney Peak Min. & Mfg. Co.*, 706.

See Adverse Possession.

PUBLIC WORK.

See Conspiracy.

PULLMAN CAR COMPANIES.

See Carriers, 28-30.

QUIETING TITLE.

1. **QUIETING TITLE—Jury Trial.**—An Action to Quiet Title is an Equitable one which should not be tried to a jury. (Iowa) *Bradley v. Burkhart*, 328.

2. **ACTION to Determine Conflicting Claims of Title, Interest or Claim Justifying Maintenance of.**—One who has an apparent judgment lien has an interest within the meaning of the statute providing that an action may be brought and prosecuted on a final decree, judgment or order by any person or persons, whether in actual possession or not, claiming title to real estate against any person or persons who claim an adverse interest therein for the purpose of determining such claim. (Neb.) *Johnson v. Samuelson*, 666.

3. **VENUE OF SUITS to Determine Conflicting Claims of Title.**—The venue of an action to quiet title to real estate as against the apparent lien of a void judgment is governed by the provisions of section 51 of the Code, and must be laid in the county in which such real estate is situated. (Neb.) *Johnson v. Samuelson*, 666.

QUITCLAIM DEED.

See Deeds, 3-7.

QUO WARRANTO.

QUO WARRANTO Against Municipal Corporation for Licensing Violations of the Law.—A judgment was rendered ousting a city from exercising unwarranted corporate powers by indirectly licensing violations of the intoxicating liquor and gambling laws, the violators paying at regular intervals stipulated sums as fines and having immunity from prosecution and punishment. (Kan.) *State v. Coffeyville*, 386.

RAILROADS.

Interfering with Flow of Water.

1. **RAILWAYS—Waters, Damage from, When Deemed to be from an Act of God and not Recoverable for.**—Damages due to an extra-

ordinary flood, higher than had ever been known before, and in which the waters flowing through a stream were increased nearly forty-fold, must be deemed due to an act of God, and the railway corporation is not liable therefor, though it had dammed up the stream and turned it through a culvert sufficient for them in their ordinary volume and also for ordinary high water. (Vt.) *Eagan v. Central Vermont Ry. Co.*, 1031.

2. **RAILWAYS, When not Liable for Damages Due to an Insufficient Culvert.**—The fact that many years before the reconstruction of a culvert there was a flood for which the old culvert was insufficient does not necessarily make the railway company answerable for damages due to a subsequent flood, though the reconstructed culvert was of less capacity than the original, if both floods were of extraordinary character. (Vt.) *Eagan v. Central Vermont Ry. Co.*, 1031.

Starting Fires.

3. **RAILROAD COMPANIES—Contributory Negligence on the Part of the Owner of Property, What is not.**—The owner of premises near or contiguous to a railway right of way is not bound to anticipate negligence on the part of the railroad, and by way of precaution, to make provision against the communication of fire thereby. Such proprietors in general owe no duty to railroad companies in this respect. Hence, negligence can rarely be imputed to the proprietors so as to exonerate the railroad company from liability for its negligence. (Ala.) *Southern Ry. Co. v. Darwin*, 94.

4. **RAILROAD COMPANY—Land Owner's Right to Use His Premises Without Being Guilty of Negligence.**—The owner of land contiguous to a railroad is entitled to use his land in any natural and lawful manner without incurring the imputation of contributory negligence in the occurrence of fire. He may use his property, or permit it to be used and be in the same manner and condition as if no railroad passed within the range of communication by fire. (Ala.) *Southern Ry. Co. v. Darwin*, 94.

5. **RAILROAD COMPANIES—Risk of Fire Assumed by the Owner of Adjacent Property.**—The owner of property situated adjacent to a railroad assumes the risk of loss from all fire started or communicated without the negligence of the railroad company or its agents. (Ala.) *Southern Ry. Co. v. Darwin*, 94.

6. **RAILROAD COMPANIES, Liability of to Abutting Property Owners if Injured by Fire.**—Railroad companies are only required to employ machinery of approved construction and to operate their engines with such precautions as are not inconsistent with the lawful, reasonable and effective conduct of their business. Beyond this abutting property owners take the risk. (Ala.) *Southern Ry. Co. v. Darwin*, 94.

7. **RAILROAD COMPANIES—Injury to Property Owner by Fire Due to Constructing His Building Near the Railroad Track.**—A property owner has the right to construct a building on any part of his property and to enjoy the same without rendering himself liable to the negligence of a railway company, whereby his property is destroyed by fire. He is not guilty of contributory negligence in building a house near the railroad, so as to prevent a recovery if it is burned through the negligence of the railroad company, though he knew the danger of fire was thereby increased. He is under no obligation to stand guard over his property, and continually watch it to protect it from the negligence of the railway company. (Ala.) *Southern Ry. Co. v. Darwin*, 94.

8. **RAILROAD COMPANY—Injury from Fire Due to Combustible Matter.**—The proprietor of contiguous property is not required

to move combustible matter from his own land in order to guard against the consequence of possible, or even probable, negligence on the part of a railroad company in communicating fire thereto. (Ala.) Southern Ry. Co. v. Darwin, 94.

9. **RAILROAD COMPANY, Liability of for Fire—Plea Seeking to Charge the Plaintiff with Contributory Negligence, When not Sufficient.**—In an action to recover for the loss of property by fire negligently communicated by a locomotive operated by the defendant railway company, pleas alleging the proximity of the property to the railroad and the negligence of the plaintiff in not having watchmen, since he knew of this proximity and the danger from passing trains, or that with such knowledge, plaintiff negligently and carelessly piled cotton near the railroad, knowing of its exposed condition, do not make out a case of contributory negligence, and demurrers thereto are properly sustained. (Ala.) Southern Ry. Co. v. Darwin, 94.

10. **RAILROAD COMPANIES—Evidence in Actions for Communicating Fire to Property.**—Evidence of a witness that he saw the train throwing large volumes of sparks is properly admitted where the other evidence is such that the jury could well infer that such sparks were from the engine in question, if from this the further inference is justifiable that it did not have a good spark-arrester. (Ala.) Southern Ry. Co. v. Darwin, 94.

11. **RAILROAD COMPANIES—Jury Trial, Doubt as to Which of Several Acts may have Produced the Injury—Instructions.**—An instruction to the jury that uncertainty in their minds as to by which of several means fire was communicated by an engine was no reason for denying plaintiff's right of recovery, if, from the evidence, they believe the fire was due to either of these means. (Ala.) Southern Ry. Co. v. Darwin, 94.

12. **RAILROAD COMPANIES—Burden of Proof in Action to Recover for Injury Due to Fire.**—It is proper to instruct the jury, in an action against a railroad company to recover for damages claimed to be due to the communication of fire from the locomotive of the defendant, that if the plaintiff reasonably satisfied the jury from the evidence that the fire was communicated by the defendant's locomotive, then the plaintiff has nothing to do until the defendant has reasonably satisfied you (1) that so far as regards the throwing of sparks, the engine was properly constructed; (2) that in that respect the engine was not in bad or defective condition; (3) that the throwing of sparks was not caused by the unskillful or careless management of the locomotive, and that even if the defendant in its turn reasonably satisfied the jury of all three of these things, yet the plaintiff might by other evidence overcome the evidence of the defendant and show that the fire was set out from the engine either because it was badly built, or in bad condition, or badly handled. (Ala.) Southern Ry. Co. v. Darwin, 94.

Injury to Brakeman from Water-tank.

13. **RAILROAD, What Sufficient Evidence to Show That Decedent was in the Service of and that It Operated Specified Tracks and Appliances.**—Where, in an action against a designated railroad corporation, the attorneys for both parties and the witnesses at the trial speak of the railroad and the railroad company and the railroad track and water-tank and spout, this language must be understood as relating to the defendant corporation and as constituting evidence that it operated the water-spout in question, and that the person spoken of as injured by it was in the employ of the defendant. (Vt.) McDuffee v. Boston etc. R. R., 1019.

14. RAILWAY CORPORATION—Negligence in Maintaining Water-tank Where It Might Injure Employés.—If a railway corporation maintained a water-tank and spout so that the latter, when raised to its highest position, was so near the car that it would hit a man of ordinary height if he stood on the top of a car, a foot or more one side of the running-board, and a man on such top signaling a train was forced to dodge the spout to avoid being hit by it, and this dangerous structure could have been reasonably avoided, the railway company was guilty of negligence and liable for the injuries inflicted on one of its employés in the discharge of his duties, so struck and fatally injured by such spout. (Vt.) *McDuffee v. Boston etc. R. R.*, 1019.

15. RAILWAY CORPORATIONS—Evidence that a Water-tank and Spout Might have been Placed in a Position Less Dangerous to Employés, What Sufficient.—In an action to recover for injuries suffered by a brakeman by being struck by the spout of a water-tank, where there is no evidence tending to show but that such tank and spout were placed at a reasonably safe distance from the water-tank, yet if the evidence offered and received shows the construction, general surroundings and location of the spout, it becomes necessary and proper for the court to submit to the jury, for them to say from all the evidence, whether it was negligence on the part of the defendant to maintain the spout where it was at the time of the injury. (Vt.) *McDuffee v. Boston etc. R. R.*, 1019.

16. RAILWAYS, Ordinary Risk Assumed by Employés, What is not.—The risk arising from the maintaining of the spout of a water-tank in a position where it will injure an employé in the discharge of his duty is not an ordinary risk, and its employés do not assume such risk unless they know of and comprehend the danger, or, in the circumstances of the case, must be taken to have known and comprehended it. (Vt.) *McDuffee v. Boston etc. R. R.*, 1019.

17. RAILWAY CORPORATIONS—Risk, Extraordinary, When Assumed by Employés.—An extraordinary risk is assumed by an employé of a railroad corporation if it is one which he had an opportunity to ascertain, and had in fact ascertained and comprehended its dangerous character, and afterward continued in the service. (Vt.) *McDuffee v. Boston etc. R. R.*, 1019.

18. RAILROAD CORPORATIONS—Extraordinary Risk, Burden of Proving that Employé did not Know and Comprehend.—If the spout of a water-tank was maintained in such a position that it might inflict injury on a brakeman in the discharge of his duties on the top of a train of cars, and he is injured thereby, and an action is brought to recover for such injury, the burden rests upon the plaintiff to prove that such employé did not know and comprehend the danger. (Vt.) *McDuffee v. Boston etc. R. R.*, 1019.

19. RAILWAY CORPORATION—Dangerous Spout on or so Near Track, What Sufficient Evidence that Brakeman did not Know of or Comprehend Danger from.—Though the spout of a water-tank was maintained in such a position at a railroad track that it might inflict injury on a brakeman in the discharge of his duty on the top of a train, he will not be held to have known of and assumed the risk, if he had passed along this part of the road only twice before the accident, and his duties did not require him to measure or inspect the spout or ascertain its distance from the top of the car. (Vt.) *McDuffee v. Boston etc. R. R.*, 1019.

20. RAILWAYS—Contributory Negligence of Brakeman on Top of a Car, When not Inferable.—Though a brakeman on the top of a car, in the discharge of his duties, does not remain on the center or running board nor keep his eyes directed toward the front, he is not

to be held guilty as a matter of law when struck by a projecting water-spout which would not have struck him had he been at the time on such board and which he might have seen had he been looking toward the front instead of toward the rear of his train. (Vt.) *McDuffee v. Boston etc. R. R.*, 1019.

21. RAILWAYS—Negligence of a Fellow-servant, When not Involved.—In an action to recover for injuries received by a brakeman through coming in contact with the spout of a water-tank while on top of a train of cars, in the discharge of his duty, the injury cannot be held to have resulted from the negligence of a fellow-servant in leaving the spout in a dangerous position, when the evidence received tends to show that the injury was due to the negligent maintenance of the tank and spout, and not in any other way. (Vt.) *McDuffee v. Boston etc. R. R.*, 1019.

22. EVIDENCE that Death Resulted from Accident and Injury, What Sufficient.—If the evidence tends to show that a brakeman was struck by a water-spout projecting above the top of a car on which he was discharging his duties, and that on the same afternoon he complained of his head aching and of feeling bad, and such complaint continued for a couple of days, though he remained in the discharge of his duties until, on the second day, he became critically ill, and in less than twelve hours died, and the medical witnesses testified that in their opinion the injury probably caused the death, is sufficient to sustain a verdict to the same effect. (Vt.) *McDuffee v. Boston etc. R. R.*, 1019.

23. PLEADING in Suit to Recover for Personal Injuries—Variance, When Immaterial.—If, in an action to recover for the death of a brakeman alleged to be due to the negligence of the defendant railway company in maintaining the spout of a water-tank, the plaintiff avers that the decedent was walking when he received his injury, and the evidence tends to show that he was signaling a train, the variance is immaterial. (Vt.) *McDuffee v. Boston etc. R. R.*, 1019.

24. RAILWAY CORPORATIONS—Duty of Employé to Discover Dangers.—An employé of a railway corporation, in the discharge of his duties, is not required to exercise diligence to discover dangers which are the result of his employer's negligence. (Vt.) *McDuffee v. Boston etc. R. R.*, 1019.

Trespassers and Licensees on Premises.

25. RAILROAD, Use of Right of Way of, When not Permissive. Ordinarily the mere acquiescence by a railroad company in the use of a right of way does not amount to permission, but this rule has no application when the use is by its invitation. (Ala.) *Alabama Great Southern Ry. Co. v. Godfrey*, 76.

26. RAILROAD, Passenger, When not a Trespasser or Mere Licensee in the Use of the Premises of.—A passenger leaving a railroad depot by a pathway on its premises, which he and passengers generally were invited to use, is not a trespasser, nor a mere licensee. (Ala.) *Alabama Great Southern Ry. Co. v. Godfrey*, 76.

Trespassers on Trains—Children.

27. RAILROAD CORPORATIONS—Party Injured and the Brakeman, When not Cotrespassers.—Action for damages which the plaintiff, a trespasser on the defendant's freight train, claimed to have sustained by being forced, by the wanton act and threat of a brakeman, to jump from the train while it was moving rapidly. Verdict for twenty-six thousand dollars. Held, the defendant was not entitled to a directed verdict on the alleged ground that the plaintiff and the brakeman were cotrespassers, nor upon the opening statement of plain-

tiff's counsel as to the motive which actuated the brakeman, nor because of a rule of the defendant forbidding brakemen to eject any person from a train except by direction of the conductor and in his presence. (Minn.) *Barrett v. Minneapolis etc. Ry. Co.*, 585.

28. **A RAILROAD COMPANY Owes No Duty to a Trespasser on Its Cars** except to refrain from wantonly injuring him in ejecting or forcing him from the train when it is going so rapidly as to imperil his life or endanger his person. (Minn.) *Barrett v. Minneapolis etc. Ry. Co.*, 585.

29. **RAILWAY COMPANIES.—A Brakeman has Implied Authority to Eject a Trespasser** from a freight train. (Minn.) *Barrett v. Minneapolis etc. Ry. Co.*, 585.

30. **RAILROADS—Duty Toward Infant Trespassers.**—Railroad companies whose lines traverse cities and other populous communities are not required to maintain a lookout for children in the habit of jumping on and off the cars while in motion, nor to provide against injuries to them. (Ky.) *Swartwood v. Louisville etc. R. R. Co.*, 465.

31. **RAILROADS—Duty Toward Trespassing Children.**—If the operators of a train know of the actual presence of children jumping on and off the moving cars, they are required to not injure them if with the means at their command they can avoid it. (Ky.) *Swartwood v. Louisville etc. R. R. Co.*, 465.

32. **RAILROADS—Trespassers on Its Cars.**—All Who Venture Unbidden by a railroad company, and unknown to it, upon its trains do so at their own peril, since they can have no right and the company therefore owes them no duty. This rule applies without regard to the age or condition of the trespasser. (Ky.) *Swartwood v. Louisville etc. R. R. Co.*, 465.

Relief Department.

33. **BENEFIT ASSOCIATIONS—Physical Disability, What is.**—Railway employes only were permitted to join the relief department of the defendant company, an institution organized to pay disability benefits to members. The contract for benefits provided: "The word 'disability' shall be held to mean inability to work." Held, that the words "physical inability to work" mean inability to perform such labor as the injured member was engaged in at the time of his injury, or similar labor which would enable him to earn wages equally as remunerative. (Neb.) *Keith v. Chicago etc. R. R. Co.*, 655.

34. **BENEFIT ASSOCIATIONS—Recovery from Disability, Effect of Partial.**—Under the provisions of such contract, if an injured member of the relief department recovers so that he is able to perform such work as is contemplated in the contract, or similar work equally as desirable and remunerative, then the obligation of the defendants to pay disability benefits ceases. But recovery sufficient to enable him to earn much smaller wages at some other employment, or employment procured through the charity or indulgence of friends or relatives, when, in fact, he has not recovered from his disabilities, is insufficient to release defendants. (Neb.) *Keith v. Chicago etc. R. R. Co.*, 655.

See Carriers.

Note.

Railway Corporations, cars furnished by the shipper or hired at his request, liability for injuries due to, 46.

cars of other corporations, when not liable for defects in, 46.

circus trains and the like, liability for injuries occurring during the transportation of, 35, 36, 48-51.

circus and other special trains, employes of, when bound by contracts limiting liability for injuries to, 48-51.

Railway Corporations, circus trains, duty of to inspect, 36.

- connecting, duty of to inspect cars, 47.
- contracts exempting from liability for injuries due to cars of other companies, 47.
- contracts exempting from liability for injuries to sleeping-cars and their employés, 39, 40.
- contracts exempting from liability for injuries received on trains which they have hauled as private carriers, 47-51.
- contracts exempting from liability to employés riding on circus trains, 43, 48.
- contracts made by them to transport special trains, when binding on employés, 47, 48.
- express messenger, liability for injury to, 37.
- inspection of cars of connecting carriers, 47.
- liability of two employés riding on special trains, contracts excluding such liability, 47-51.
- liability of when hauling cars owned by others, 35.
- menagerie trains, duties and liabilities of when moving, 36, 37.
- private carriers, when act as, 35.
- refrigerator-cars, liability for injuries due to though owned by another, 45, 46.
- sleeping-car companies and their employés, right of to contract for exemption from liability when hauling, 38.
- sleeping-cars, assaults on passengers in, liability for, 44.
- sleeping-cars, defects in, liability for injuries due to, 44.
- sleeping-cars, duty of to accept and transport, 38.
- sleeping-cars, duty of to furnish to passengers, 38.
- sleeping-cars, duty of to passengers occupying, 41.
- sleeping-cars, employés and servants of, to what extent deemed employés and servants of the railway company, 41, 43.
- sleeping-cars, employés, contracts respecting liability for injuries to, 39.
- sleeping-cars, free passes, passengers riding upon, liability of to, 44.
- sleeping-cars, passengers in, liability to, 41-44.
- sleeping-cars, right of to run trains consisting of none but passenger-cars, 40.
- special cars, liability for injuries due to the condition of, 44.

RECEIVERS.

1. RECEIVERS, Diligence Required of.—Receivers of insolvent estates are not guarantors against loss, but they are required to exercise that degree of diligence in the administration of the trust which is exercised by a man of ordinary prudence with reference to his own business affairs. (Minn.) *State v. Germania Bank*, 599.

2. RECEIVERS, Advice of Counsel as a Protection to.—Where the proper administration of the estate makes it necessary or expedient to take legal advice, and competent counsel is employed whose advice is followed in good faith, the receiver is not liable for consequent losses. (Minn.) *State v. Germania Bank*, 599.

3. RECEIVERS, Negligence, When not Shown to be Liable for.—The evidence does not sustain the charge that appellant, while acting as receiver of the insolvent bank, was guilty of such negligence as to make him responsible for losses resulting from the failure of his attorney, acting upon a mistake of law, to bring suits against certain stockholders before the expiration of the statute of limitations. (Minn.) *State v. Germania Bank*, 599.

RELEASE.

RELEASE—Manner of Pleading.—A Release or an Accord and Satisfaction must be specially pleaded in order to be available. (Colo.) *Harvey v. Denver & R. G. R. R. Co.*, 120.

RELIEF DEPARTMENT.

See Railroads, 33, 34.

RES GESTAE.

See Criminal Law, 3; Homicide, 5.

RES JUDICATA.

See Judgments, 12-16.

RETURN.

See Judgment; Process.

REVERSAL OF JUDGMENT.

See Appeal and Error, 11.

Note.

Revocation of Wills by change in testator's circumstances. See Wills.

SALES.

SALE, Continuing Offer, What is not.—An offer to sell stock at a specified price is not a continuing offer. (Mich.) *Sprague v. Hosie*, 558.

SALOON-KEEPER.

See Intoxicating Liquors.

SCHOOLS.

SCHOOLS—Uniform System.—A Statute Providing a Local Tax for the support of a common school to provide a better school than the common school fund alone would afford does not change the character of the school or infringe the constitutional provision requiring a uniform system of common schools. (Ky.) *Smith v. Simmons*, 420.

SELF-DEFENSE.

See Homicide, 4.

SETOFF AND COUNTERCLAIM.

SETOFF not Pleded, Evidence in Favor of, When Properly Considered.—Though a setoff must be specially pleaded, and evidence in its favor is not admissible unless it is pleaded, yet if evidence is received without objection, and the right to recover is not confined by the prayers of the pleadings and evidence, the jury, or the court sitting as a jury, may find itself a setoff in favor of the defendant. (Md.) *Richardson v. Anderson*, 543.

SHIPS.

See Trespass.

SLANDER.

See Libel and Slander.

Am. St. Rep., Vol. 130—77

SLEEPING-CAR COMPANIES.

See Carriers, 28-30.

SPECIAL ADMINISTRATORS.

See Executors and Administrators, 1.

SPECIFIC PERFORMANCE.

EQUITY PRACTICE—Amending Bill for Specific Performance. If a case for specific performance is made in every respect, except that the bill does not show that the complainant is ready and willing, nor that he has offered to perform, the court will give him an opportunity to amend in this respect rather than deny the relief. (Vt.) *Wilkins v. Somerville*, 906.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.*Enactment.*

1. **STATUTE, Re-enactment of After Receiving a Judicial Construction.**—The readoption of a statute after it has received construction by the highest court of a state has the effect of adopting such construction as a part of the statute. (Ala.) *Tennessee Coal I. & Ry. Co. v. Rousell*, 56.

2. **CONSTITUTIONAL LAW**—Statute Signed by the Governor and Officers of the Legislature Differing from that Passed by It.—If a statute as signed by the speaker of the House, president of the Senate, and governor of the state and approved by the latter, omits three sections which were concurred in by the Senate and Assembly, it is unconstitutional and wholly invalid. (Ala.) *King Lumber Co. v. Crow*, 65.

Interpretation.

3. **STATUTES, Construction of.**—In Arriving at Legislative Intent, not only must the statute in every part be considered, but when there are several statutes in *pari materia*, all must be considered together. (Vt.) *State v. Central Vt. Ry. Co.*, 1065.

4. **STATUTES, Interpretation of.**—It is always competent to consider the consequences of a statute, to arrive at the intention of its framers. (Neb.) *Johnson v. Samuelson*, 666.

5. **STATUTES, Construction of.**—In ascertaining the legislative intent, regard must be had to the subject matter of the statute, as well as to its language and the consequences which would follow the proposed construction. (Vt.) *State v. Audette*, 1061.

STIFLING BIDDING.

See Conspiracy.

STOCKHOLDERS' LIABILITY.

See Corporations.

STREET FAIRS.

See Municipal Corporations, 9-12.

STREET RAILWAYS.

See Carriers.

SUBROGATION.

1. SUBROGATION.—It is Essential to the Right of Subrogation that the person making the payment be one who is under some obligation requiring it, or that he should have some interest to be affected by it. (Vt.) *Davis v. Davis*, 1035.

2. SUBROGATION.—Payment by a stranger at the request of the debtor does not entitle the payer to subrogation, unless there was an understanding to that effect. (Vt.) *Davis v. Davis*, 1035.

3. SUBROGATION Contemplates the Existence of a Lien to which some other person succeeds by reason of having procured an interest in the property. The lien must be an existing one which its holder could have enforced at the time of the transfer of interest. (Neb.) *Barkley v. Lincoln*, 659.

See Homestead, 3; Mortgages, 4-6.

SUIT CLUB.

See Lottery.

SUMMONS.

See Process.

SUPPORT OF GRANTOR.

See Deeds, 8-10.

SURETYSHIP.

See Principal and Surety.

SURVIVORSHIP.

See Death, 3-5.

TAXATION.*In General.*

1. TAXES—Imposition by Special Statute.—A Constitutional Provision that taxes must be levied by general laws does not render inoperative special tax laws enacted before its adoption. (Ky.) *Smith v. Simmons*, 426.

2. TAXATION—Situs of Property Wrongfully Withheld.—A person, by taking possession of personal property and holding it against the consent of the owners, cannot give it a situs for taxation in the place where he happens to reside. (Ky.) *Board of Council v. Illinois Life Ins. Co.*, 499.

3. TAXATION—Situs of Security Wrongfully Withheld.—If a foreign insurance company buys out a domestic company that has securities on deposit with the state treasurer, and he wrongfully withholds them from the purchasing company, they are not taxable, while thus withheld, at the place of his residence. (Ky.) *Board of Council v. Illinois Life Ins. Co.*, 499.

Tax Sales and Titles.

4. TAX SALE—Affidavit of Advertisement.—It is the fact of publication and posting, not the proof thereof, that gives the treasurer jurisdiction to make a tax sale. Hence the statutory affidavits may be filed at any time, even upon the trial of an action to cancel

the tax deed, when it becomes necessary to prove the publication and notice. (Colo.) *Sternberger v. Moffat*, 140.

5. **TAX SALE—Conclusiveness of Treasurer's Affidavit of Posting.**—The probative force of the treasurer's affidavit of posting the delinquent tax list and notice of sale cannot be impaired by his subsequent oral testimony. (Colo.) *Sternberger v. Moffat*, 140.

6. **TAX TITLE—Misnomer of Party—Idem Sonans.**—Tax proceedings will not be set aside because the notice of summons thereunder was addressed to Minnie E. Tilter instead of Minnie E. Tiller, for these names are idem sonans. (Wash.) *Kelly v. Kuhnhausen*, 1093.

7. **PURCHASER at a Void Tax Sale, Right of to Recover Moneys Paid.**—In the absence of a statute, a purchaser at a tax sale cannot, upon failure of his lien, recover the amount expended for taxes from the city levying the same. (Neb.) *Barkley v. Lincoln*, 659.

8. **TAX SALE—Right to have a Reassessment of the Property for the Benefit of a Purchaser at a Void.**—Section 7792, Annotated Statutes of 1903, providing for the reassessment of property by the city council in all cases where special assessments have been or may be declared void or invalid, does not authorize a reassessment of property for the benefit of a purchaser at tax sale, who fails to recover the amount of such special taxes from the property on account of the illegality of the assessment. (Neb.) *Barkley v. Lincoln*, 659.

See Injunction; Limitation of Actions; Mortgages, 4-6; Municipal Corporations, 13-18; Schools.

TELEPHONES.

Regulating the Placing of Poles.

1. **MUNICIPAL CORPORATIONS—Telephone Poles, Power of to Exclude from a Street.**—A municipal corporation authorized by its charter to prevent the encumbering of its streets has power to wholly exclude the poles and wires of a telephone corporation from a block of a street, unless so doing would cut the company off from communication with persons it desires to reach and by law is obliged to serve. (Mich.) *Village of Jonesville v. Southern Mich. Tel. Co.*, 562.

2. **MUNICIPAL CORPORATIONS.**—The mere fact that a route designated by a municipality for a telephone line is less convenient or involves large expense on the part of the company is of no consequence, so long as the company is not thereby prevented from reaching all those whom it desires to serve and who desire service from it. (Mich.) *Village of Jonesville v. Southern Mich. Tel. Co.*, 562.

3. **TELEPHONE CORPORATIONS, Duty of to Conform to Municipal Regulations.**—Where a municipality in the exercise of its inherent police power adopts an ordinance reasonably regulating the manner, character or place of construction of a contemplated line, the telephone company must comply with such regulation and exercise its right of entry under the general powers conferred by the state subject to them. (Mich.) *Village of Jonesville v. Southern Mich. Tel. Co.*, 562.

Service of Patrons—Payment of Charges.

4. **TELEPHONE CORPORATIONS, Rule of Requiring Payment of Rent in Advance.**—A rule of a rural telephone company that telephone rent must be paid six months in advance is reasonable, and a subscriber refusing to comply therewith is not entitled to service from the company. (Neb.) *Buffalo County Tel. Co. v. Turner*, 699.

5. TELEPHONE CORPORATIONS, Counterclaim in Favor of Subscriber, When does not Justify Refusal to Pay for Services.—Nor will the existence of a counterclaim or setoff asserted by the subscriber, a large part of which is exorbitant and illegal, justify him in demanding that he be given service without prepayment of charges as other subscribers pay. (Neb.) *Buffalo County Tel. Co. v. Turner*, 699.

6. TELEPHONE CORPORATIONS, Deductions for Rent While Line is Out of Repair.—A telephone subscriber is presumed to know that his telephone is liable to get out of order, and, if it is situated in the country, that some time may elapse before it can be repaired, and such subscriber is only entitled to a deduction from his bill subsequent to the expiration of a reasonable time after the company had notice of the trouble and has failed to repair it. (Neb.) *Buffalo County Tel. Co. v. Turner*, 699.

7. TELEPHONE CORPORATIONS, Right of Citizens to be Served by.—One paying or offering to pay charges imposed by a telephone corporation is entitled to telephone service, provided he and the members of his family conduct themselves within the reasonable rules of the company. (Neb.) *Buffalo County Tel. Co. v. Turner*, 699.

See Electric Companies.

TENANTS IN COMMON.

TENANTS IN COMMON—Adverse Possession.—The possession of land by one tenant in common and the exercise of acts of ownership by him will be referred to the common title, and will not, without more, be considered adverse to the other cotenant, but if it appears that he has repudiated the title of his cotenant, of which the latter has notice or is chargeable with notice, then the possession will be adverse. (Ala.) *Layton v. Campbell*, 17.

See Partition.

THEATERS.

1. THEATERS—Regulation of Arcades and Moving-picture Shows. Five and ten cent theaters, penny arcades, and moving-picture shows may be singled out for special municipal regulation. An ordinance so doing is not unconstitutional because it does not include other theaters and other forms of public entertainment. (Ill.) *Block v. Chicago*, 219.

2. THEATERS—Regulation of Arcades and Moving-picture Shows. An ordinance that requires persons who desire to exhibit moving pictures to first exhibit them to the chief of police, who shall determine whether they are immoral or obscene, and if they are refuse to permit their public exhibition, is not invalid because giving him such power of determination and rejection, nor because the pictures are reproductions of scenes enacted in theaters without previous exhibition before the chief of police. (Ill.) *Block v. Chicago*, 219.

3. THEATERS—Regulation of Arcades and Moving-picture Shows. An ordinance requiring persons who desire to exhibit moving pictures to first exhibit them before the chief of police, and giving him authority to reject those that are immoral or obscene, is not invalid because fixing no standard by which their character is to be determined. (Ill.) *Block v. Chicago*, 219.

4. THEATERS—Regulation of Arcades and Moving-picture Shows. An ordinance which requires persons who desire to exhibit moving pictures to first exhibit them before the chief of police, who is authorized to reject such as are immoral or obscene, is not unconstitu-

tional because no sort of hearing is required in court to determine the character of the pictures. (Ill.) Block v. Chicago, 219.

5. **THEATERS—Moving Pictures, When Immoral.**—Moving pictures which represent criminal scenes are immoral, notwithstanding they may illustrate experiences connected with the history of the country, such as the careers of the "James Boys" and the "Night Riders." (Ill.) Block v. Chicago, 219.

6. **THEATERS—Regulation of Arcades and Moving Pictures.**—An ordinance providing that persons engaged in showing moving pictures shall first exhibit them to the chief of police, and that if he determines they are immoral or obscene he shall refuse a permit for their public exhibition, otherwise he shall issue a permit free of charge, and that persons violating the ordinance are subject to a fine for each offense, is constitutional. (Ill.) Block v. Chicago, 219.

THREATS.

See Homicide, 6-13.

TIMBER.

See Statute of Frauds, 2, 3.

TRESPASS.

1. **TRESPASS—Necessity.**—An entry on the land of another may be justified by necessity. (Vt.) Ploof v. Putnam, 1072.

2. **TRESPASS—Mooring Sloop to the Dock of Another.**—If one is sailing a loaded sloop, on which are his wife and minor children, and there arises a sudden and violent tempest, whereby the sloop and the persons thereon are placed in great danger of destruction, he is justified in mooring the sloop to a dock other than his own. (Vt.) Ploof v. Putnam, 1072.

3. **PLEADING—Necessity of Mooring to a Private Dock, When Sufficiently Shown.**—If a pleading alleges that the plaintiff was sailing a loaded sloop on which were his wife and minor children, and that the stress of sudden and violent tempest compelled him to moor to the defendant's dock, to save his sloop and the people thereon, it is not necessary for him to negative the existence of natural objects to which he might have moored in safety. The details of the situation are matters of proof, and need not be alleged. (Vt.) Ploof v. Putnam, 1072.

4. **PLEADING—Wrongful Action in Casting Off a Moored Vessel.**—A complaint which, after showing the necessity for the plaintiff's mooring his sloop to the defendant's dock, alleges that the defendant, by his servant, unmoored the sloop, sufficiently shows that the action of the servant was not for a purpose of his own, but was within the scope of his employment. (Vt.) Ploof v. Putnam, 1072.

See Animals; Arrest; Negligence, 15-18; Railroads, 25-32.

TRIAL.

Instructions.

1. **INSTRUCTIONS.**—The Court may Decline to Give a Requested Instruction on impeaching testimony when its general charge on the question sufficiently covers the case. (Tex. Cr.) Hunter v. State, 887.

2. **INSTRUCTIONS—When Cured by Others.**—An Omission to Instruct on one phase of a personal injury case may be cured by other instructions, when the instructions, read as a series, cannot be misunderstood by the jury. (Ill.) Van Cleef v. Chicago, 275.

3. JURY TRIAL—Instructions, When not Prejudicial.—A judgment will not be reversed because of an instruction which, taken by itself, is ambiguous, and which in one view seems to impose on the master a greater burden than the law imposes in respect to the character of the tools and appliances furnished his servant, if such instruction is qualified by others, so as to make it apparent that the jury were not misled, and the charge as a whole correctly defines the law. (Neb.) *Ault v. Nebraska Tel. Co.*, 686.

4. TRIAL—Practice.—An Instruction to the Court Sitting as a Jury should instruct as to the law applicable to the facts, leaving it to the court sitting as a jury to find the facts necessary to entitle the party to recover. (Md.) *Richardson v. Anderson*, 543.

5. TRIAL—Practice—Instruction to the Court as to a Waiver, When Improper.—Where a court sitting as a jury instructs itself respecting the waiver or abandonment of a claim, this is improper if there is no evidence of such waiver or abandonment. (Md.) *Richardson v. Anderson*, 543.

6. TRIAL PRACTICE—Prayer for Instructions Where Evidence has been Received Beyond the Issues of the Pleadings.—In considering a prayer for instructions which does not refer to the pleadings, and which is not affected by any other prayer referring to the pleadings, the court cannot consider the pleadings, but must determine the correctness of the prayer with reference to the evidence. (Md.) *Richardson v. Anderson*, 543.

7. INSTRUCTIONS—Failure to Give, Whether Waived.—The court is required to state to the jury all issues joined by the pleadings upon which any evidence has been offered, and to state the law applicable thereto. A failure to do so is not waived by failure of counsel to ask or formulate an instruction. (Iowa) *Wise v. Outtrim*, 301.

8. INSTRUCTIONS.—The Giving of an Erroneous Instruction at the request of the appellant which is favorable to him does not constitute prejudicial and reversible error, although the instruction may conflict with other correct ones. (Wash.) *Benson v. Tacoma Ry. & P. Co.*, 1096.

Directing Verdict.

9. JURY TRIAL—Directing a Verdict.—If there is evidence supporting the claim of the plaintiff, the court will not direct a verdict for the defendant. (Vt.) *McDuffee v. Boston & Maine R. R.*, 1019.

10. JURY TRIAL—Directing Verdict from the Statement of Counsel.—A trial court has the right to act upon the facts deliberately conceded by counsel in his opening statement to the jury, and direct a verdict against the plaintiff if such conceded facts would not entitle him to a verdict; but such power must be exercised sparingly, and never without full consideration and opportunity for counsel to qualify his statement, so far as the truth will permit. (Minn.) *Barrett v. Minneapolis etc. Ry. Co.*, 585.

11. PRACTICE—Motion for Peremptory Instruction.—In considering whether a motion for peremptory instructions should have been given, the court must take as true the strongest legitimate effect of the evidence in favor of the verdict and discard all countervailing evidence. (Tenn.) *Walton & Co. v. Burchell*, 788.

Judgment Notwithstanding Verdict.

12. JUDGMENT Notwithstanding Verdict, When will not be Ordered.—Judgment notwithstanding the verdict will not be ordered if the defect relied upon can be cured by amending the complaint. (Minn.) *Barrett v. Minneapolis etc. Ry. Co.*, 585.

Argument of Counsel.

13. **JURY TRIAL—Improper Argument.**—If counsel for the plaintiff, in his argument before the jury, persists in urging that a presumption should be indulged against the defendant, because it did not offer evidence on some question necessary to the establishment of the plaintiff's claim, and the burden of proof is not on the defendant, but on the plaintiff, this is prejudicial misconduct, on account of which a judgment in favor of the plaintiff may be reversed. (Vt.) *McDuffee v. Boston & Maine R. R.*, 1019.

14. **TRIAL—Misconduct of Counsel in Argument.**—In an action against a street railway company for the death of an intoxicated passenger, counsel should not be permitted to refer to the absence of evidence that the deceased was a drunkard. (Wash.) *Sullivan v. Seattle Electric Co.*, 1082.

See Criminal Law; Homicide, 5-13; Jury.

TRUSTS.

1. **TRUST, TESTAMENTARY—Personal, Test of.**—It is purely a matter of intention, to be gathered from a consideration of the whole will and from the nature and object of the trusts created thereby, as to whether a trust is personal in its character or is annexed to the office of trustee. (Md.) *Dodge v. Dodge*, 503.

2. **TRUST, TESTAMENTARY, When may be Exercised by a Substituted Trustee.**—If a will devises and bequeaths the property of the testator to three trustees and the survivors and last survivor, and the heirs, executors, administrators and assigns of the last survivor, to hold with full power according to their or his best judgment, to sell and convey such property, the power may be exercised by a substituted trustee appointed after the death of the original trustees. (Md.) *Dodge v. Dodge*, 503.

3. **TRUSTEE, Power of Sale Given to, When Deemed Annexed to the Office.**—Generally, in the absence of a specially expressed intent to the contrary, a power of sale conferred upon a trustee in a will is regarded as a ministerial duty annexed to the office and passing to any person legally substituted in place of the original trustee. (Md.) *Dodge v. Dodge*, 503.

4. **TRUSTEES, Decree Appointing a New Trustee and not Distinguishing Between Personal and Other Trusts.**—Where some of the trusts conferred upon a testamentary trustee are personal and others pertinent to the office, and a decree undertakes to appoint a new trustee and to confer upon him authority to execute both classes of trusts, the decree is good pro tanto, but cannot invest the substituted trustee with powers of a personal nature. (Md.) *Dodge v. Dodge*, 503.

5. **TRUST, When Descends to the Heir at Law, and What Amounts to a Disclaimer by Him.**—When property is devised to trustees and to the last survivor of them, and the heirs, executors, administrators and assigns of such last survivor, the property descends to the heir of the last surviving trustee, but if he is complainant in a suit seeking the appointment of a new trustee, this amounts to a renunciation of the trust, and authorizes the court to appoint a substituted trustee. (Md.) *Dodge v. Dodge*, 503.

6. **TRUSTEE, NONRESIDENT, Selection of by the Court.**—Though it is the custom of courts and the better practice to select a resident of the state, yet they are not without power to appoint a nonresident, and there may be circumstances justifying such an appointment. (Md.) *Dodge v. Dodge*, 503.

7. **TRUST, Selection of New Trustee.**—The recommendation of the parties in interest is always entitled to weight, and the court, on such

recommendation, may select as trustee one who is not a resident of the state. (Md.) *Dodge v. Dodge*, 503.

8. TRUSTEE'S SALE.—The Failure in the Report of a Trustee's Sale to state that it was for the advantage of all the parties in interest, and was made with their consent, does not constitute a sufficient objection to the ratification of the sale, though it is possible for the trust to open and let in unborn persons. (Md.) *Dodge v. Dodge*, 503.

Note.

Trusts, appointment of new trustee, duty of, when devolves upon court, 517.

courts which may appoint new trustee on a vacancy, 519–522.

death of less than all of the trustees, devolution of title upon, 508.

death of less than all of the trustees, who may execute trust after, general intent of the testator, 508.

death of sole or last surviving trustee, devolution of title upon, 515.

devolution of title on the death of one of several trustees, 508–514.

devolution of title on the death of the sole or last surviving trustee, 515.

duties of trustee, when indicate that survivor cannot act, 514.

equity, jurisdiction of over, 517.

equity, power of to appoint a new trustee, 517, 518.

exception of from statutes abolishing joint tenancy, 509–511.

executors and administrators, right of to execute, 523.

expiration of by operation of law, 523, 524.

heir at law, when devolve upon, 515–517, 522.

heir at law, when may execute, 515, 522.

heirs, statutes taking away the power of to execute, 522.

in personal property pass to the executor or administrator, 517.

intent of the testator, how to be determined, 508.

intent that surviving trustee shall execute, when apparent, 512.

joint power of trustees, when prevents survivor from acting, 513.

joint tenancy, exceptions to the rule that they are held in, 512–514.

joint tenancy, property subject to is held in, 508.

joint tenancy, statutes abolishing do not affect, 509.

new trustee, right of courts to appoint, 518.

new trustee, suit for the appointment of, when precludes survivor executing, 513.

new trustee, who may appoint, 519–522.

oldest son, title and ability to execute, when devolve upon, 516, 517.

personal, what are, 524.

successor of trustee, who may move for the appointment of, 523.

surviving trustees, right of to execute, 514, 515.

survivorship of on the death of a trustee, 508, 509.

title, devolution of upon the appointee of the court, 518.

title, when vested by grants in, 516.

title, whether remains in abeyance after the death of the trustee and until his successor is appointed, 518.

vacancies in trustees, how and by whom may be filled, 521.

who may execute after the death of a sole or last surviving trustee, 532.

who may execute after the death of one of the trustees, 508–514.

UNCONSTITUTIONAL LAW.

See Acknowledgment.

VARIANCE.

See Pleading, 12.

VENDOR AND VENDEE.

1. VENDOR AND VENDEE, Effect of the Death of Either Before a Conveyance.—If the vendee dies before a conveyance to him, his interest should be considered as real estate descending to his heir or subject to his devise; but if the vendor dies before conveying, his heir receives the title in trust for the vendee, and must convey on payment of the purchase money, and this money goes to the personal representative and not to the heir, because the vendor's interest by his contract of sale was converted from realty into personalty. (Ala.) *Flomerfelt v. Siglin*, 67.

2. REAL PROPERTY, Conversion of into Personalty by a Contract of Sale.—In order that a contract to sell real property may convert it into personalty, the contract must be enforceable at the death of one of the parties, but enforceability at such death refers to validity and not to evidence in the nature of conditions which may not have been performed, because such performance was not due at such death. It is sufficient that this condition can be performed by his representative. (Ala.) *Flomerfelt v. Siglin*, 67.

3. REAL PROPERTY, When Converted into Personalty by an Agreement for Its Sale.—An agreement between two persons declaring that they are owners of specified real property, that one of them is to receive from the proceeds of the property when sold a sum designated, and the remainder of the proceeds shall be divided between them, share and share alike, and also containing a further provision, to be effective if the property should not sell for a specified sum, operates to convert such real property into personalty as between the heirs and representatives of the parties. (Ala.) *Flomerfelt v. Siglin*, 67.

4. VENDOR AND PURCHASER, Contract to Furnish Abstract Showing Satisfactory Title.—A contract for the sale of land provided that the vendor should furnish an abstract showing satisfactory title to the property. In an action against the vendee for damages for his failure to perform it was alleged that the vendor furnished an abstract showing a good and sufficient title. Held: (1) The vendee was the party to be satisfied. (2) It was immaterial that the title was good if the vendee in good faith was not satisfied with it. (3) In order to withstand a demurrer it was essential that the petition either allege that the title was satisfactory to the vendee or show that the vendee did not act in good faith. (Kan.) *Hollingsworth v. Colthurst*, 382.

5. VENDOR—Retention of Legal Title as Security.—The vendor of land under an executory contract retains the legal title only to secure the payment of the unpaid purchase money. (Tex.) *Brown v. Canterbury*, 824.

6. VENDOR AND VENDEE, Relation of to the Title.—From the time of a contract for the sale of land the vendor, as to the land, is considered the trustee for the purchaser, and the vendee, as to the purchase money, the trustee for the vendor. (Vt.) *Wilkins v. Somerville*, 906.

7. VENDOR AND VENDEE.—A Purchaser from the Vendor or the Vendee After the Contract of Sale, with knowledge thereof, and before a conveyance, is subject to the same equities as would be the party from whom he purchased. (Vt.) *Wilkins v. Somerville*, 906.

VENUE.

See Quieting Title, 3.

VESSELS.

See Trespass.

VICE-PRINCIPAL.

See Master and Servant.

WAGES.

See Constitutional Law, 6-10; Work and Labor.

WATERS AND WATERCOURSES.

See Railroads, 1, 2.

WHARVES.

See Trespass.

WILLS.*Construction and Interpretation.*

1. **WILLS.**—In Construing Wills, the intent of the testator, when ascertained, governs. (Mich.) Gilchrist v. Corliss, 568.

2. **WILLS, Precatory Words in, When do not Create an Absolute Estate in the First Taker.**—Precatory words in a will will not be construed to confer an absolute estate on the first taker merely because of the failure or uncertainty in the object or subject of the devise. (Mich.) Gilchrist v. Corliss, 568.

3. **WILLS, Construing to Avoid Intestacy Where Precatory Words are Used.**—Where it appears that the purpose of precatory words is too vague to be capable of enforcement, and hence excludes a trust in the legal sense, such construction should be given, if reasonably open, as to avoid intestacy. (Mich.) Gilchrist v. Corliss, 568.

4. **WILLS, Devise of Bequest, When does not Vest in an Estate in Fee.**—A devise and bequest of all testator's property to his wife, with a request that she at her death will at least two-thirds under the will to some trust designated by her in the city of A., and stating it to be the wish of the testator that she have and use the income from the portion of his estate willed to her as long as she lives, does not vest in her the fee except in one-third, and the remainder, on her dying without making any disposition of it, reverts to his estate, and as to it he must be regarded as dying intestate. (Mich.) Gilchrist v. Corliss, 568.

Uncertainty of Gift.

5. **WILLS, Bequest, When not too Uncertain.**—A bequest to "women's work in foreign fields," and to "women's work in home fields," is not incurably uncertain when it appears that the testatrix was a member of a Congregational church, which carried on work in behalf of foreign fields through the instrumentality of a corporation entitled "Women's Board of Missions of the Interior," and that there was another corporation known as "Women's Home Missionary Union of the Congregational Church of Michigan," and that decedent had been president of the local missionary society. (Mich.) Gilchrist v. Corliss, 568.

6. **WILLS.**—A Bequest in a Will to Protestant missionary work among the poor colored people of the south will be construed as in favor of the American Missionary Association, if it is shown to be

a corporation organized by the Congregational churches, of one of which the testatrix was a member, of which society she had been a subscriber in her lifetime, and she had expressed an intention to do something for the society. (Mich.) *Gilchrist v. Corliss*, 568.

Revocation of Will.

7. **WILLS**—Revocation, Implied, Evidence to Rebut.—Where the revocation of a will is implied from a change in the testator's circumstances, no evidence is admissible to rebut it. (Minn.) *Donaldson v. Hall*, 621.

8. **WILLS**, Revocation, Common-law Rules Respecting, Statutory Adoption of.—The common-law rule of implied revocation of wills by "changed conditions and circumstances" of the testator arising subsequent to their execution is affirmatively adopted as the law of this state by section 3665, Revised Laws of 1905. (Minn.) *Donaldson v. Hall*, 621.

9. **WILLS**, Revocation of by a Devisee and the Settlement of Property Rights.—A settlement of property rights between husband and wife, in anticipation of a divorce, by which the husband made over to the wife one-third of all his property, coupled with the fact of divorce, revoked by implication of law a will theretofore executed by the husband in and by which he devised and bequeathed to her the amount of property she so received on the settlement. (Minn.) *Donaldson v. Hall*, 621.

Contest of Will.

10. **CONTEST OF WILL**.—A Special Administrator cannot Employ Counsel in a Will Contest, and the charges of an attorney employed by him do not constitute any claim against the estate. (Mich.) *Zimmer v. Saier*, 575.

11. **WILL CONTEST**—Who may Wage.—The Words "Any Person Interested," in the statute designating who may contest a will, mean those having a direct pecuniary interest existing at the time of the probate of the will and detrimentally affected thereby. (Ill.) *Selden v. Illinois Trust & Sav. Bank*, 180.

12. **WILL CONTEST**.—The Jurisdiction of Courts of Equity over will contests is derived solely from statute. It does not exist by virtue of their general chancery powers. (Ill.) *Selden v. Illinois Trust & Sav. Bank*, 180.

13. **WILL CONTEST**—Who may Wage.—No Action to Contest a Will can be brought by anyone except a person interested at the time the will was admitted to probate. (Ill.) *Selden v. Illinois Trust & Sav. Bank*, 180.

14. **WILL CONTEST**—Assignability or Descent of Right to Contest.—The right of action to contest a will is not assignable nor the subject of conveyance and does not pass by inheritance or descent. (Ill.) *Selden v. Illinois Trust & Sav. Bank*, 180.

15. **WILL CONTEST**—Death of Contestant—Survival of Action.—The right to contest a will does not survive the death of the contestant, whether or not he filed a contest in his lifetime. (Ill.) *Selden v. Illinois Trust & Sav. Bank*, 180.

16. **WILL CONTEST**—Constitutional Law.—Since the Right to Contest a will in chancery exists only by virtue of statute, the fact that the right may be given to certain persons but not to their heirs or devisees violates no constitutional right. (Ill.) *Selden v. Illinois Trust & Sav. Bank*, 180.

Probate of Foreign Will.

17. **PROBATE OF FOREIGN WILL**, Effect of by Relation.—If executors, acting under a power in a will made in another state, con-

vey real property of the testator situate in this state before his will is admitted to probate here, this is a defective execution of the power, but the subsequent probate in this state relates back to the will and gives effect to the prior conveyance. (Vt.) Tudor v. Tudor, 977.

See Trusts.

Note.

Wills, contesting and resisting probate of are based on the same grounds, 188.

contesting, difference between and attacking validity of, 187.

contesting, heir not interested is not entitled to contest, 188.

contesting, interest which will authorize, 188.

contesting, right of generally extends to all persons interested, 188.

contesting, right of is purely statutory, 187.

contest of, acceptance of benefits under, effect of upon, 212-216.

contest of, acquiescence which will defeat right of, 213.

contest of, administrator, when may maintain, 204.

contest of, agreements affecting the right of, 218.

contest of, appearing and consenting to the original probate, when does not prevent, 210.

contest of, assignment of right of, 193-195.

contest of by a public administrator, 204.

contest of by persons cited and appearing in the probate proceeding, 203.

contest of by persons having rights independent of the will, 202, 203.

contest of by the attorney general, 204.

contest of, creditors of decedent, right of to maintain, 196.

contest of, creditors of heirs at law, right of to maintain, 196-202.

contest of, devisees and legatees, right of to maintain, 195.

contest of, divorced husband, when may maintain, 192.

contest of, election to take under the will, when does not prevent, 210.

contest of, estoppel against arising from accepting benefits under the will, 212.

contest of, estoppel to maintain, 206-212.

contest of, executors, when may maintain, 205.

contest of, grantees of heirs may not maintain, 193.

contest of, guardianship, person entitled to, when may maintain, 206.

contest of, heirs excluded by a previous will, whether may maintain, 190.

contest of, heirs of testator, when entitled to maintain, 189, 204, 205.

contest of, heirs of testator, who are not prejudiced, whether may maintain, 189, 190, 201, 202.

contest of, heirs, whether may maintain as to personal property, 192.

contest of, husband of executrix, whether may maintain, 190.

contest of, interest, slight, when will sustain, 205.

contest of, interest, which will justify must exist at the probate of, 188, 189.

contest of, interest which will support must be direct and pecuniary, 188.

contest of, interest which will support, nature of, 188.

contest of, interest which will support, tests of, 188, 189.

contest of, interest which will not support proceeding to maintain, 205-208.

contest of, lienholders, right of to maintain, 199-202.

contest of, miscellaneous instances of persons who may maintain, 204.

- Wills, contest of, pretermitted child, when may maintain, 204, 205.**
contest of, receivers cannot maintain, 206.
contest of, restoration of benefits received under a condition precedent to, right to maintain, 216-218.
contest of, right of is a personal privilege, 191.
contest of, right of, whether may descend or be devised, 191.
contest of, tests of interests which will justify, 188, 189.
contest of, widow of testator, heirs of may not maintain, 192.
contest of, widow of testator, when entitled to maintain, 189, 190, 191, 202.
revocation of, change in circumstances of testator, statutes declaring what amounts to, 630, 631.
revocation of, common-law rule respecting, where still prevails, 631.
revocation of, contracts of sale, when may result in, 643.
revocation of, conveyances not recorded until after the death of the testator, 643.
revocation of, conveyances not valid cannot result in, 643.
revocation of, from a change in the testator's family or in his beneficiaries, 632.
revocation of, from changes in the condition and circumstances of the testator, ecclesiastical rules respecting, 629.
revocation of from changes in the condition and circumstances of the testator, history of rules respecting, 628-630.
revocation of from changes in the condition and circumstances of the testator, origin of rules of, 628.
revocation of from changes in the condition and circumstances of the testator, reasons for rules respecting, 628, 629.
revocation of from what change in circumstances implied, 631.
revocation of implied from a change in the circumstances of the parties pro tanto only, 652-654.
revocation of implied from a change in the form of personal property, 651.
revocation of implied from a change in the form of real property, 644-646.
revocation of implied from a conveyance liable to be set aside for fraud, 651.
revocation of implied from a conveyance of property, reservations in, whether affect, 646.
revocation of implied from a conveyance of property though a mortgage is taken, 646.
revocation of implied from conveyances to and other transactions with the devisee, 646-649.
revocation of implied from conveyances, when partial only, 652.
revocation of implied from executory contracts of sale, 641-643.
revocation of implied from purchasing the devised premises, 649.
revocation of implied from the adoption of a child, 632.
revocation of implied from the conveyance of property, limitation upon the rule respecting, 639-641, 651.
revocation of implied from the conveyance of the testator's property, 635-641.
revocation of implied from the execution of a trust deed, 636.
revocation of implied from the involuntary alienation of real property, 649.
revocation of implied from the settlement of property rights of husband and wife, 633.
revocation of implied from the subsequent birth of issue, 632.
revocation of implied from the subsequent divorce of the testator, 632.
revocation of implied from the termination of title to the devised premises, 649.

Wills, revocation of implied from the transfer of personal property, 650.

revocation of, intentions not executed cannot amount to, 641.

revocation of is controlled by statute, 630.

revocation of, presumption of from a change in the testator's circumstances, 629, 630.

revocation of, proceeds of sale of land, how affected by, 644.

revocation of, what conveyances do not amount to, 639.

revocation of, when not implied from a conveyance of property, 637.

WITNESSES.

1. WITNESS—Communications with Persons Since Deceased.—A statute forbidding testimony of communications with persons since deceased does not forbid the testimony of an interested party to communications and transactions between the deceased and a third person in which the witness took no part. (Iowa) *Wise v. Outtrim*, 301.

2. EVIDENCE to Impeach a Witness, What Properly Excluded.—In an action involving the question of whether a sale of land had been made by a broker, and wherein a written contract of sale was offered and received in evidence, evidence to prove that on a prior occasion such broker had testified that he had sold the land to the plaintiff and to no other person is not admissible, because nothing to which he testified could overthrow the contract which he confessedly executed. (Minn.) *Peterson v. O'Connor*, 618.

3. WITNESS—Instruction as to Credibility.—The refusal of an instruction, "If the jury found that any witness in the case had willfully and intentionally sworn falsely with reference to any material fact in the case, they were at liberty to disregard the testimony of such witness, or to give it only the weight and credit to which in their judgment it was entitled," is without prejudice, if the jury is also instructed: "You are the judges of the credibility of the witnesses and the weight to be given to each and all of them. Where there is a conflict in the evidence you should harmonize it if you can; but if you cannot do so, you should give to each witness such credit as you deem him entitled, or none if entitled to none." (Iowa) *Burger v. Omaha & C. B. St. Ry. Co.*, 343.

WORDS AND PHRASES.

1. WORDS AND PHRASES.—An "Apparent Danger" is one capable of being seen or otherwise comprehended through the medium of the senses. (Iowa) *Correll v. National Accident Soc.*, 294.

2. WORDS AND PHRASES—"Character" and "Reputation."—Character consists of the qualities which constitute the individual; reputation the sum of opinions entertained concerning him. The former is interior; the latter external. The one is the substance; the other the shadow. (Ill.) *United States v. Hraskey*, 288.

3. WORDS AND PHRASES.—An "Emergency" is a Sudden or Unexpected Happening or Occasion calling for immediate action; an emergency is presented where a street-car starts while a passenger is attempting to board it. (Iowa) *Burger v. Omaha & C. B. St. Ry. Co.*, 343.

4. DEFINITION.—"Forestalling" is Buying Victuals on their way to market with intent to sell again at a higher price. (Tenn.) *Dutton v. Knoxville*, 748.

5. DEFINITION.—"Regrating" is the Buying of Grain or Other Dead Victual in any market and selling it again in the same market. (Tenn.) *Dutton v. Knoxville*, 748.

6. WORDS AND PHRASES—"Wages" and "Salary."—"Wages" has a less extensive meaning than "salary." Wages is usually restricted to sums paid as hire to domestic or menial servants and to sums paid to artisans, mechanics, laborers and others employed in various manual occupations; while "salary" has reference to the compensation of clerks, bookkeepers, and other employés of like class, officers of corporations, and public officers. (Ill.) *Massie v. Cessna*, 234.

WORK AND LABOR.

PERSONAL SERVICES—Implied Contract for Compensation. Where a girl goes to live with a family and renders services therein during her minority and up to the time of her marriage at twenty-four years of age, her services are presumed to be rendered gratuitously. (Iowa) *Wise v. Outtrim*, 301.

See Constitutional Law, 6-10.



Library Use Only

UC SOUTHERN REGIONAL LIBRARY FACILITY



A 001 190 786 2

